1934 *Present :* **Garvin S.P.J.**

MARIKAR *v.* DHARMAPALA UNNANSE.

79—C. R. Ratnapura, 2,249.

Appeal—Order of Court of Requests committing a person obstructing a writ of possession—Final order—Courts Ordinance, No. 1 of 1889, s. 39.

An order made by a Court of Requests under section 326 of the Civil Procedure Code committing to prison a person who had obstructed the execution of a writ of possession is an order having the effect of a final judgment from which an appeal lies to the Supreme Court.

APPEAL from an order of the Commissioner of Requests, Ratnapura, committing the fourth respondent to prison for obstruction alleged to have been caused by him to the execution of a writ of possession by the Fiscal.

H. N. G. Fernando, for plaintiff, respondent, raised a preliminary objection to the hearing of the appeal. On the day the order appealed from was made the appellant was not represented by a proctor nor was he present himself. Judgment was therefore entered for default of appearance. Section 823, sub-section (2), says that in Courts of Requests "no appeal shall lie against any judgment entered under this section for default of appearance".

[GARVIN J.— If the order appealed against is not a final order, has the appellant a right of appeal in a Court of Requests case?]

The order appealed against is not a final order. In *Arnolis Fernando v. Selestinu Fernando*[1] it was held that an order under section 326 of the Civil Procedure Code committing a person who is not a party to the original action to prison for obstruction was not a final order nor an order having the effect of a final judgment.

J. R. Jayewardene, for the appellant, was called upon to reply on the objection.

Section 823, sub-section (2), does not apply as this order was not made under that section. The section says, "no appeal shall lie . . . . against orders made under *this* section"; *i.e.,* section 823. This order was not an order made for default of appearance but an order purporting to be made under section 326 for resistance to the execution of a proprietary decree.

It is submitted an appeal does lie from such an order. Section 39 of the Courts Ordinance gives the Supreme Court jurisdiction to correct "all errors in fact or in law which shall be committed by any Court of Requests in any final judgment or any order having the effect of a final judgment". Section 80 of the same Ordinance gives "a party dissatisfied with any final judgment, or any order having the effect of a final judgment", pronounced by a Court of Requests the right to appeal, except "where such right is expressly disallowed".

Ordinance No. 12 of 1895, section 13 (1), refuses the right of appeal from "any final judgment, or any order having the effect of a final judgment", pronounced by the Commissioner of Requests, "in any action for debt,

[1] *4 C. L. R. 70.*

damage or demand", unless upon a matter of law or with leave. This order would not come under that section. The only question therefore is whether the order appealed against was a final judgment or an order having the effect of a final judgment. The case cited *Arnolis Fernando v. Selestinu Fernando* (*supra*) takes too narrow a view of what is a final judgment.

In *Vyraven Chetty v. Ukku Banda*[1] Jayewardene A.J. took a broader and a more correct view of what is a final judgment. He says, "a judgment or order which can be considered on appeal at a later stage of the proceedings, that is when the case is finally decided, does not fall within the term 'final judgment,' but an order which can never be so brought up in appeal is a final judgment". This order is not an incidental order but is final as against the party affected. See also *Perera v. Novis Hamy*[2].

On the facts the appellant was not a defendant in the action and the defendants themselves have been discharged. The inference is that the appellant was not acting at the instigation of the defendant or judgment-debtor, but independently. If so, section 326 does not apply to him (see *Seneviratne v. Kurera*[3]).

Fernando, in reply.

Cur. adv. vult.

September 7, 1934. GARVIN J.—

Upon a petition filed by the judgment-creditor in this case against the defendants to the action and two other persons, the learned Commissioner made order under the provisions of section 326 of the Civil Procedure Code committing the fourth respondent to prison for 30 days for the obstruction alleged to have been caused by him to the execution of a writ of posesssion by the Fiscal. The fourth respondent now appeals. A preliminary objection has been taken to the appeal which is that this is not an appealable order. It was urged that an appeal only lies against a final judgment of the Court of Requests or against an order made by that Court which has the effect of a final judgment. On a first impression I should have thought that an order under section 326 committing a person who is a party to the original action to prison for obstruction was a final order. But Counsel for the respondent relied upon the judgment of Bertram C.J. in the case of *Arnolis Fernando v. Selestinu Fernando*[4], in which a similar objection was upheld by him, who observed in the course of his judgment, "It would be straining words to declare that an incidental order on a matter of this sort arising in the course of execution proceedings is an order having the effect of a final judgment. I think that by these words something more substantial is meant, some order which has some effect upon the original action."

Now the appellate jurisdiction of this Court as defined in section 39 of the Courts Ordinance extends "to the correction of all errors in fact or in law, which shall be committed by any Court of Requests in any final judgment or any order having the effect of a final judgment". It will be noticed that there are no words which limit the words "any

[1] *27 N. L. R. 60.*
[2] *29 N. L. R. 242.*
[3] *8 Brown 207.*
[4] *4 C. L. R. 70.*

order having the effect of a final judgment", to orders made in the original action as distinct from orders made in the course of proceedings arising out of the original action and affecting rights of persons who were not parties to the original action. In this case the appellant was a stranger to the original action. He is not affected by the decree entered in the case and he claims the possession of the premises in respect of which the writ of possession was issued in his own right and that the resistance offered by him was not at the instigation of the judgment-debtor, but in assertion of his own rights. An order rejecting his plea and committing him to prison determines the proceedings in which the order was made and such an order is a final order and would be appealable as such unless it be held that the words " any order having the effect of a final judgment " must be limited to orders made in " the original action ". In the absence of a clear indication of such an intention, I see no reason to construe the words in that sense, for I cannot think that it was the intention of the legislature to deny to persons who were not parties to the original action whose rights are affected by final orders made in proceedings arising out of the original action the right to appeal to this Court. All orders made by District Courts are subject to appeal. In the case of Courts of Requests the appellate jurisdiction is no doubt limited to final judgments or orders having the effect of final judgments. In the result, parties to an action in the Court of Requests cannot appeal from any of the orders made in the course of the proceedings and before the rights of the parties are determined by a final judgment until such final judgment has been entered. At that stage an appeal may be entered and an opportunity is thereby afforded to impeach the judgment by impeaching some order made in the course of the proceedings from which an appeal at an earlier stage was not available. But subsequent to the entry of the final judgment determining the rights of the parties, as for instance, in the execution of the judgment, other proceedings may be taken in which orders having the effect of final judgments may be passed.

In the case of *Vyraven Chetty v. Ukku Banda*[1] Jayewardene A.J., when considering an objection to an appeal based upon the ground that the order did not come within the words earlier referred to, expressed the opinion that " a judgment or order which can be considered on appeal at a later stage of the proceedings, that is when the case is finally decided, does not fall within the term 'final judgment' but an order which can never be so brought up in appeal is a final judgment". The test therein indicated appears to me to offer a sounder test as to what may be deemed an order having the effect of a final judgment. As I have already said, orders made in the course of the proceedings and before the stage of final judgment is reached can always be considered when an appeal is taken from the final judgment. But a proceeding such as this is subsequent to the stage of the decree which determines the rights of the parties, and can never come under review by the Appellate Court in an appeal from a decree in the case or any other final judgment. In the case referred to, the appeal was by a person who had bound himself as surety for the satisfaction of a judgment by the judgment-debtor who had been arrested on a civil warrant in an application by him to have an order directing

[1] *27 N. L. R. 65.*

the issue of writ against him recalled. Then again in the case of *Perera v. Novis Hamy*[1] Schneider J. held that an order of a Court of Requests adjudicating on an issue relating to the satisfaction of decree was one having the effect of a final judgment.

With all respect, therefore, I differ from the view expressed by Bertram C.J. and hold that in such a case as this an appeal lies.

Interlocutory Order was made on the petition of the judgment-creditor and was served on the respondents. On November 8, 1933, the respondents appeared. The first and second respondents stated that they had vacated the premises. The third respondent said that he had been asked by the fourth respondent to repair the house standing on the premises, and fourth respondent wished to show cause. The petitioner through his proctor stated that he claimed no relief against the first and second respondents and they were discharged. Inquiry into the complaint against the third and fourth respondents was fixed for December 6. On that day the respondent was absent. The inquiry proceeded.

The judgment-creditor gave evidence and the Commissioner made order granting " the prayer in the petition ". On the following day application was made to the Court by the fourth respondent, praying that the above order be set aside. This application was considered and granted on February 6, 1934, and the matter of the judgment-creditor's petition again fixed for inquiry on May 28, 1934. Once again the fourth respondent was absent. He sent a report to the effect that he was ill. The Judge then made order as follows :—

" The prayer in the petition will be granted and the fourth respondent brought up on attachment to be committed to prison unless a certificate from a qualified Medical Officer is produced on or before April 4." He further directed the District Medical Officer stationd at Kahawatta to report whether fourth respondent was well enough to attend Court on March 28.

On April 4 no medical certificate was produced by the fourth respondent. The District Medical Officer of Kahawatta reported that he examined the fourth respondent on March 28 and that he was then well enough to have attended Court that day. In terms of his conditional order dated March 28, the Judge granted the petitioner the relief he prayed for and directed that the fourth respondent be committed to prison for 30 days.

It is from this order the respondent appeals. The appellant has had every indulgence shown him. Despite this he deliberately absented himself again, and when given a further opportunity to satisfy the Court that this plea of illness was true, failed to avail himself of the indulgence extended to him. It is obvious that his purpose was to delay the determination of the matter and thereby prevent the judgment-creditor obtaining the relief he claimed. It is said he had no opportunity to prove his defence. The fact is that he had every opportunity. He has elected to obstruct and delay the proceedings instead of placing his defence, if any, before the Court, and must take the consequences. The Judge was quite right in refusing any further indulgence and going on with the material before him.

[1] *29 N. L. R. 242.*

I am compelled, however, to admit the argument that upon the material before him it is not possible to say that the obstruction complained of by the petitioner was caused by the fourth respondent at the instigation of the first and second defendants. The facts spoken to by the petitioner show that it was the fourth respondent who was responsible for the obstruction and that it was he who instigated the first and second defendants to offer resistance to the execution of the writ of possession. It is only when the obstruction or resistance complained of is occasioned by the judgment-debtor or by some person at his instigation that a Court may commit the judgment-debtor or such other person to prison—*vide* section 326.

The order committing the appellant to prison cannot therefore be sustained.

The evidence before the Judge strongly indicates, if it does not prove, that the appellant has no title to the premises and that his resistance was not *bona fide*, but purely perverse and obstructive. In his petition of appeal he states, however, that he is ready " to file a civil action to settle all disputes in connexion with the land ". He will now have the opportunity he desires. So much of the order of the Commissioner as directs that the appellant be committed to prison for 30 days is set aside.

Set aside.