1938 *Present :* **Koch J.**

BARON APPUHAMY *v.* TIVANAHAMY.

50—C. R. Badulla, 8,755.

Courts of Requests—Order setting aside judgment by default—Not a final order.

An appeal does not lie from an order of the Courts of Requests setting aside a judgment entered by default.

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

P. Thiagarajah, for plaintiff, appellant.

W. E. Abeykoon, for defendant, respondent.

July 4, 1938. Koch J.—

Judgment by default was entered in this case against the respondent who later appeared before the Court, and, having shown cause, succeeded in obtaining an order setting aside the judgment so entered. An appeal has been preferred from that order on two grounds—

(1) that the judgment against the respondent was not one by default, but entered *inter partes*, and that, therefore, the Court had no power to vacate it;

(2) that the cause shown by the defendant was insufficient in law to excuse his default.

A preliminary objection has been taken by the respondent's Counsel that no appeal lay from the order setting aside the judgment by default, as this order was not final. He cited the case of *Lebbe v. Appuhamy*[1] I think that there is substance in the objection, although the case cited does not appear to deal with a situation such as has arisen here.

Under sections 39 and 80 of the Courts Ordinance, No. 1 of 1889, an appeal is permitted from a final judgment or order or from any order having the effect of a final judgment pronounced by a Court of Requests. But judgment by default can scarcely be considered to be a final judgment not only in view of the fact that the defendant is permitted by section 823 (3) of the Civil Procedure Code to appear within reasonable time, and, on sufficient cause shown, to have such judgment set aside and to open up proceedings afresh in the Court of Requests itself, but also in view of the express denial to the defaulting defendant of the right of appeal by reason of section 823 (6) of the Civil Procedure Code.

It was argued in *Nonohamy v. Divunhamy*[2] that as a judgment by default was not a final order no appeal lay from an order refusing to set aside such judgment, but it was held that an appeal would lie as the effect of a refusal to set aside such a judgment was to invest such judgment with finality.

The present is the converse case. Here the Commissioner has set aside the judgment by default and the question for consideration is whether this order setting aside the judgment by default partakes of the character of a final order or not.

[1] *14 Ceylon Law Rec. 14.*

[2] *25 N. L. R. 414.*

It has been held in *Karonchihamy v. Angohamy*[1] that a "final judgment has been variously interpreted", and in *Vairavan Chetty v. Ukku Banda*[2] Jayawardene A.J. held that it was impossible to give a comprehensive definition of the term "final judgment", and that what such a judgment is must depend on the circumstances of the case. It may, however, be sometimes possible to apply a rough and ready test, namely, has the actual matter in dispute between the parties been finally concluded?

Applying this test, it is clear that the effect of the order of the Commissioner setting aside the judgment by default, far from introducing finality to the proceedings, permits the defendant to put his defence before the Court. Finality, in these circumstances will be reached only when after trial a decree is entered.

For these reasons, therefore, I am of opinion that an appeal will not lie from the order setting aside the judgment entered by default. The appeal is dismissed with costs.

Appeal dismissed.