1927.

Present: Schneider J.

PERERA *v.* NOVISHAMY

146—C. R. Panadure, 13,438.

Writ—Reissue after several years—Judgment-debtor respondent to application—Copy of petition—Due diligence—Order regarding satisfaction of decree—Final order—Appeal—Leave of Court—Civil Procedure Code, s. 347—Court of Requests Ordinance, No. 12 of 1895, s. 80.

An application for the reissue of a writ, where more than one year has elapsed between the date of the decree and the application should be made by petition to which the judgment-debtor is made a respondent and a copy of the petition should be served on the judgment-debtor.

The order of a Court of Requests adjudicating on an issue, relating to the satisfaction of a decree; is one having the effect of a final judgment with the meaning of section 80 of the Courts Ordinance; and where such an order was made in the course of a hypothecary action, an appeal may be taken without leave of Court.

APPEAL from an order of the Commissioner of Requests, Panadure.

Zoysa (with *Rajapakse*), for appellant.

Weerasooriya, for respondent.

November 29, 1927. SCHNEIDER J.—

In this action, a hypothecary decree in favour of the plaintiff was entered on July 20, 1917. The writ of execution issued in January and reissued in May, 1919, was returned unexecuted for no default on the part of the decree holder. The return to the third issue of the writ is the following endorsement on the writ itself "sale adjourned at the request of the plaintiff who has allowed the defendant two months' time to settle." It is dated December 20, 1919. The next application for the issue of a writ was made in October, 1926. A period of nearly seven years having elapsed, the Court rightly directed notice to issue on the judgment-debtor. I take it that this direction was given in view of the provisions of section 347 of the Civil Procedure Code. But this order is not in strict compliance with the provisions of that section as I shall presently indicate. In view of the arguments which were presented upon this

appeal, and the frequency with which applications for writs in cases of this kind occur in appeals, which come up before this Court, I would make a few observations upon the provisions of the Code regarding such applications. The application under consideration does not appear to comply strictly with the requirements of section 347. According to that section the application should be by petition and the judgment-debtor should be named as respondent. The present application is simply in the tabular form No. 42 in schedule II. of the Code, and the words " I pray " in column 10 which are to be found in the prescribed form are omitted. No respondent is made nor is the form strictly adapted to the decree which is a hypothecary decree directing the sale of the specific land mortgaged. It seems to me that an intelligent application of that form to the requirements of the present application would have been to give the name of the plaintiff describing him as decree holder and petitioner, and the name of the first defendant describing her as judgment-debtor and respondent, and in column 10 " I pray for an order to issue to the Fiscal to sell the property mentioned in the decree and if the sum realized be not sufficient for the satisfaction of the decree in full and the costs of this execution the balance be realized by the seizure and sale of other property of the judgment-debtor." The form given in the schedule is headed " Form of application for execution of a decree by seizure and sale of movable property." (See sections 224 and 225). That heading is not quite accurate. It should be form of application for execution of " a decree to pay money " as indicated by the heading of the group of sections in which section 224, which prescribes the particulars to be given in applications for execution of a decree, occurs, upon such an application being made section 347 requires not that notice of the application be given, but that the Court " shall cause the petition to be served on the judgment-debtor." I think what was meant was not the petition itself but a copy of it.

Upon receiving notice of the application under consideration the judgment-debtor appeared and opposed the application upon two grounds: One of them, that due diligence was not " used on the last preceding application to procure complete satisfaction of the decree," does not appear to have been pressed in the lower Court. The other was that the decree had been satisfied by payment. No payment had been certified and in view of the provision in section 349 that " no payment or adjustment shall be recognized by any Court unless it has been certified," a motion supported by an affidavit was made on behalf of the first defendant " for a notice on the plaintiff to show cause (if any) why payment should not be certified." This motion is not in order. Section 349 requires that the Court should be " informed by petition " of any payment or

1927.

SCHNEIDER J.

Perera v. Novishamy

adjustment. The application should have been by petition therefore. But no objection was taken to the form of the application, and the question whether payment had been made was inquired into. Upon the evidence before it the Court held against the first defendant's contention that the decree had been paid and satisfied and thereupon directed that writ should issue according to the application of the plaintiff. It is from those orders that his appeal is taken by the first defendant. I accept the findings of the Commissioner upon the questions of fact. I agree with him that the evidence regarding payment is contradictory and unreliable, and that the first defendant's explanation of her failure to produce receipts for the alleged payments and the fact that the title deeds of the property were in the possession of the plaintiff render it highly improbable that the decree had been paid and satisfied.

On appeal a long argument was addressed to me on the ground that due diligence had not been used as required by section 337. There is no room for that argument in view of the endorsement on the return to the writ to which I have already referred showing that execution had been stayed by the decree holder at the request of the judgment-debtor. It was only at the close of the argument that I discovered this endorsement which appears to have escaped the notice of counsel for both parties. In view of the endorsement section 337 has no application.

Mr. Weerasooriya took the preliminary objection that the orders against which this appeal was taken are not appealable orders, and that in any event there was no right of appeal without leave previously obtained in accordance with the provisions of the Courts of Requests Amendment Ordinance, No. 12 of 1895. He argued that the right of appeal conferred by section 80 of the Courts Ordinance, No. 1 of 1889, was curtailed by the provisions of section 39 of that Ordinance. This argument raises a question of practical importance and I would here state the reasons for the ruling I gave against the objection.

In substance this appeal is from the adjudication of the Commissioner upon the question whether the decree was satisfied by payment. His order that the writ should reissue depends and follows on his holding that the decree was not satisfied. Section 80 is the section which confers the right of appeal in Courts of Requests cases. According to its provisions any person "dissatisfied with any final judgment or any order having the effect of a final judgment may (excepting where such right is expressly disallowed) appeal against any such judgment or order for any error in law or in fact." The only material variation between this section and section 75 which confers the right of appeal in District Court cases is the presence of the word "final" in this section. It is because of this

variation that appeals from certain orders in District Court cases are allowed and are listed in this Court as Interlocutory appeals, but are not allowed in Courts of Request cases. If the order holding that payment of the decree had not been made is to be regarded as an order having the effect of a final judgment, there can be no question but that there is an appeal against that order. Mr. Weerasooriya argued that it is not such an order, that the orders which are to be considered such are those which finally dispose of the action for some reason before the action is brought to trial; or, in other words, orders made before the decree in the action is entered as, for instance, an order dismissing the action because it is wrongly constituted or that the Court has no jurisdiction. To sustain this contention he pointed to section 39 of the Courts Ordinance where the extent of the Appellate jurisdiction of the Supreme Court regarding appeals in Courts of Requests cases is described as being for the " correction of all errors in any final judgment or order having the effect of a final judgment," whereas the language in regard to District Courts is that it extends to the " correction of all errors " without mention of judgment or order. I am unable to agree with this argument. First, I do not think that section 39 was intended to limit what is conferred by a subsequent section in the same Ordinance, specially as in the subsequent section it is explicitly enacted that the right conferred by it is to have effect unless it is " expresly disallowed." Section 39 cannot be read as expressly disallowing the right conferred by section 80. Nor do I think that there is any difference in the language used in the two sections. Section 80 confers a right of appeal against a judgment or final order having the effect of a final judgment for any error, and section 39 enacts that the Supreme Court has the power to correct any error in any such judgment or order. The error in a judgment or order must mean the error upon which it rests or in consequence of which it was pronounced or made. It appears to me that the holding that the decree had not been satisfied clearly comes within the description of a " formal expression of any decision of a Civil Court which is not a decree," which is the definition of an order given in the Civil Procedure Code. That Code and the Courts Ordinance are ancillary, and it would be in consonance with the intention of the legislature where the provisions of the two Ordinances permit, to make use of a definition in one of them for the interpretation of a provision in the other. Upon evidence the Court in this action had adjudicated finally upon the issue which arose as to the satisfaction of the decree. Its order upon that adjudication is therefore obviously an order having the effect of a final judgment on the question adjudicated upon. The word " judgment " in section 80 appears to me to be equivalent to " judgment " and decree in section 75 of the Courts Ordinance.

1927.

SCHNEIDER J.

Perera v. Novishamy

Mr. Weerasooriya next argued that the question adjudicated upon was whether a sum of money was paid—that is whether a "debt was paid" and that therefore there was no appeal on the facts except with leave previously obtained according to the provisions of section 93 of the Courts of Requests Amendment Ordinance, 1895. This argument is not sound. What that section enacts is that "there shall be no appeal from any judgment or order in any action for debt," &c. Whether leave must be obtained would accordingly depend not upon the nature of the incidental question, which is adjudicated upon, but whether the action is one for debt, &c. This action is not one for a debt purely—but a debt involving an interest in land. The order appealed against therefore is not one pronounced in an action for debt. Accordingly there is no necessity to obtain leave. On the merits the appeal is dismissed with costs.

Appeal dismissed.