1923.

Present : Jayewardene A.J.

NONOHAMY *v.* DIVUNUHAMY *et al.*

201—C. R. Matara, 12,415.

Court of Requests—Judgment by default—Refusal to set aside—Does appeal lie against refusal ?

An appeal lies against an order of Commissioner of Requests refusing to set aside a judgment entered by default in an action for declaration of title to land.

THE facts appear from the judgment.

Soertsz, for appellant.

Weerasooriya, for respondents.

October 17, 1923. JAYEWARDENE A.J.—

This is an action for declaration of title to land, coupled with a claim for damages at the rate of Rs. 90 per year. There were two defendants in the case. First defendant filed answer ; the second defendant was in default. On the date of trial the plaintiff and first defendant were present. Plaintiff gave evidence, and

thereafter an agreement was come to by which the plaintiff waived all damages and costs against the first defendant, who was present and agreed to take judgment against the second defendant, who was not before the Court, for the full damages claimed and to a share of the land which she said she was entitled to. The evidence recorded is very meagre, and does not show that either of the defendants possessed a share of the land which belonged to the plaintiff. However that may be, a decree was entered against the second defendant. Subsequently the second defendant moved the Court, under section 823 (3) of the Civil Procedure Code, to have the judgment entered by default set aside on the ground that she was never served with summons, and that she had a good and valid defence on the merits. The matter was then fixed for inquiry, and at this inquiry the advocate for the second defendant wished to raise the question whether the original judgment was justified by the evidence. This was disallowed, as the case had been fixed for that day for the inquiry into the question whether the second defendant had been served with summons. At the inquiry into this question three witnesses gave evidence. One Don Nikulas Ranesinghe, who was called to prove that summons had been served by him on the second defendant in a testamentary case, which has, so far as I could see, nothing whatever to do with the present litigation. Then one K. A. David was called, the man who is said to have served the summons in the present case on the second defendant. He stated in Court that he acted for the last witness, and that he did not know the second defendant, who was then present in Court, and that he did not remember having ever seen her before that date. He served the summons in the case, he went to a house shown to him by the headman and served summons on a woman who called herself Divunuhamy. He was unable to say whether the second defendant was the woman. Second defendant herself gave evidence, and denied that summons was served on her. She also stated that she did not receive the summons, which the process server Ranesinghe had stated he had served on her in the testamentary case. This was all the evidence called by the parties. In my opinion, this evidence fails to prove that this woman, Divunuhamy, had been served with summons in the action. The learned Commissioner does not believe the process server David or the woman Divunuhamy. Well, if he does not believe them it cannot help the plaintiff, because there is no other evidence upon which he could hold that the summons had been served on the second defendant. I would therefore hold that there is no proof of the service of summons, and that the second defendant is entitled to have the judgment by default set aside.

But it is contended for the plaintiff that there is no right of appeal from the order of the learned Commissioner refusing to set

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aside the judgment by default. He relies on sub-section (6) of section 823, which says that "no appeal shall lie against any judgment entered under this section for default of appearance anything in the Courts Ordinance, 1889, or in this Code to the contrary notwithstanding."

Section 84 of the Courts Ordinance, which deals with appeals from Courts of Requests, enacts that "any party who shall be dissatisfied with any final judgment or any order having the effect of a final judgment pronounced by the Commissioner of any Court of Requests, may, excepting where such right is expressly disallowed, appeal to the Supreme Court appeal against any such judgment or order for any error in law or in fact committed by such Commissioner." Now, sub-section (6) expressly disallows an appeal against any judgment for default of appearance, and it nowhere takes away the general right conferred by section 84 on an aggrieved party to appeal against a final judgment or order from a Court of Requests. I am unable, therefore, to accept the contention of the respondents' counsel that a judgment for default of appearance includes not only that judgment itself, but also a judgment on any application to have that judgment set aside. In support of his contention he relies upon a case which is unreported, which appears to support the learned counsel's contention. But the facts are not stated in the judgment, and I am inclined to think that that judgment was delivered in a case in which the subject-matter in dispute was not land but a money claim. As regards land cases in the Court of Requests, parties have the right to appeal without the leave of the Commissioner, and I cannot see why an appeal should not be allowed against the order now in question, especially as it finally decides the question of title to the land and the second defendant's liability for its possession. I would, therefore, allow the appeal, set aside the judgment of default, and direct that the second defendant be allowed an opportunity of filing answer and contesting the plaintiff's claim. The appellant will be entitled to the costs of the appeal. All other costs will abide the event.

Appeal allowed.