1947 *Present :* **Dias J.**

ARLIS APPUHAMY *et al.*, Appellants, *and* SIMAN, Respondent

78—C. R. Matara, 495

Court of Requests—Execution of decree—Resistance to execution—Order under section 330, Civil Procedure Code—Final order—Courts Ordinance s. 36.

An order made by a Commissioner of Requests under section 330 of the Civil Procedure Code is a final order for the purposes of an appeal.

Marikar v. Dharmapala (1934) 36 N. L. R. 201 followed.

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

H. W. Jayewardene, for 5th to 10th defendants, appellants.

E. B. Wikramanayake (with him *Vernon Wijetunge*), for plaintiff, respondent.

Cur. adv. vult.

July 2, 1947. DIAS J.—

In this action the plaintiff sued for a declaration of a right of cartway, or in the alternative for a right of way by necessity over the land of the 1st to 4th defendants, who are the 1st to 5th respondents to this inquiry. The plaintiff in his prayer also asked that, in the event of his being successful, he be placed and quieted in the possession and enjoyment of the said right of way. In November, 1941, decree was entered in his favour and he was declared entitled to a right of way three feet wide through the land Bingegawa Watta, and also to a cartway eight feet wide over the said land on payment of compensation as depicted in Plan No. 552, dated February 17, 1940. It was also ordered and decreed "that the plaintiff be placed and quieted in the possession of the said path and cartway". There was an appeal against that decree which was affirmed by the Supreme Court in February, 1943. When the plaintiff attempted to obtain execution of his decree it was discovered that obstructions had been placed on the land making it impossible for him to enjoy his right of way. During the pendency of the action some of the defendants had transferred their interests in the land to the 5th to 8th respondents to this appeal. Admittedly, the 9th and 10th respondents are squatters and, therefore, trespassers. Proceedings under section 325 of the Civil Procedure Code were then taken against the respondents and after inquiry the learned Commissioner of Requests treated the case as coming under section 330 of the Civil Procedure Code and directed that the writ should be re-issued for execution. He further held that "if the respondents 5th to 10th have any real interests, they can adopt the course indicated in section 330; but they are hereby ordered not to resist delivery of the path and cartway by the Fiscal's officer to the petitioner". He also ordered that the 5th to 10th respondents should pay the costs of the inquiry which he fixed at Rs. 20. From that order the respondents appeal.

Mr. E. B. Wikramanayake for the plaintiff has taken the preliminary objection that no appeal lies in this case, as the order appealed against is not a final judgment or order having the effect of a final judgment within the meaning of section 36 of the Courts Ordinance, inasmuch as an order re-issuing a writ of execution in a Court of Requests action cannot be called a final judgment or order.

The 5th to the 10th respondents are not bound by the decree in the main action, which was the final judgment entered in the case. Section 330 under which the Commissioner purported to act indicates that he considered that these respondents, excepting the 9th and 10th respondents, were not in occupation of the land over which the right of way runs. Section 330 (2) provides that "The party against whom such order is passed (*i.e.*, under section 330 (1)) may within one month institute an action to establish the right which he claims to the present possession of the property, but subject to the result of such action, *the order shall be final*".

In the case of *Arnolis Fernando v. Selestinu Fernando*[1] Bertram C.J. held that an order made by a Court of Requests on an application under

[1] *(1922) 4 C. L. Rec. 71.*

section 326 of the Civil Procedure Code is not an appealable order, and he expressed the view that an order which has the effect of a final judgment within the meaning of section 36 of the Courts Ordinance would be some order which has some effect upon the original action which practically disposes of the issues in the action, but leaves certain other matters to be worked out by calculation or in some purely ministerial manner. This view was dissented from by Garvin J. in *Marikar v. Dharmapala Unanse*[1] who held that where a stranger to the decree claimed possession of the premises in respect of which the writ of possession was issued in his own right and 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 would be appealable as such. Garvin J. further held that the words in section 36 of the Courts Ordinance could not be limited to orders made in the original action. He held that after the decree in a Court of Requests action, there may be execution proceedings in which judgments having the effect of final judgments may be passed. Garvin J. adopted the test suggested by A. St. V. Jayewardene J. in *Vyraven Chetty v. Ukkubanda*[2] 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. I would respectfully follow the principle laid down in *Marikar v. Dharmapala Unanse.* (*supra*). Applying this test it seems to me that the order of the Commissioner of Requests in this case is a final judgment as between the plaintiff and the 5th to 10th respondents so far as this case is concerned. If the respondents do not file the action contemplated by section 330 (2) the order made is deemed to be final. If they file the action and lose it, they will have to appeal in that case. They cannot take any further steps in the present case. I am, therefore, of opinion that the preliminary objection fails.

On the merits, I do not think the appellants can agitate the question as to whether the relief claimed by the plaintiff in a right of way action falls under sections 217 (C), (E) or (G) of the Civil Procedure Code. True the appellants are not bound by the decree in the main action, but that decree was in accordance with the relief claimed in the plaint, and that decree having been affirmed in appeal is now a decree of this Court. Under that decree the plaintiff was entitled to a writ of possession. Furthermore, some of the appellants derive their title from deeds executed by the defendants to the action during the pendency of that action. Plaintiff not having registered the *lis pendens,* they are not bound. They have now been given the right to show, if they can do so, that the plaintiff cannot have a right of way over this land. In these circumstances I see no reason to interfere with the decision arrived at by the learned Commissioner of Requests.

I dismiss the appeal with costs.

Appeal dismissed.

[1] *(1934) 36 N. L. R. 201.*

[2] *(1924) 27 N. L. R. 65.*