

1962

Present: Tambiah, J.

A. P. DINGIHAMY, Appellant, and N. M. DON BASTIAN and
another, Respondents

S. C. 7/1962—C. R. Tangalle, 18844

Court of Requests—Failure of Court to fix date to file answer—Invalidity of proceedings thereafter—Refusal of Court to set aside decree nisi—Defendant's right to appeal—Ex parte order—Remedy of party affected—"Final order"—Courts Ordinance (Cap. 6), s. 36—Civil Procedure Code (Cap. 107), ss. 809 (3), 823 (2), 823 (6).

Where, in an action in the Court of Requests, the Commissioner fails to fix a date to file answer, proceedings against the defendant thereafter in his absence are illegal and null and void. In such a case, an order refusing to set aside the decree *nisi* and making the decree absolute is appealable.

A party affected by an *ex parte* order of which he had no notice must apply in the first instance to the Court, which made the order, to rescind the order.

APPEAL from an order of the Court of Requests, Tangalle.

N. R. M. Daluwatte, for defendant-appellant.

Miss Suriya Wickremasinghe, for plaintiffs-respondents.

Cur. adv. vult.

November 22, 1962. TAMBIAH, J.—

The plaintiffs brought this action for declaration of title to a right of way along the defendant's land. On 3rd July, 1961, summons was served on the defendant and she appeared in Court. The following journal entry was made:

"Summons served on Defendant. Defendant present, answer after survey. T. R. and Commission for 17/7/1961."

The Commission was returned to Court on 16th of October, 1961 on which date the defendant was absent. The learned Commissioner of Requests fixed the case for *ex parte* trial, which was held on 30th of October, 1961 and decree nisi was entered declaring the plaintiffs entitled to the right of way claimed in the plaint.

Thereafter, the defendant made an application to set aside the order nisi made by the learned Commissioner of Requests and applied for time to file answer on the ground that, as no date to file answer was given by the Court, he could not file answer. The learned Commissioner of Requests refused the defendant's application and made the decree nisi absolute on the 10th of January, 1962. The defendant has appealed from this order.

Certain preliminary objections were raised by counsel for the respondent. She contended that the order of the learned Commissioner is not a "final judgment" or "an order having the effect of a final judgment", within the meaning of section 36 of the Courts Ordinance (Cap. 6) and, therefore, the appellant has no right of appeal. She further contended that this is an order for default of appearance within the meaning of section 823 (6) of the Civil Procedure Code, and, therefore, no appeal lies. It is convenient to consider these objections last.

The journal entry of 3rd July, 1961, referred to earlier, clearly shows that the answer was to be filed only after the Survey Report and Commission issued to the Surveyor were returned. After the Commission was returned, it was the duty of the learned Commissioner of Requests to have fixed a date for filing answer in terms of section 809 (3) of the Civil Procedure Code (Cap. 107), which enacts, inter alia, that :

"If the defendant shall deny the claim, he shall be called upon to plead to the same forthwith, or within such time as the Court on cause shown may allow."

Since the learned Commissioner had not fixed the date for filing answer, the defendant could not have filed his answer. The learned Commissioner, in the course of his order, states "Then a date was given for the return of the Commission and on that date, on 16/10/61, when parties were to be informed of the return of the Commission, the defendant was absent. Now the position is that the defendant should have been present on all dates on which the case was called, if she was vigilant about the action. On 16/10/61, she being absent, the Court could not inform her a date to file answer. She was in default of appearance on that day and I do not think that there would have been any purpose in the Court giving a date to file answer to a party who was absent and who would not have noticed such information."

I am unable to find any provision in the Civil Procedure Code which states that, on the date the Commission was due, the defendant should have been present. Even if the defendant was absent on the 16th of October, 1961, had the learned Commissioner of Requests fixed a date to file an answer, the defendant might have found out the date when answer is due by referring to the journal entries even on a later date. The learned Commissioner's failure to perform a statutory duty has resulted in a denial of natural justice to the defendant. I hold that all proceedings from the 16th of October, 1961 are illegal and null and void.

The defendant quite properly made an application to the learned Commissioner of Requests to rectify an order, made *ex parte*, without proper notice to her. Indeed, the ordinary principle is that, where parties are affected by an order of which they have had no notice, and which had been made behind their back, they must apply in the first instance to the court which made the *ex parte* order to rescind the order, on the ground that it was improperly passed against them.

(vide *Gargial v. Somasunderam Chetty*¹; *Sayadoo Mohamado v. Maula Abubakar*²). In the instant case, therefore, the learned Commissioner of Requests has erred in refusing to vacate his order.

What is the test to be applied to find out whether a particular order is an order having the effect of a final order within the meaning of section 36 of the Courts Ordinance? The question is by no means easy to answer. In *Vairaven Chetty v. Ukku Banda*³ Jayewardene A.J. (as he was then) was of the view that "a judgment or order which can be considered by a Court of 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 it is not possible to say that any order which can never be so brought up in appeal is not a final judgment.

The above dictum of Jayewardene A.J. in *Vairaven Chetty's* case (supra), received the express approval of Garvin S.P.J., (as he then was) in the later case of *Marikar v. Dharmapala Unnanse*⁴. In the instant case, I am of the opinion that the order of the learned Commissioner of Requests, refusing to set aside his order and fixing the case for *ex parte* order and making the order nisi absolute, is a final order from which an appeal lies to this Court. If the defendant does not appeal from this order, he will not be in a position to canvass it in any other proceeding. Even if the defendant had no right of appeal, I would have acted in revision and set aside the orders of the learned Commissioner of Requests.

Further objection was taken by the counsel for the respondent that section 823 (6) of the Civil Procedure Code is a bar to the hearing of this appeal. This section is only a bar to an appeal against any judgment entered under section 823 (2) of the Civil Procedure Code and thus it has no application where a judge has proceeded with a case without service of summons on a defendant (vide *Jamis v. Dochinona*⁵) or where the peremptory provisions of the Civil Procedure Code enjoining an essential step taken by a judge to ensure the administration of the principles of natural justice are flouted, as for instance, where a party was not given notice of a date of trial (vide *Charles Singho v. Simeon Singho*⁶), or where a judge has not fixed a date to file answer and proceeds to hear the case.

For these reasons, I set aside the order of the learned Commissioner of Requests, dated 16th July, 1961, fixing the date for *ex parte* trial and all subsequent orders. I remit this case before another Commissioner of Requests, who, after fixing a date to file answer, will proceed from that stage.

Since the defendant herself had not been vigilant, I order no costs in her favour, in the lower court, but she is entitled to the costs of this appeal.

Order set aside.

¹ (1905) 9 N. L. R. 26 at 28—per Layard C.J.

² (1926) 28 N. L. R. 58.

³ (1924) 27 N. L. R. 65 at 67.

⁴ (1934) 36 N. L. R. 201 at 203.

⁵ (1942) 43 N. L. R. 527.

⁶ (1945) 46 N. L. R. 418.