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KARUPPAN CHETTY *v.* ANTHONAYAKE HAMINE.

D. C., Kurunegala, 1,905.

Costs in claim proceedings—Civil Procedure Code, s. 241—Summary investigation—Option of Court to investigate or not—Duty of Court to notify claimants and execution-creditor—Form of notice of investigation—Reasonable fees to proctors for work done—Practice of making motions when none are needed—Date on which work of proctor was done, and dates of alleged payments essential to bill of costs.

The District Court having an option as to whether or not it shall undertake the investigation of a claim made under section 241 of the Civil Procedure Code, it is its duty, and not of the proctors concerned, to notify to the claimants and the execution-creditor its intention to hold the investigation.

No notice is necessary on the judgment-debtor.

Rengappa Thevar v. Kudadurage (2 *C. L. R.* 45) disapproved.

The form of the notice should be similar to the summons prescribed in criminal cases.

The only question for determination in this summary inquiry is whether the claimant was in possession at the time of the seizure. If he was in possession, the Court directs the Fiscal to release the seizure.

Where, notwithstanding the possession of the claimant, the execution-debtor appears to be the true owner of the property, the question whether it is executable under the writ must be determined in a separate action brought under section 247.

In claim proceedings summarily investigated, the District Court should allow to the claimants' proctor what, having regard to the work done, is in its opinion a sufficient remuneration.

In such proceedings, bills of costs should not be permitted.

In matters of regular procedure, nothing which is a step in that procedure should be the subject of a motion, and no bill of costs which does not give the date on which a work was done or a payment made is a proper bill.

UPON a decree entered in favour of the plaintiff in this case, execution issued and certain property, alleged to belong to the defendants and to be of the value of Rs. 600, was seized. Two sets of claimants appeared before the Fiscal and claimed an undivided half share of the property seized.

The claims being reported to the District Judge, an inquiry was held, when the two sets of claimants appeared on the same day by the same proctor. The Court upheld the claims with costs.

The proctor for the claimants filed two bills of costs as in the second class of costs taxable in the District Court, on the footing of each claim being of the value of Rs. 600. The Secretary allowed all the items, and the judgment-creditor moved the District Court to revise the taxation of the two bills on the following grounds: (1) that there was only one inquiry; (2) that only one set of stamps should have been allowed; (3) that only one bill of costs

should have been taxed; (4) that the charges made as for a regular trial and for attending Court should not have been sanctioned; and (5) that under the third schedule a reasonable sum ought to have been awarded to cover the costs of the inquiry.

The District Judge found that in Colombo and Kandy the practice was to allow costs in claim inquiries as in regular actions, and that the two bills of costs were properly taxed by the Secretary, save as to one item of Rs. 10 withdrawn by the claimants' proctor.

The judgment-creditor appealed. The case was argued on the 26th and 27th February, 1902.

Sampayo, for appellant.—The proceedings were the same and the work done by the proctor was the same, and the fact that there were two sets of claimants does not justify the recovery of taxes on two bills. Stamps were charged for above the value of stamps necessary for these claims. Each set of claimants claimed half only of the property, and the scale of taxation should have been as for Rs. 300, whereas the calculation is on the whole value of the land in each case. That is obviously wrong. Appearances are charged for which were unnecessary, and they include appearances before the proxy was filed. There are charges made for copying and reading the proceedings and pleadings. That was unnecessary, and the proctor is not entitled to charge these things. [BONSER, C.J. —Why not?] The claim proceedings are to decide who is in possession of the land, but that question is wholly apart from the original action. The pleadings and proceedings at the trial do not affect the point inquired into. All these costs charged are not fair in a mere claim inquiry which is a summary inquiry, and they must therefore be reasonable charges only. [BONSER, C.J.— Under what section are these costs allowed ?] The provision at the foot of schedule 3 of the Code has been relied on. [BONSER, C.J.—I am not sure that any bill of costs should be allowed to be taxed.]

H. A. Jayawardene, for claimants, respondents.—Costs should be allowed in such cases. It has always been done. *Das v. Prasad*, *I. L. R., 6 All. 21*, shows that costs should be allowed. In *Vanniah v. Veemanadan*, *2 Browne, 226*, it was suggested that costs should be allowed in cases like these, in cases of damages, &c. [BONSER, C.J. —What was the necessity for all these motions ? Why a motion to file lists of witnesses ? to move for taxation ?] Lists must be filed so as to let the Court know and give an opportunity to exercise its judgment with regard to the witnesses to be called. The other side also gets a notice of who is going to be called. [BONSER, C.J. —Where you have a right to do a thing, you need not move the

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Court for permission. In a summary inquiry all delay and expense should be avoided. The prospective charges in the bills are unjust. You must assume the other side will pay without bills, &c. But what right have you to costs ?] The Fiscal only collects the prospective costs when they are incurred. Costs are awardable in these inquiries, and the class in which they should be taxed should be determined by the value of the land seized. The items criticised are not the items which were objected to. The decision in a claim case is most important, and parties cannot afford to go without the help of professional advisers. In fairness they must be deemed to have a right to be paid for the work and to have their costs taxed. *Candaperumal v. Sinnatar (1 N. L. R. 128).*

Sampayo, in reply, quoted *Ramalingam v. Kurukkal (2 N. L. R. 14); Indian Code, § 278; O'Kinealy, p. 304 (1893); Shivapa v. Dodnagaya, I. L. R. 11 Bombay, 117.*

27th February, 1902. BONSER, C.J.—

This is an important case to suitors, more important than many cases which come before us, because it deals with the question of the costs which an unsuccessful suitor is bound to pay. In this case the appellant was the execution-creditor, that is to say, he had a judgment against a debtor, and in seeking to execute that judgment he caused a piece of land to be seized, which he stated to be of the value of Rs. 600. Thereupon two sets of claimants put in a claim alleging that the land was not liable to be seized in execution for the debt due under the judgment to the execution-creditor. Each of the claimants claimed an undivided half of this property, and on the 10th May, 1901, they delivered to the Fiscal a formal document in support of their claim. The seizure had taken place on the 22nd April previous. Upon receiving that claim, it is the duty of the Fiscal to transmit it to the Court with a report of the circumstances under which the seizure was made, and the Code provides that the Court shall thereupon proceed in a summary manner to investigate such a claim.

Now, the words " in a summary manner " are very important, and, if we may take the proceedings in the present case as a sample of what generally takes place in these claim proceedings, those words have been generally ignored or forgotten. The claimants themselves did not comply with the requirements of the law, but although the seizure was on the 22nd April, the claim was not made till 10th May. Section 242 of the Civil Procedure Code provides that the claim is to be made " at the earliest opportunity." However, no difficulty arose in consequence of the delay in making the claim.

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The only direction is that the Court shall investigate the claim in a summary manner. No duty is thrown on the claimant to set the Court in motion, but it is the duty of the Fiscal to bring the matter before the Court. It is not incumbent on the Court necessarily to hold an inquiry upon the claim, for section 242 provides that an investigation shall not be made if it appears to the Court that the making of the claim was designedly or unnecessarily delayed with a view to obstruct the ends of justice, so that the Court has an option as to whether it shall undertake this investigation or not.

If the Court does determine to hold an investigation, it seems to me that it is the duty of the Court to notify to the claimant and the execution-creditors, who are both interested in the result of the investigation, that it is going to hold. As regards the judgment-debtor, it seems to me that it is unnecessary to serve him with notice, for the investigation is not binding on him in any way, and therefore he is not a necessary party to the inquiry. I mention that because, in *Rengappa Thevar v. Kudadurage*, 2 *C. L. R. 45*, the Court there expressed the opinion that the debtor should be served. That was not necessary for the decision in that case, and was merely a *dictum* which is not binding upon us.

It seems to me that the form of the notice issued by the Court should be something similar to the summons in a criminal case which is to be tried summarily. In that case the summons to the accused informs him that a charge has been made against him, and that that charge will be investigated on a certain day, and that he is then to attend with his witnesses. It further informs him that, if he has any difficulty in procuring the attendance of witnesses, he should make an application to the Court, which will issue process and compel their attendance.

Then, when the parties are before the Court on the day of the inquiry, the procedure should be very simple. It must be remembered that the only question is whether the claimant was in possession at the time of the seizure, and not whether the claimant is the owner of the land. If it is found that he is in possession, the Court makes an order to the Fiscal to release the property, but that order determines nothing as to the rights of the parties. It may be that the claimant is in possession of the property, but yet the true owner of the property is the execution-debtor, and the property is therefore executable under the writ. But that question cannot be determined in the claim inquiry. The Code provides that that question shall be determined in a separate action brought under section 247. If the object and scope of the inquiry had been strictly kept in view, the proceedings in this

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and other cases would have been conducted more summarily than they appear to have been.

In the present case the matter was not dealt with summarily. In the first place the Fiscal delayed till the 28th May before referring the matter to the Court, and then the matter was not finally disposed of by the Court until the 26th August, when it appears to have taken a few minutes only. The District Judge records that "the Fiscal's report and the evidence shows that at "the time of seizure the lands claimed were in the claimant's "possession", and the Fiscal was ordered to release them.

The execution-creditor then found himself presented with a bill of costs on behalf of the claimants under the first claim for Rs. 106.50, and an exactly identical bill on the second claim for the same amount. I should have mentioned that the two sets of claimants employed the same proctor, and that the cases were heard together. This bill of costs seems to have been too much for the patience and long-suffering of the litigant, because he found himself asked to pay Rs. 213 to the claimants, in addition to his own bill of costs, making up a sum which was, at all events, a very large proportion of the value of the property seized. The Secretary of the Court, whose duty it was to tax the bill, allowed every item. The District Judge, who was asked to review the taxation, allowed every item except Rs. 10, and as a result the appellant brought the matter before this Court.

The Court and practitioners have considerable difficulty in administering the provisions of the Civil Procedure Code, which may, without disrespect, be termed a chaotic compilation. It would defy the skill of the most learned lawyers to interpret and make any consistent sense of a great deal of it. But District Judges are for the most part not trained lawyers, and they therefore have to work under considerable difficulty, and that they work the Code as well as they do is, I think, a matter creditable to them.

It would really seem that there is no provision in this Code for the costs of these claim inquiries. How that came about is easy to be seen. Under the old rules and orders these objections to seizure were made to the Fiscal, and he held a rough and ready inquiry and determined the matter, taking security from the parties. There were no costs, therefore, of any inquiry made by the Fiscal. But the Legislature, apparently, was not content with this state of things, and abolished the old rules and orders and substituted for them the Code, partly founded on the Indian Procedure Code, partly drawn from the New York Code, partly from the old rules and orders, and partly drawn from the inner consciousness of the compilers. As regards the taxation of costs,

the scale was taken from the old rules and orders, and they have been put into a schedule to the Code. The fact that this new procedure had been adopted was doubtless overlooked, and therefore no special provisions were made for it. The result has been that the Courts appear to have treated these summary proceedings as though they were a regular and formal action, and to have taxed the costs on that footing, which of course is not in accordance with the intention of the Code.

We think that in a case like this, as is done in Courts of Requests, we are informed, Courts should allow what they may consider a reasonable fee for the work done in the matter by the proctors on either side. There can be no sound reason or sense in making the costs of the claimant depend on whether the original debt with which he has nothing to do was sued for in a District Court or a Court of Requests. Certainly in any event a great number of the items which have been allowed in this case ought never to have been allowed. For instance—and it is a very glaring instance—the proctor for the claimant took copies of the proceedings in the original action and charged Rs. 10 in each for that purpose, and he also charged Rs. 5 in each case for perusing those documents when he had obtained them. Now, it is impossible to conceive that the proceedings in the original action can have anything whatever to do with the question as to whether these persons, who were third parties, who had nothing to do with the action, were in possession of this land or not at the time of seizure. The idea is ridiculous, and yet this charge was solemnly allowed. Then, allowances were made for drawing up lists of witnesses and moving to file the same, and so on.

I thought that this Court had stamped out that practice of making unnecessary motions, for we had expressed ourselves very strongly sometime ago with regard to the practice of filing motions on every conceivable pretext, which then prevailed in the District Court of Colombo. We are told it is the practice to move for leave to file this list of witnesses. But if that is the practice, it is a practice entirely contrary to the provisions of the Code. Section 91 deals with motions, and it says there that every application made to the Court in the course of an action incidental thereto and not a step in the regular procedure should be made by motion; that is to say, nothing which is a step in the regular procedure is to be the subject of a motion. Filing lists of witnesses is emphatically a step in the regular procedure; it is required by the Code to be done, and I trust that this will be the last we shall hear of such motions.

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Then the appellant, although he objected *in toto* to the bills of costs, objected also in particular to the charge of stamp duties which he had been made to pay. The stamps in the various proceedings in this summary matter were calculated as though these were two actions each relating to the subject-matter of Rs. 600, and therefore falling under the 4th class of the Stamp Ordinance, but the fact was lost sight of that these claimants were only claiming each for himself property of the value of Rs. 300. Therefore there could be no excuse for treating it as though the Court were dealing with two properties each in an action of the value of Rs. 600. However, that point was at once conceded by the respondent's counsel in this Court.

But I do not think that any stamp duties are chargeable in claim proceedings with the exception of a fee of Re. 1, which the Stamp Ordinance imposes on the claim petition. The stamp duties in actions in the District Courts and Courts of Requests are not applicable to these claim proceedings.

As regards the form of the bill, I think the appellant was quite justified in objecting to it *in toto*, for it does not contain, except as to six of the numerous items, the date on which the work which was alleged to have been done was done or the payments alleged made. It is quite clear that the bill was not a proper bill, unless it contained that information. If that information had been conveyed, it would have been seen that some of the items were quite unjustifiable, because some of them relate to matters which occurred before the proxy was filed by the claimant's proctor.

We think that this appeal should be allowed and the matter remitted to the District Court to allow what, having regard to the work done, is in the opinion of the District Court a sufficient remuneration for the claimants' proctor.

WENDT, J.—I am of the same opinion. Although the contrary was argued, I think that the Court had power to award costs against the unsuccessful party to a claim inquiry. It has already been so decided in *Candeperumal v. Sinnatai*, 1, *N. L. R. 128*.

As to the scale of costs, I cannot think that the Code intended the scale in schedule III. to apply to the "summary" inquiry which the Court makes into a claim, where the decision does not finally settle the rights of parties, but in effect merely determines who shall be plaintiff in the regular action which is to settle those rights.

I agree with the Chief Justice in thinking that the proper course would be for the Court when disposing of the claim to fix such a sum for costs as in its discretion appeared to be reasonable.