Present: Garvin, Dalton, and Lyall Grant JJ.

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ISOHAMINE *v.* MUNASINGHE.

144—D. C. Kalutara, 13,275.

Action under section 247—Action—Claim inquiry—Absence of claimant—Order made after investigation—Civil Procedure Code, ss. 241, 243, 245 and 247.

An order disallowing a claim, in the absence of the claimant on the date fixed for inquiry, of which the claimant had notice, is an order to which the conclusive character given by section 247 of the Civil Procedure Code attaches.

APPEAL from a judgment of the District Judge of Kalutara.

The facts are stated by the learned Judge as follows:—

The property in dispute was seized on January 29, 1921, under writ issued in C. R. case No. 8,861. The plaintiff preferred a claim to it on March 2, 1921, the Court fixed the matter for inquiry for

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April 22, 1921, and directed that the execution-creditor be noticed. The notice was duly taken out by the claimant; on the date fixed for inquiry the plaintiff (claimant) was absent. There was no return to the notice on the execution-creditor. The Court made order dismissing the claim. The plantiff did not bring an action under section 247 of the Civil Procedure Code. The property in dispute was sold and purchased by the defendant in the present suit. The learned District Judge held that the order in the claim-inquiry was conclusive against the plaintiff.

F. de Zoysa (with *A. L. Jayasuriya*), for plaintiff, appellant.—The proceedings of April 22, 1921, are recorded thus: "No return to notice; claimant absent; creditor absent; claim dismissed." Section 247 gives a conclusive effect only to orders made under section 244-245. These sections contemplate an investigation being held. It is submitted that these proceedings show that there was not and could not be an investigation as both parties were absent on that date. Hence the dismissal of the claim does not operate as *res judicata*. Section 242 indicates that there is a possibility of a claim on which no investigation takes place. The case on which the learned Judge relies has no application to the facts of the present case. In that case *Maracair v. Maricair* [1] the date was duly notified to both parties. Here the creditor did not receive notice and hence both parties were absent. It could not be said in the present case that it was ripe for investigation. The furthest Courts have gone is to hold that there has been a constructive investigation (*Chelliah v. Sinnacutty*[2]; *Silva v. Wijeysinghe*.[3])

M. T. de S. Amerasekere, for respondent, relied on *Maracair v. Maricair* (*supra*).

January 27, 1928. GARVIN J.—

The short point for decision in this case is whether an order dismissing a claim to property seized in execution of a writ made under the circumstances hereafter set forth is one which is conclusive inasmuch as no action was brought by the claimant to establish the right which he claimed within the period specified in section 247 of the Civil Procedure Code.

The material facts as found by the learned District Judge are set out in his judgment as follows:—

> "The property in dispute was seized on January 29, 1921, under writ issued in C. R. case No. 8,861. The plaintiff preferred a claim to it on March 2, 1931. The Court fixed the matter

[1] *22 N. L. R. 441.* [2] *18 N. L. R. 65.*

[3] *2 C. L. R 143*

for inquiry for April 22, 1921, and directed that the execution-creditor be noticed. The notice was duly taken out by the claimant. On the date fixed for the inquiry the plaintiff (claimant) was absent. There was no return to the notice on the execution-creditor. The Court made order dismissing the claim. The plaintiff (claimant) did not bring an action under section 247 of the Civil Procedure Code. The property in dispute was sold and purchased by the defendant in the present suit."

It will thus be seen that the claimant with notice of the date appointed by the Court for the investigation of his claim failed to attend the sitting of the Court for the investigation and failed also to cause any material to be placed before the Court in support of his claim.

It is urged, however, that no order disallowing a claim is conclusive unless it be shown to have been made after actual investigation of the facts and circumstances of the claimant's case or of the respective cases of the claimant and the opposite party. This contention is based largely upon the following passage in the judgment of Shaw J. in *Perera v. Fernando*[1]: " Section 245 of the Code appears to me to relate to a disallowance of a claim after an investigation into the merits under the previous section . . . ." It is evident, however, that in that case the Court refused to investigate the claim in the mistaken belief that a claim could not in law be made to an undivided share. Under the circumstances, Shaw J., if I may say so, rightly held that there had been no investigation. This is the effect of his judgment and the passage quoted read in its context does not appear to have been intended to lay down any wider proposition than that an order of dismissal made without any investigation of the claim is not an order which attracts to it the conclusive effect of section 247. The procedure to be followed in the even of any claim being preferred to property seized in execution is contained in sections 241 to 247 of the Code. Generally speaking, under the Civil Procedure Code proceedings in Court must either conform to the rules of regular procedure or of summary procedure. But the procedure in the case of claims is of a special character—it is neither " regular procedure " nor " summary procedure." The Court is required to investigate the claims " in a summary manner." The intention is manifest that a claim should be dealt with expeditiously so that the execution of the writ should not be delayed or defeated; and to this end the Court is expressly empowered to refuse to investigate a claim which appears to have been designedly and unnecessarily delayed with a view to obstruct parties.

[1] *1 C. W. R. 17.*

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What is contemplated is a proceeding in Court of a summary nature directed to the speedy investigation of the claim preferred and its disposal. It is necessary to the due execution by a Court of its writs and is also in the interests of all persons concerned that a claim to property seized when once made should be disposed of by an order which is final if the matter is not prosecuted further under the provision of section 247. Now with reference to this proceeding it is enacted by section 243 as follows:—

> " The claimant or objector must on such investigation adduce evidence to show that at the date of the seizure he had some interest in, or was possessed of, the property seized."

The words " on such investigation " can only mean at the sitting of the Court for the investigation of the claim.

Then follow three sections—244 to 246—which specify the various orders which the Court may make " upon such investigation." The orders there specified are (*a*) an order allowing the claim; (*b*) an order disallowing the claim; (*c*) an order directing the continuance of the seizure but subject to a mortgage or lien in favour of some person not in possession.

If at the sitting of the Court or, to use the language of section 243, " on such investigation " the claimant fails to adduce evidence the Court can but disallow the claim since the claimant having failed to establish that he had an interest in or was possessed of the property it may surely be inferred that the judgment-debtor and not the claimant is in possession. This is a conclusion at which the Court arrives " upon such investigation." There is ample authority for the proposition that an order disallowing a claim in such circumstances is one to which the conclusive character given by section 247 attaches. It is an order under section 245—for what difference is there between a decision which proceeds upon a disbelief of evidence and one which proceeds upon an absence of evidence in support of the claim ? (Vide *Roy v. Dossia* [1]; *Hajrah v. Tajooddeen* [2]; *Chelliah v. Sinnacutty* [3]; *Maracair v. Maricair.*[4]) These judgments, if I may respectfully say so, are in accordance with the plain and natural meaning of the words of the sections with which we are concerned and have checked a certain tendency to attached to the words " upon such investigation " a meaning which would render it impossible for the Court to make an order disposing of the matter of the claim which would be final, subject to the right of action conserved by section 247 in any case in which the claimant, in disregard of the duty cast on him by section 242 fails to adduce any evidence or cause any evidence to be adduced to establish the right he claimed.

[1] *(1873) 20 W. R. 345.*
[2] *(1874) 21 W. R. 409.*
[3] *(1914) 18 N. L. R. 65.*
[4] *(1921) 22 N. L. R. 441.*

At a sitting of the Court for the purpose of investigating a claim duly appointed and of which notice has been given the Court is entitled to proceed judicially to determine the matter of the claim upon a consideration of the evidence where evidence is adduced, and in the absence of evidence when the claimant adduces none, and the order so made is, in my view of these sections, an order made upon investigation.

The facts and circumstances of the case under consideration can hardly be distinguised from the case of *Maracair v. Maricair* (*supra*) in which it was held that an order disallowing a claim where the claimant with notice of the date appointed for the investigation was absent and caused no evidence of his claim to be adduced was conclusive unless followed by an action under section 247. It is urged, however, that there is a difference in that there was no return to the precept directing service on the execution-creditor and upon this circumstance counsel founded the argument that the Court was not in a position to proceed with the investigation. The absence of the return does not necessarily mean that the judgment-creditor was not served with notice, and it is worthy of note that though five years have elapsed since the order on this claim was made no evidence has been offered to establish that such service had not taken place.

But I cannot in any event assent to the argument that the Court was unable to proceed with the investigation. Had the claimant been present the Court might have sent for the return and according as it was informed that service had not been effected, in its discretion proceed with or postpone the investigation. But when the claimant who was bound by law to adduce evidence was not present in person and had not arranged for evidence to be adduced in support of his claim, the Court was, I think, entitled in the absence of such evidence to make an order disallowing the claim. For the reasons already stated, that order is in my opinion conclusive when the claimant did not within the period prescribed in section 14 institute an action to establish the right which he claimed to the property.

This determination is conclusive of the appeal which is accordingly dismissed with costs.

DALTON J.—I agree.

LYALL GRANT J.—

This is an appeal from a judgment of the District Court of Kalutara dismissing an action for declaration of title.

The property in dispute was seized on January 29, 1921, under a writ issued in a Court of Requests case. The plaintiff preferred a claim to it on March 2, 1921.

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The Court fixed the matter for inquiry for April 22, 1921, and directed that the execution-creditor be noticed. The notice was duly taken out by the claimant. On the date fixed for the inquiry the plaintiff was absent and it was ascertained by the Commissioner that there was no return to the notice on the execution-creditor.

The Court made an order dismissing the claim, presumably, purporting to act under section 245 of the Civil Procedure Code.

The claimant failed to take steps under section 247 and the property was purchased by the defendant upon a Fiscal's transfer dated February 1, 1922.

On May 21, 1926, the plaintiff, who is the mother of the judgment-debtor in the former case, brought the present action for declaration of title.

The learned District Judge has dismissed the action on the ground that the claimant was in default on the day fixed for the inquiry, and that the order of dismissal was therefore tantamount to an order after investigation under section 245 of the Civil Procedure Code.

As no proceedings were taken under section 247 the order was conclusive.

The learned District Judge rejected the argument advanced for the plaintiff that as there was no return to the notice on the execution-creditor on the date the claim was dismissed, no inquiry could have been held by the Court, and that the failure to investigate the case was therefore not due to the plaintiff's default but to the fact of the failure to serve the notice.

It is clear from the authorities that on the one hand where no date has been fixed for the inquiry or where by a mistake of the Court an order has been made before the date fixed for inquiry has arrived, no valid order can be made under section 245. See the case of *Fonseka v. Ukkuarala.* [1]

On the other hand where a date has been fixed for the inquiry and the claimant has failed to appear, a dismissal of his claim under section 245 has been held to be final. See the cases of *Muttu Menika v. Appuhamy,*[2] and *Maracair v. Maricair.*[3]

The principle which appears to underlie these cases is that while in the ordinary course a judgment dismissing a claim can only be made after investigation, yet if the Court has afforded the claimant an opportunity of leading evidence in support of his claim, and he has failed to take advantage of this opportunity, the case falls to be dealt with as if an investigation had actually been held.

[1] *15 N. L. R. 219.*

[2] *14 N. L. R. 329.*

[3] *22 N. L. R. 438.*

Section 241 provides that on receipt of a claim in respect of property seized in execution the Court shall proceed to investigate the claim in a summary manner. Summary procedure is dealt with in chapter 24 of the Code, and section 382 provides that if, on the day appointed for the determination of the matter of the petition, the petitioner does not appear before the Court in support. the Court shall dismiss the petition.

It appears to me therefore that if any effect is to be given to the words " in a summary manner " in section 241, those words means that on the failure of the claimant to appear on the day duly appointed for the investigation of his claim, the Court is not only entitled but is bound to dismiss the claim.

In the absence of the claimant it does not seem to me that the Court is either bound or entitled to inquire into questions relating to the service of notice on the creditor, questions which no doubt would have arisen had the claimant appeared.

If the claimant had appeared, presumably, further time would have been given for the service of notice and a later date fixed for the hearing.

What the plaintiff in the present action seeks to do is in effect to take advantage of her laches and to revive a claim which she failed to prosecutive five years previously.

I agree to the judgment proposed by my brother Garvin.

Appeal dismissed.