Present: Lascelles C.J. and Wood Renton J.

1912.

FONSEKA *v.* UKKURALA.

201—D. C. Kurunegala, 4,237.

Claim—Claimant absent at inquiry owing to mistake of the Court—Claim dismissed—Order not conclusive—Civil Procedure Code, ss. 247 and 245.

Where the claimant was prevented from attending at the inquiry and prosecuting his claim by a mistake on the part of the Court, and the Court dismissed the claim owing to the absence of the claimant—

Held, that the order was not a valid order under section 245 of the Civil Procedure Code, and that it was not conclusive within the meaning of section 247.

THE facts are fully set out in the judgment.

A. St. V. Jayewardene, for the appellant.

H. A. Jayewardene, for the respondent.

The following cases were cited at the argument: *Muttu Menika v. Appuhamy*,[1] *Sinnatamby v. Ramanathan*,[2] *Silva v. Wijesinghe*,[3] *Chandra Bhusan Gangopadhya v. Ramkauth Banerji*.[4]

Cur. adv. vult.

February 16, 1912. LASCELLES C.J.—

This is an appeal from a decision of the District Judge of Kurunegala in the course of a partition action. The question relates to certain shares purchased by the plaintiff under a writ against one Kuramuttu Chetty, which at the time of the sale were claimed by the defendant, and the question is whether or not a certain order made in the claim proceedings is *res judicata* against the defendant. The material facts and dates are the following. On October 10 the Fiscal forwarded the claim, and the inquiry was fixed for November 14, notice being returnable on November 1. On November 1 the journal entry is " Claimant absent, and has failed to issue notice; claim disallowed ". This order is admittedly wrong. It was made under the mistaken impression that the inquiry was fixed for November 1. However, the land was sold on November 27. On December 6 the Judge made an order to vacate the order disallowing the claim. On December 24 another District Judge refused

[1] *(1911) 14 N. L. R. 329.*
[2] *(1905) 2 Bal. 38.*
[3] *2 C. L. R. 143.*
[4] *I. L. R. 12 Cal. 108.*

1912.

LASCELLES C.J.

Fonseka v. Ukkurala

to inquire into the claim, apparently treating the order vacating the order disallowing the claim as a nullity. In the present case the learned District Judge considers that the order vacating the order of November 1 was a proper order, and that, in any case, so long as that order stands, there is no adjudication on the claim. Before the plea of *res judicata* can succeed, it must be established (1) that the order of November 1 is such an order as is conclusive within the meaning of section 247 of the Civil Procedure Code, and (2) that order vacating the above-mentioned order is a nullity, so that the former order is in force.

With regard to the first point, the question whether the order of November 1 is conclusive within the meaning of section 247 of the Civil Procedure Code depends upon whether it is an order passed against a party under section 245 (for sections 244 and 246 are not applicable). Can, then, an order be regarded as an order passed under section 245, when it was made in the absence of the claimant and not on the date for which the inquiry was fixed, but on another date, of which the claimant had no notice? In other words, can an order be treated as a valid order made under section 245 in the course of a claim investigation when the claimant was prevented from attending at the inquiry and prosecuting his claim by a mistake on the part of the Court? Apart from authority, it seems to me that the answer to these questions must be in the negative. But the Indian case of *Chandra Bhusan Gangopadhya v. Ramkauth Bannerji* [1] is in point, although the facts in that case were not the same. There the claim was disallowed on the ground of a discrepancy between the boundaries of the property seized and those stated by the claimant, and it was held that the order disallowing the claim on this ground was not an order under section 281, corresponding with section 245 of our Code. But the observations of the learned Judge are in point. " The order contemplated by that section ", said Field J., " is an order made after the investigation mentioned in section 278. Section 280 commences, ' If upon the said investigation the Court is satisfied ', &c. Section 281 begins, ' If the Court is satisfied '. ' Satisfied ' clearly means satisfied upon the investigation ".

In the present case it seems to me that the investigation contemplated by the Code was never made, inasmuch as a mistake was made in fixing the date of the inquiry, which for all practical purposes precluded the claimant from attending the inquiry and putting forward his claim. The present case is, of course, essentially different from the case where a claimant having received notice of the day fixed for inquiring fails to appear, and the claim is disallowed in his absence. It being clear that the order of November 1 is not a conclusive order made under a claim inquiry, and that it does not

[1] *I. L. R. 12 Cal. 108.*

constitute an adjudication of the title to the property now in dispute, it is not necessary to discuss the value and effect of the order vacating the order of November 1.

In my opinion the appeal should be dismissed with costs, and the case go back for trial on the other issues.

WOOD RENTON J.—

The plaintiff-appellant sues the defendant-respondent for the partition of two lands, allotting to himself a one-half share of each. The appellant purchased the shares in execution of a writ against Kuramuttu Chetty. The respondent claimed them on October 10, 1905. The claimant was directed to issue notice for November 1, and the claim inquiry itself was fixed for November 14, 1905. On November 1 the District Judge made an entry that the claimant was absent and had failed to issue notice, and disallowed his claim. The claimant brought no action under section 247 of the Civil Procedure Code. Under these circumstances, the question has now arisen whether the disallowance of the respondent's claim operates as *res judicata*, so as to preclude him from disputing, as he seeks to do, the appellant's title to the lands in suit in the present action. The District Judge has answered this question in the negative, and I think that he is right. There is, to my mind, no doubt but that where, as in *Muttu Menika v. Appuhamy*,[1] the provisions of section 247 of the Civil Procedure Code apply, a claimant whose claim is disallowed must adopt the remedy prescribed by that section. But section 247 applies only in cases where an order has been made under section 244, 245, or 246, and these sections contemplate something in the nature of an investigation as a condition precedent to the order. In *Muttu Menika v. Appuhamy*,[1] as I have just satisfied myself by reference to the original record, the claimant had express notice of the date of the inquiry; the inquiry was held on the day fixed, but she did not appear or put before the Court, as she might have done, even if absent, as she subsequently and, perhaps, truly said, from illness, other evidence in support of her case. Both sides would seem to have been legally represented. On these facts, the order disallowing her claim was, in my opinion, one to which the provisions of section 247 applied. In the present case, however, the inquiry was held on a day for which notice had not been given; and a claim was dismissed on November 1, which the claimant was not bound to support till November 14. I do not think that it can fairly be said to have been the subject of any such investigation as to attract to the order disallowing it the provisions of section 247. I would dismiss the appeal with costs, and send the case back to the District Court for trial on the remaining issues.

Appeal dismissed.

[1] *(1911) 14 N. L. R. 329.*