1930

Present: Dalton J.

KARONISA *v.* SINGHO

164—C. R. Kegalla, 2,744.

Claim-inquiry—Duty of Court to notice parties—Power to vacate order of dismissal—Civil Procedure Code, s. 823.

When a claim is reported to Court by the Fiscal, it is the duty of the Court to fix a day for inquiry and give notice to the parties. A Court has no inherent power to vacate an order dismissing a claim on account of the absence of the claimant on the day fixed for inquiry.

APPEAL from an order of the Commissioner of Requests, Kegalla.

Weerasooria, for appellant.

Abeyesekera, for respondent.

February 24, 1930. DALTON J.—

This is an appeal from an order of the Commissioner of Requests, who vacated an earlier order of his Court, whereby the claim of a claimant under section 241 of the Civil Procedure Code had been dismissed.

The facts are shortly as follows: The judgment-creditor (present appellant) issued writ, and on February 14, 1929, seized certain property as belonging to his judgment-debtor. On February 18 a claim was made to it by the present respondent, his claim being made to the Fiscal in the usual way. The Fiscal reported this claim to the Court in the usual way on February 21. On receiving this report, the Commissioner on February 22 made an order in the following terms:—

> Claimant to notice J. C. (judgment-creditor) for inquiry for 4/4 (April 4).

No parties were present on February 22, when that order was made, and the order does not state how the claimant is to have it brought to his notice.

On April 4 the journal entry shows that notice on the judgment-creditor had not yet issued and the claimant was not present. The judgment-creditor's proctor, however, it appears, was present in Court presumably in connection with some other matter, as no notice had been given of this claim, and he moved that the claim be dismissed with costs. This was done.

On May 4 the claimant (respondent) moved to have his claim reopened and that he be given time to serve notice on the judgment-creditor. In support of his application he filed an affidavit stating that he was ignorant of the order of the Court of February 22, and was waiting for a notice from the Court in respect of his claim. He

does not state how or when he became aware of the order dismissing his claim, but I do not think he has been guilty of any laches in presenting this application of May 4.

The Commissioner on May 8 allowed notice of the motion to be served on the judgment-creditor, stayed the sale, and on July 9, after hearing the parties, set aside the order of April 4, and directed that an investigation be held on the claim.

The judgment-creditor appeals from that order. It is conceded that there has been no investigation of claimant's claim, but it is urged that the Commissioner had no power to set aside the order of April 4, and if he had, he should not have done so, as it was claimant's duty to ascertain the date fixed for the claim inquiry.

The Commissioner does not state under what powers he sets aside the order of April 4. That order, it might be stated, was not made by him but by his predecessor in office, although this fact is not, in my opinion, material to the question under consideration. After considering the facts, as he said it was not a matter *inter partes*, as there was no investigation, and as claimant had no notice of the date fixed for the inquiry, he set aside the order, apparently as he thought it unjust to claimant that the order should stand.

In supporting this order Counsel for respondent has sought to apply the provisions of section 823 of the Code, arguing that the word " action " there includes a claim made under section 241. He urges that such a claim comes within the term " action " as defined in section 5 of the Code, that definition being wider than the definition given in section 6. It is true his claim is made to the Fiscal, but it is referred by the Fiscal to the Court, and is in fact a claim to the Court.

It is clear that no reference was made to this section 823 in the lower Court, nor has the Commissioner acted under it. Further, the remedy that can be granted to a claimant, if he can be said to come within the term " plaintiff, " is the right to institute a fresh action, and not to reopen the old action. In the absence of any authority to support counsel's argument, I am unable to hold that a claim such as this comes within the purview of section 823. I am also of opinion that the Commissioner, if he was exercising any inherent power of the Court to make an order that seemed to him necessary for the ends of justice, was wrong here in setting aside the order of dismissal. The claimant has his remedy to apply in revision to this Court.

I am not satisfied, therefore, that the Commissioner had any power to make the order he has made. In the event of my coming to that conclusion I am asked by respondent to affirm the order of the Commissioner by exercising my powers in revision. The

1930

DALTON J.

Karonisa v. Singho

procedure followed in *Velaithapillai v. Sangarapillai* [1] referred to below, it is to be noted, was by applying to this Court in revision and not as was done in this case.

In that event the question to be decided is whether it was the duty of the claimant to ascertain for himself the existence and nature of the order of the Court of February 22, or whether it was the duty of the Court to notify the claimant that it had fixed the claim-inquiry for a certain day and that he was to notify the judgment-creditor thereof.

Upon this question there is authority both ways.

Under section 241 the claimant has to make his claim to the Fiscal, whose duty it is to report the claim to the Court. It is then for the Court to proceed to investigate the claim in a summary manner. In *Karuppen Chetty v. Anthonayake Hamine*[2] Bonser C.J. discussing the words " in a summary manner " points out that there is no duty thrown upon the claimant to set the Court in motion, since it is the Fiscal's duty to report the claim to the Court. He concluded that it was the duty of the Court to notify both claimant and judgment-creditor that the inquiry was going to be held, the notice giving the date of inquiry and requiring the person notified to attend with his witnesses. With that conclusion Wendt J. agreed. In *Velaithapillai v. Sangarapillai* (*supra*) Grenier and Wood Renton JJ. declined to follow this conclusion, holding it was not the duty of the Court to issue notices to parties, but that the claimant should make himself acquainted with the date of the inquiry and take the initiative in procuring the attendance of his witnesses to support his claim.

In the latter case the learned Judges found that the claimant had been guilty of gross laches in bringing his application for revision to the Court, hence there was ample ground for dismissing his application without considering the further question as to where the duty of the Court under section 241 began and where it ended. It is possible therefore to regard the opinion of the learned Judges as *obiter*, just as they regarded the opinion of Bonser C.J. The opinion, however, of Grenier J. as to the practice that obtained in his day in the District Court, Colombo, cannot but have great weight. Unfortunately, as I have found out in other matters, the practice in matters of procedure in different District Courts varies very considerably, whilst I have even known a District Judge, transferred from one Court to another, to carry his practice on some points with him.

I am unable to find in section 241 anything with requires the claimant to find out for himself what order the Court has made upon the Fiscal's report of the claim. The learned Commissioner from whom this appeal comes, who is also a District Judge, points out

[1] *3 Bal. 292.* [2] *5 N. L. R. 300.*

that this would mean the claimant possibly having to spend several days about the Fiscal's Office and the Court to ascertain what order has been made by the Court. It seems to me it is for the Court to notify him of the date fixed for inquiry. I do not see that thereby I am in any way making the law and not declaring it as has been suggested in *Velaithapillai v. Sangarapillai* (*supra*) referred to above.

No question of laches on the part of the appellant arises here.

Whilst upholding the appeal that the Commissioner had no power to set aside the previous order made, the appellant having his remedy in revision, I think this such a case as should be dealt with in revision, the appellant through no fault of his own having had his claim dismissed without any investigation.

The appeal is allowed, but the order of April 4 dismissing the claim is set aside on revision, and the inquiry will proceed. I make no order as to the costs of proceedings in this Court.

Appeal allowed.