1938

Present : **Keuneman and Nihill JJ.**

DHARMATILAKE *v.* BRAMPY SINGHO *et al.*

165—D. C. Kalutara, 19,564.

Claim inquiry—Absence of judgment-creditor at inquiry—Order upholding claim without investigation—Failure of claimant to adduce evidence—Order not res judicata*—Civil Procedure Code, ss. 243, 244 and 247.*

The terms of section 243 of the Civil Procedure Code render it imperative on the claimant to adduce evidence in support of his claim, whether the judgment-creditor be present or not at the inquiry.

Where the requirements of section 243 have not been followed, an order allowing a claim cannot be regarded as one made under section 244, to which the conclusive effect given to it by section 247 would apply.

Isohamine v. Munasinghe (*29 N. L. R. 277*) followed.

Section 114 (*e*) of the Evidence Ordinance means that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to a case.

APPEAL from a judgment of the District Judge of Kalutara.

N. Nadarajah (with him *U. A. Jayesundera* and *V. F. Gunaratne*), for plaintiff, appellant.

N. E. Weerasooria, K.C. (with him *Gilbert Perera* and *A. E. R. Corea*), for second defendant, respondent.

Cur. adv. vult.

December 21, 1938. KEUNEMAN J.—

This action was brought by plaintiff under section 247 of the Civil Procedure Code. The plaintiff was the substituted plaintiff in D. C. Colombo, 53,771 where in execution of the decree against the present first defendant certain premises were seized and were claimed by the present second defendant. The claim of the second defendant was upheld on January 20, 1936, and plaintiff thereafter brought the present action against the first and the second defendants. In this action the second defendant pleaded that an earlier order of August 30, 1934, upholding his claim in action D. C. Colombo, 53,771 was *res judicata*. Certain issues were framed, but issues 4 and 5 relating to the question of *res judicata* were by agreement taken up for decision first. The learned District Judge decided these issues in favour of the second defendant, and dismissed plaintiff's action, and the plaintiff appeals from that judgment.

In D. C. Colombo, 53,771, the original plaintiff obtained judgment and decree on October 5, 1933, and writ was issued on October 10, 1933, returnable on October 9, 1934. Thereafter on January 29, 1934, the original plaintiff assigned his decree to the present plaintiff by deed, and on February 5, 1934, an application was made by the present plaintiff to have himself substituted as plaintiff in that case. The original plaintiff consented to the substitution on March 9, 1934, but objections were filed by the defendant in that case, and substitution was not in fact allowed

by the District Judge till November 19, 1934. An argument was addressed to us that substitution was effected earlier, but I think that argument cannot be maintained.

Meanwhile on July 12, 1934, the Fiscal had seized under the decree the property in question, and claim was made by the present second defendant on July 30, 1934. The right under which the claim was made was stated to be deed No. 1,735 dated January 16, 1934. As the land was situated in Kalutara, the claim was referred to the District Court of Kalutara. On July 31, 1934, the learned District Judge ordered stay of sale, and notice for August 30, 1934. On that latter date the journal entry by an acting District Judge runs as follows :—

"Claimant in person. Present.

Notice served on plaintiff personally.—Absent—Claim upheld".

It seems clear that the original plaintiff addressed a letter P 3 dated August 25, 1934, to the District Judge stating that he had assigned the decree and that the present plaintiff had been substituted as plaintiff. This letter certainly reached the permanent District Judge whose initials appear on it as against the date August 28. But there is nothing to show that it was brought to the notice of the District Judge who acted on August 30. The statement in the letter that the present plaintiff had been substituted plaintiff by that date was however not correct, and the plaintiff on the record was still the original plaintiff.

Neither the original plaintiff nor the present plaintiff instituted an action under section 247, Civil Procedure Code, within fourteen days of August 30, 1938, and the second defendant now claims that this order is *res judicata*.

Counsel for the appellant argued that the District Judge, in view of the letter P 3, should have postponed his order, and issued notice on the present plaintiff. As far as the notice was concerned, it was served on the party who was then plaintiff on the record, and I do not agree that any notice had to be given to the present plaintiff at that stage of the proceedings.

Counsel for the appellant next argued that the order made by the learned District Judge could not be regarded as an order under section 244 of the Civil Procedure Code, in view of the fact that the claimant had not adduced any evidence to show that at the date of the seizure he had some interest in or was possessed of the property seized. He depended on the wording of the order which I have quoted earlier, and argued that the District Judge upheld the claim merely because the judgment-debtor was absent. He argued that under section 243 it was the imperative duty of the claimant to adduce evidence in support of his claim, and that it was only when such evidence was adduced that an order releasing the property from seizure could be made under section 244. He also argued that under both those sections an investigation was necessary even though the judgment-debtor was absent, and that no investigation had been made by the District Judge. He accordingly argued that this order could not be regarded as conclusive within the terms of section 247.

Under section 241 after the Fiscal sends the report of the claim, the Court proceeds to investigate the claim "in a summary manner". Under section 242 the sale may be postponed for the purpose of making

this investigation. Section 243 states that "the claimant . . . . 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". Section 244 states that "If upon the said investigation the Court is satisfied that, for the reason stated in the claim or objection, such property was not, when seized, in the possession of the judgment-debtor . . . . or that . . . . it was so in his possession not on his own account or as his own property, but on account of or in trust for another person . . . . the Court shall release the property . . . . from seizure". Under section 245 if the Court is satisfied that the property was at the time of seizure in possession of the judgment-debtor as his own property, the Court shall disallow the claim. Section 243 is in its terms imperative, and places a duty on the claimant to "adduce evidence". In *Chelliah v. Sinnacutty*[1] Pereira J. stated, "Under section 243 of the Code it is incumbent on the claimant to adduce evidence in the first instance". In fact so heavy was this burden, that the learned Judge held that if the claimant was absent on the date of the inquiry after notice, his claim should be disallowed. Justice Garvin, in the case of *Isohamine v. Munasinghe*[2], emphasized the importance of section 243. He made certain interesting comments on the sections relating to claims. First he held that "the words 'on such investigation' can only mean at the sitting of the Court for the investigation of the claim". He continued, "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". It was held by the Divisional Court that when a claim was disallowed under these circumstances, that, amounted to an order under section 245, which became conclusive when the claimant failed to bring an action under section 247.

The learned District Judge was of opinion that where the judgment-creditor was absent at the date of the inquiry, it was equally open to the Court merely in consequence of that fact to uphold the claim. I do not think this result follows from the judgments cited. No duty is placed by the relevant sections of the Code on the judgment-creditor to adduce evidence, while an imperative duty is imposed on the claimant to do so. The *ratio decidendi* of these judgments accordingly does not apply. On the contrary, I think that the terms of section 243 make it necessary for the claimant to adduce evidence, whether the judgment-creditor is present or not at the inquiry, and where the requirements of section 243 have not been observed, I do not think that any allowance of the claim can be regarded as an order under section 244.

The District Judge rested his finding in this connection partly on the form of notice issued to the judgment-creditor, who was noticed to appear and "show cause if any why the claim preferred by the above-named claimant should not be upheld with costs". It was contended before us that this matter was governed by the sections relating to summary procedure, and that the effect of the District Judge's order taken in

[1] *18 N. L. R. 65.*

[2] *29 N. L. R. 277 (Divisional Court).*

conjunction with the notice was to establish an order *nisi* under section 377 (*a*). In the first place the claim sections, section 241 *et seq.*, do not authorize the use of summary procedure, but section 241 merely says that the "investigation" shall be made "in a summary manner". Next, the sections relating to summary procedure require petition and affidavit to be filed before order is obtained, and that requirement has no application to claim inquiries. Again the only order made by the District Judge on July 31, 1934, was "Notice for August 30, 1934". No order *nisi* was entered by the Judge, nor does the notice indicate that any such order *nisi* had been entered. Further, I do not think that the District Judge was entitled to enter an order *nisi* in view of the burden placed on the claimant under section 243.

The only case cited to us which most nearly resembled the present one was *Kiri Banda v. Assen*[1]. In that case a claim was made in 1891 to a property seized, where after investigation the property was released from seizure. Three years later the same property was seized under the same decree, and was again claimed and the claim allowed. In the action under section 247 which followed, it was held that the order in the original claim inquiry was conclusive. There is, however, the vital difference that in the case cited, there had been investigation of the claim in the first instance, before the order allowing the claim was made.

Counsel for the respondent next argued that the order allowing the claim was an order which the District Judge had jurisdiction to make, and that we must not look behind that order. He relied on the case of *Sinnatamby v. Ramanathan*[2]. In that case all that appeared on the record was "parties absent, claim set aside". Pereira J. said: "I do not think it is competent in this case to look behind the order setting aside, or, in other words, disallowing the claim. The order is one that the Court had jurisdiction to make under section 245 Civil Procedure Code. Being an order made in the absence of the claimant, he might possibly have moved on proper material that it be vacated, but so long as the order stood it was operative although made on insufficient materials". It is to be noted that this also was a case where the claimant was absent on the date of inquiry, and it is difficult to know whether the special considerations applicable to the case of the absence of the claimant were taken into consideration by the learned Judge. At any rate, in later cases in Ceylon the question whether an order was properly made under section 244 or 245 has been considered, and the proceedings examined for the purpose of deciding the question. For example, in *Perera v. Fernando*[3], where a claim was dismissed on a preliminary objection taken by the other side without hearing evidence or going into the merits, this was held not to be a disallowance of the claim under section 245 and the claimant was later allowed to vindicate title to the property, although he had failed to bring an action under section 247. Again in *Marikar v. Perera*[4], an order was made by the District Judge after obtaining certain information from the Secretary, without a sitting in Court directed to the investigation of the claim. It was held that this was not an order made under section 245, and that it was not conclusive, in the absence of an action under section 247. In this case Garvin J. refers to "a long series

[1] *2 N. L. R. 27.*
[2] *2 Bal. Reports 38.*
[3] *1 C. W. R. 17.*
[4] *29 N. L. R. 61.*

of judgments of the Court, based upon an examination of sections 244, 245, and 246 and the kindred sections of the Code, that the order which is made conclusive by section 247 is an order passed by the Court after investigation of the claim".

The case of *Sardhari Lal v. Ambika Pershad*[1] was also cited to us. Lord Hobhouse delivering the judgment of their Lordships of the Privy Council said: "the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be proper that there should be as full an investigation as if a suit was instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the subordinate Judge at the time leaving the aggrieved party to bring the suit which the law allows to him. However . . . . the order was made, and it was an order within the jurisdiction of the Court that made it". It is to be remembered that (in the words of Lord Hobhouse) "the sole question in this suit is whether it is brought in time to satisfy the exigencies of the Law of Limitations". Further there was nothing before their Lordships to show what took place before the subordinate Judge, except that both parties were before him, and it was possible that they had so far agreed on the facts that he was enabled to deliver his opinion off-hand. The main point discussed was not the absence of any investigation, but the extent of the investigation necessary. This Privy Council judgment has been discussed in subsequent cases in India. In *Koyyana Chittemma v. Doosy Gavarama*[2] it was held that an order that purports to be an adjudication on the merits of the case can be regarded as made after investigation, and in *Bal Makund v. Maqsud Ali*[3], that an order passed is not operative only if there has been no investigation whatever, but that it is operative if there has been some investigation whether perfunctory or satisfactory.

In the present case it appears to me that there has been no investigation however perfunctory, and that there has been no adjudication on the merits from which we may presume that there has been some investigation. The journal entry of June 30, 1934, reads "claimant in person—present. Notice served on the plaintiff personally—absent. Claim upheld". The natural presumption is that the claim was upheld, because of the absence of the plaintiff. But it is argued that in virture of section 114, illustration (*e*), we must presume that the necessary evidence had been adduced by the claimant under section 243. But that illustration only raises a presumption as to the regularity of official acts. I think it is not possible to stretch it to a presumption that all necessary evidence has been taken before an order is made, of the *dictum* of Woodroffe J. in *Navendra Lal Khan v. Jogi Hari*[4]. "The meaning of section 114 (*e*) of the Evidence Ordinance is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to the plaintiff's case". In this case, I think it was incumbent on the second defendant to show that the order of August 30, 1934, was an order which was conclusive under section 247, and I think the burden lay upon him to establish that the requirements

[1] *I. L. R. 15 Calc. 521.*
[2] *I. L. R. 29 Madras 220.*
[3] *(1917) A. I. R. Oudh 99.*
[4] *I. L. R. 32 Calc. 1107.*

of section 243 were satisfied. Further, the fact whether he had adduced evidence on that occasion was a matter which was especially within his knowledge under section 106 of the Evidence Ordinance, and if he wished to supplement the entries on the record, it was within his power to do so.

In all the circumstances I hold that the order of August 30, 1934, was not an order duly made under section 244, Civil Procedure Code, and that it was not conclusive under section 247. The issues 4 and 5 must be answered in favour of the plaintiff. I allow the appeal and set aside the judgment of the learned District Judge, and send the case back for the decision of the other issues. The plaintiff is entitled to the costs of the appeal and of the trial already had. All other costs will be costs in the cause.

NIHILL J.—I agree.

Appeal allowed.