Present : Pereira J.

1914.

CHELLIAH *v.* SINNACUTTY.

347—C. R. Anuradhapura, 7,440.

Default of claimant to supply stamps to issue process—Dismissal of claim—Order not tantamount to an order disallowing claim under s. 245 of the Civil Procedure Code—New claim to same property.

An order "dismissing with costs" a claim to property seized in execution owing to default on the part of the claimant to supply the necessary stamps to issue notices to parties for the inquiry is not tantamount to an order "disallowing" the claim under section 245 of the Civil Procedure Code. It is rather tantamount to an order merely rejecting the claim with a refusal to investigate it. There should be an investigation before an effectual order under section 244 or section 245 is made. Under section 243 it is incumbent on the claimant to adduce evidence in the first instance to show that at the date of the seizure he had some interest in or was possessed of the property seized, and if on the day fixed for the inquiry he absent himself and thus make default in discharging this onus, the proper order would be an order disallowing his claim, as the proceeding was in effect an investigation of the claim.

THE facts are set out in the following judgment of the Commissioner of Requests (M. Prasad, Esq.):—

The plaintiff claimed the property seized under writ in C. R. 7,333, Anuradhapura, before the Fiscal on January 29, 1914. The Fiscal reported the claim to Court on February 4, 1914. No steps were taken by the claimant (the present plaintiff) till February 21, 1914, when the judgment-creditor moved that the claim be dismissed with costs, as claimant took no steps in the matter. The Court allowed the motion.

On February 27, 1914, the claimant sent a petition to Fiscal, North-Central Province, alleging that the first claim was dismissed as he was ignorant of the rules of law, and requested the Fiscal to entertain a second claim.

The Fiscal referred the matter to Court. Notices were issued, but the claim (second) was again dismissed by Court on March 17, 1914, as the claimant was absent on the date of the inquiry.

No application was made to Court to set aside its order of February 21, 1914.

On March 17, 1914, the claimant instituted the present action under section 247, Civil Procedure Code. Defendant now states that the action has been brought too late, *i.e.*, it has not been brought within fourteen days of the date of dismissal of first claim (February 21, 1914). The plaintiff contends that the action is not too late, as the date from which the period of fourteen days should run would be the date of dismissal of the second claim (March 17, 1914).

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Mr. Thambapillai, for defendant, drew my attention to *Balasingham's Reports, vol. III., p. 292 (Velaithupillai v. Sangarapillai)*.

In that case it was held that it was not the duty of the Court, but that of the claimant, to take steps regarding issues of notices to parties in a claim inquiry.

It would consequently appear that the order of dismissal on February 21, 1914, was valid, inasmuch as the claimant took no steps in the matter for nearly three weeks.

Bonser C.J.'s judgment in *2 N. L. R. 27 (Kiri Banda v. Assen)* clearly suggests that the proper course for the claimant would have been to apply to the Court to re-open the inquiry. No such steps were taken in this matter.

Mr. Nana Ratna Raja suggests that the claim on February 21, 1914, was not properly dismissed, as there is no provision under section 245, Civil Procedure Code, for dismissal of a claim for failing to supply stamps. I think section 245 of the Civil Procedure Code is not exhaustive regarding the circumstances under which a claim should be dismissed, and consequently the ordinary rules regarding dismissal of inquiries under the summary procedure would apply to claim inquiries also.

Velaithupillai v. Sangarapillai's case referred to above was dismissed on similar grounds; and that case goes further, inasmuch as it was held that the District Judge was justified in not re-opening the matter as the claimant had been guilty of gross laches.

Plaintiff's counsel took a second objection to the dismissal of the claim on February 21, 1914. They contended that as claimant had not taken any steps the Court was not justified in dismissing the claim, but only in rejecting it.

I do not think this will be of any avail to plaintiff. It is clearly stated in the Civil Procedure Code, under the definition of the word "decree," that the rejection of a plaint amounts to the decree of the Court.

If the claimant thought that the order of February 21, 1914, was not in order, his proper remedy would have been to apply to the Supreme Court to vacate that order.

Under the circumstances, I think that the order of February 21, 1914, must stand, and that the period of fourteen days for a section 247 action must be reckoned from the date of dismissal of first claim.

I dismiss plaintiff's action with costs.

The plaintiff appealed.

J. S. Jayewardene, for the plaintiff, appellant.—There was no investigation into the first claim. There was therefore nothing to prevent the claimant from preferring a new claim. The order of the Commissioner refusing to investigate the claim is wrong. Counsel relied on *Fonseka v. Ukkurala.*[1] This case is a binding authority.

Balasingham, for respondent.—In *Fonseka v. Ukkurala* [1] the facts were quite different. There the claim was fixed for the 14th of a

[1] *(1912) 15 N. L. R. 219.*

month, but the claim was called by mistake on the 1st of the month, and dismissed by mistake on the ground that the parties were absent.

The observations of Lascelles C.J. at page 220 are merely *obiter*. Moreover, the Indian case (*12 Cal. 108*) on which the Chief Justice relies bases the decision on other grounds. The observations of Field J. were *obiter*. *Muttu Menika v. Appuhamy*[1] is an authority for the proposition that where the claim is dismissed the only remedy is to bring an action under section 247 of the Civil Procedure Code. See also *Sinnatamby v. Ramanathan*, [2] *Silva v. Wijesinghe*, [3] *Velaithupillai v. Sangarapillai*. [4]

Cur. adv. vult.

November 18, 1914. PEREIRA J.—

In this case the simple question is whether an order "dismissing with costs" a claim to property seized in execution owing to default on the part of the claimant to supply the necessary stamps to issue notices to parties for the inquiry is tantamount to an order "disallowing" the claim under section 245 of the Civil Procedure Code. In the case *Velaithupillai v. Sangarapillai* [4] it was held that after a claim was forwarded to the Court by the Fiscal it was the duty of the claimant to supply the necessary stamps to issue notices to persons who should be parties to the inquiry and to take other steps to bring about the inquiry, and this Court refused to interfere, in revision, with an order refusing to open up an *ex parte* order "dismissing the claim" for default on the part of the claimant to take the steps referred to above. Whether the order "dismissing the claim" in that case had the effect of an order "disallowing a claim" under section 245 does not appear to have been decided. In *Fonseka v. Ukkurala* [5] the claim inquiry had been fixed for the 14th November, 1911, but by some mistake the case was called on the 1st November, and the order then made was "Claimant absent, and has failed to issue notice; claim disallowed," and it was held that that order could not be sustained as an order disallowing the claim under section 245, because it could not be said that there was any investigation of the claim. In *Sinnatamby v. Ramanathan* [2] the order made was: "Parties absent; claim set aside." There was nothing to show what led up to the order, and it was held that, nothing appearing to the contrary, the presumption was that the order was duly made, and, inasmuch as it was an order that the Court had jurisdiction to make, it should be considered to be an order duly made under section 245. In *Silva v. Wijesinghe* [3] it was held by the Collective Court that even where a claimant abandoned his claim and left the Court without any evidence in support of it, and the claim was thereupon disallowed, he might bring an action under

[1] *(1911) 14 N. L. R. 329.*
[2] *(1905) 2 Bal. 38.*
[3] *2 C. L. R. 143.*
[4] *(1907) 3 Bal. 292.*
[5] *(1912) 15 N. L. R. 219.*

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section 247 to establish his right to the property claimed by him. And lastly, in *Muttu Menika v. Appuhamy*[1] the claimant's claim was dismissed for default of appearance. That is all that can be gathered from the report, and it was held that that was an order having the effect of an under section 245 disallowing a claim. The Indian case of *Mohadeb Mundul v. Modhoo Mundul* [2] is strong authority in support of the proposition that if a claim is made and dismissed or struck off without any adjudication in the manner provided for by section 244 or 245 of the Code, the order is not to be deemed to be an order "disallowing" the claim under section 245. From the authorities cited above, it may fairly be gathered that there should be an investigation before an effectual order under section 244 or 245 is made. Now, under section 243 of the Code it is incumbent on the claimant to adduce evidence in the first instance to show that at the date of the seizure he had some interest in or was possessed of the property seized, and if on the day fixed for the inquiry with notice to all parties the claimant absent himself, and thus make default in discharging the onus on him under section 243 referred to above, the proper order would be an order disallowing the claim, and the order would have the full effect of an order under section 245, because the proceeding that resulted in it was in effect an investigation of the claim. In the present case what occurred was neither an actual nor constructive investigation. No date was fixed for inquiry, and the appropriate order would have been an order merely rejecting the claim rather than one dismissing it. I read the order "dismissing the claim" as amounting to nothing more than an order rejecting it, and I set aside the order appealed from with costs and remit the case for further proceedings in due course.

Set aside.

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

[2] *16 Weekly Report 59.*