

RAZIK
VS
L. B. FINANCE LTD

COURT OF APPEAL
SOMAWANSA, J. (P/CA)
BASNAYAKE J.
C. A. NO. 293/04
D.C. COLOMBO 7871/MHP
D. C. GAMPOLA/CLAIM/25
DECEMBER 17, 2004

Civil Procedure Code-Sections 87 (3), 218 S241, 343, 344 Inquiry - Is the Judgement Debtor entitled to prefer a claim to the property seized in terms of Section 241 of the Code ?

HELD:

- (i) Judgement debtor is not a person who is entitled to prefer a claim to the property seized under Section 241.
- (ii) Section 241 sets out the procedure for a third party to prefer a claim to the property and for the Court to investigate such claim. The Judgement debtor is not a person contemplated by Section 241.

Application for Leave to Appeal from an order of the District Court of Gampaha.

Case referred to :

1. *Ghouse vs Mercantile Credit Ltd.*, 1997, 2 Sri LR 127

Dushan de Alwis for Plaintiff -Respondent Respondent.
Riza Muzni for Defendant Petitioner Petitioner.

cur. adv. vult.

March 17, 2005

Eric Basnayake, J.

The plaintiff-respondent-respondent (plaintiff) Instituted case No. 7871/MHP in the District Court of Colombo against the defendant-petitioner-petitioner (defendant) and two others to recover a certain sum of money. The said case was concluded *ex parte* and a writ of execution was issued. In executing the writ the Fiscal of the District Court, Gampola seized the saw mill and accessories belonging to the defendant. The defendant preferred a claim before the District Court of Gampola in terms of Section 241 of the Civil Procedure Code. On 25.2.2004, the day that this case was fixed for inquiry the defendant was absent and unrepresented. Hence, his application was dismissed. On 8.3.2004 the defendant filed a petition together with an affidavit and moved court to vacate the order of dismissal in terms of section 87 (3) of the C. P. C. The plaintiff objected to this application.

After inquiry the learned District Judge Gampola dismissed the application of the defendant. The defendant is now moving to have the order of the learned District Judge set aside. He is also seeking leave to appeal at the first instance. When this case was taken up for inquiry for support on the granting of leave, the learned counsel for both parties agreed to file written submissions.

Section 241 of the Civil Procedure code is as follows :-

- S. 241. In the event of any claim being preferred to, or objection offered against the seizure or sale of, any immovable or movable property which may have been seized in execution of a decree or under any order passed before decree, as not liable to be sold, the Fiscal or Deputy Fiscal shall, as soon as the same is preferred or offered, as the case may be, report the same to the court which passed such decree or order ; and the court shall thereupon proceed in a summary manner to investigate such or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he were a party to the action :

In *Ghouse Vs. Mercantile Credit Limited*⁶ the question to be decided was whether a judgment debtor was entitled to prefer a claim to the property seized in terms of section 241 of the C. P. C. His Lordship the Chief Justice G. P. S. De Silva held that the judgement debtor is not a person who is entitled to prefer a claim to the property seized under the provisions of section 241 of the C. P. C. and consequently the District Court had no jurisdiction to hold an inquiry. His Lordship held it is the District Court that passed the decree which has jurisdiction in terms of sections 343 and 344 of the C. P. C.

In terms of section 218 of the Civil Procedure Code the judgement creditor "has the power to seize, and to sell or realize in money by the hands of the fiscal all saleable property belonging to the judgement debtor or over which or the profits of which the judgement debtor has a disposing power, which he may exercise for this own benefit, and whether the same be held by or in the name of the judgment debtor or by another person in trust for him or on his behalf".

His Lordship G. P. S. De Silva observed thus "it is seen that it is necessary to safeguard the rights of a third party who owns the property or claims an interest in the property seized. It is section 241 which sets out the procedure for a third party to prefer a claim to the property and for the court to investigate such claim. The words in section 241 "**and the court shall thereupon proceed in a summary manner to investigate such claim objection with the like power as regard the examination of the claimant or objector, and in all other respects, as if he were a**

party to the action" are indicative of the fact that the judgment debtor is not a person contemplated by the section". His Lordship further observed that "the powers of the court upon an investigation of a claim preferred in terms of section 241 are set out in sections 244 and 245 of the C. P. C. lend further support to the view that a judgement debtor is not entitled to have recourse to section 241".

This being an action filed by the judgment debtor under section 241 therefore cannot be supported. Hence, this court is not required to go into the merits of this case. Leave is therefore refused with costs fixed at Rs. 5,000/-.

ANDREW SOMAWANSA J. - I agree.

Application dismissed.
