

**MARIKKAR  
VS  
VANIK INCORPORATION LTD AND OTHERS**

COURT OF APPEAL  
SOMAWANSA, J. (P/CA) AND  
WIMALACHANDRA, J.  
CALA 326/2004  
D. C. MT. LAVINIA No. 258/03/CL  
APRIL 20, 2005

*Civil Procedure Code, sections 86(2), 241, 245 and 247 - Claim under section 241-Claimant absent on the day of inquiry - Counsel not ready to proceed with the case-Can the claimant seek redress from the Court of Appeal ?- Is there a specific remedy available to him?*

**HELD:**

- (i) A person whose claim was dismissed for default of appearance must bring an action under section 247; he should not move to re-open the claim inquiry by explaining the default on the ground that the order was made *ex parte*.
- (ii) An order disallowing a claim, in the absence of the claimant on the date fixed for inquiry, of which the claimant had notice is an order for which conclusive character given by section 245 attaches.

**APPLICATION** for leave to appeal from an order of the District Court of Mt. Lavinia.

**Cases referred to :**

1. *Muthu Menika vs. Appuhamy* 14 NLR 329
2. *Marikkar vs. Marikkar* 22 NLR 438
3. *Isohamine vs. Munasinghe* 29 NLR 277

*Manohara R. de Silva* for petitioner - petitioner  
*Harsha Amaraskera* for plaintiff respondent

June 14, 2005

**WIMALACHANDRA, J.**

This is an application for leave to appeal from the order of the learned Additional District Judge of Mount Lavinia dated 19.08.2004.

The facts relevant to this application are briefly as follows :

The 1st to 4th defendant - respondent - respondents (1st to 4th defendants) are partners of the firm called and known as *Sari Kingdom*. The defendants sought and obtained a bill purchasing facility from the plaintiff- respondent - respondent (plaintiff). However the defendants defaulted in making the payments. Thereafter the plaintiff filed action jointly and severally against the 1st to 4th defendants for the recovery of a sum of Rs.1,091,339.03 from the 1st to 4th defendants. The Court issued summons on the 1st to 4th defendants and on the summons returnable date the defendants were absent and unrepresented. Thereafter the Court fixed the case for *ex-parte* trial.

On 05.03.2002 the learned Additional District Judge of Colombo entered *ex-parte* judgment in favour of the plaintiff and the Court ordered that the *ex parte* decree be served on the defendants. The decree was served on the defendants. Consequently, the 1st defendant filed an application to vacate the *ex-parte* judgement in the District Court of Colombo. The inquiry into the said application made under section 86(2) of the Civil Procedure Code was pending in the District Court of Colombo. Despite the *ex-parte* decree being served on the 2nd to 4th defendants, they made no attempt to have the *ex-parte* judgment entered against them vacated. The plaintiff then made an application for the execution of the decree against the 2nd to 4th defendants and the Court issued a writ of execution against them. Upon receiving the writ, the fiscal seized the goods belonging to the aforesaid partnership business of the 1st to 4th defendants, the *Sari Kingdom*, on 29.10.2003 from its show rooms at Majestic City, Liberty Plaza and Wellawatte. The 1st defendant made a claim in the District Court of Mount Lavinia under section 241 of the Civil Procedure Code, claiming the goods seized from the Majestic City show room. The said application was given the number 258/3/CL by the District Court of Mount Lavinia. The plaintiff filed objections to the said application and the Court fixed the matter for inquiry to be held on 19.08.2004. On that day a lawyer appeared for the claimant, the 1st defendant and moved for a postponement of the inquiry on the ground that the 1st defendant's senior counsel had by

mistake taken down the said date in his diary as a calling date for the plaintiff to file objections. Even the 1st defendant who was the claimant was absent. The learned judge after hearing the submissions made by the counsel dismissed the 1st defendant's application on the basis that it is an imperative requirement for the claimant to be present in Court on the date of the inquiry, and that in this instance the counsel who was present in Court was not ready to proceed with the inquiry.

The question that arises is, when the claimant's application is dismissed due to want of appearance of the claimant and his counsel, what is the remedy available to the claimant. Can he seek redress from the Court of Appeal by filing an application for leave to appeal from the said order when the Civil Procedure Code has provided a specific remedy under section 247? The answer to this question is found in the well considered judgment pronounced by Wood Renton, J. in the case of *Muttu Menika Vs. Appuhamy*<sup>(1)</sup> In this case the Supreme Court held that, a person whose claim was dismissed for default of appearance must bring an action under section 247 ; he should not move to re-open the claim inquiry (by explaining the default) on the ground that the order was made *ex-parte*. It was also held that when the legislature has enacted a particular remedy for a grievance in terms which show that it intended that remedy to be the only one open to an aggrieved party, redress cannot be sought by any other form of proceedings.

Section 247 of the Civil Procedure Code states thus :

"The party against whom a order section 244, 245 or 246 is passed may institute in action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour, subject to the result of such section, if any, the order shall be conclusive."

In *Muttu Menika Vs. Appuhamy* (Supra) Wood Renton, J. at page 328 observed thus :

"There can be no doubt but that an *ex-parte* order within the meaning of this group of sections, and I think, therefore, that in terms of section 247 it is conclusive, unless the party aggrieved by it brings the action for which that section provides."

The learned Counsel for the plaintiff referred to the Supreme Court case of *Marikkar Vs. Marikkar*<sup>(2)</sup>. In this case, De Sampayo, J. after examining the local and Indian authorities, and upon a consideration of the principles involved in the procedure laid down in sections 241 to 247, held that when the date of the inquiry has been notified and the proceeding is otherwise regular, and where therefore it is the duty of the claimant to appear and adduce evidence in support of his claim but he fails to do so, the Court is within its powers in disallowing his claim, and that an order so made is equivalent to an order after investigation under section 245 of our Code and is conclusive against the claimant, unless he brings an action under section 247.

In the case of *Isohamine Vs. Munasinghe*<sup>(3)</sup> It was held that an order disallowing a claim, in the absence of the claimant on the date fixed for inquiry, of which the claimant had notice, is an order to which conclusive character given by section 245 of the Civil Procedure Code attaches.

In the circumstances, it is my considered view that recourse must be first sought in terms of section 247 of the Civil Procedure Code and not by way of appeal. On this ground alone the application for leave to appeal should be dismissed.

In the light of the above mentioned decisions, it appears to me that the order of dismissal of the 1st defendant's claim action filed under section 241 of the Civil Procedure Code, for want of appearance of the claimant and his counsel on the date of the inquiry, tantamounts to an order made under section 245 of the Civil Procedure Code. The 1st defendant has not resorted to the remedy provided by section 247 of the Civil Procedure Code. As no proceedings were taken under section 247 the order made by the learned judge on 19.08.2004 has conclusive effect. Hence no appeal lies to this Court from such order. Accordingly, the 1st defendant cannot maintain the application for leave to appeal made to this Court.

For these reasons we refuse to grant leave to appeal and dismiss the 1st defendant's application for leave to appeal with costs.

**SOMAWANSA, J.** — I agree.

*Application dismissed.*