

1938

*Present : Maartensz J.*

PANDITHA v. DAWOODBHOY.

83—C. R. Colombo, 35,170.

*Action under section 247 of the Civil Procedure Code—Brought by unsuccessful claimant—Judgment-debtor not a necessary party.*

The judgment-debtor is not a necessary party to an action brought by an unsuccessful claimant for the purpose only of section 247 of the Civil Procedure Code.

<sup>1</sup> 5 *Cey. Law Weekly* 51.

**A** PPEAL from a judgment of the Commissioner of Requests, Colombo.

*P. Tiyyagarajah*, for plaintiff, appellant.

*J. E. M. Obeyesekera*, for defendant, respondent.

*Cur adv. vult.*

August 3, 1938. MAARTENSZ J.—

This is an action brought by an unsuccessful claimant, under the provisions of section 247 of the Civil Procedure Code, to establish that he is the owner of the property seized by the judgment-creditor.

The action was brought within the time prescribed by section 247. At the trial, objection was taken to the constitution of the action on the ground that the judgment-debtor was not a party to the action. Plaintiff's counsel, thereupon, moved to make the judgment-debtor a party. The Court held that the application was made too late, and dismissed the plaintiff's action with costs.

It is contended in appeal by the plaintiff-appellant that the judgment-debtor is not a necessary party to the action. There is, certainly, nothing in the provisions of section 247 of the Civil Procedure Code which requires that the judgment-debtor should be made a party to an action brought by an unsuccessful claimant. The only local cases I am aware of, in which the judgment-debtor was held to be a necessary party, were in ; (1) a case where a claim in the nature of a Paulian action is joined to an action under section 247 of the Civil Procedure Code, or set up in a defence to an action under section 247 by a successful judgment-creditor ; (2) where the judgment-creditor sought to prove that the judgment-debtor had a title by prescription. The reasons for holding that the judgment debtor was a necessary party in such an action were in no way connected with the provisions of section 247.

Counsel for the respondent has referred me to the case of *Ghasi Ram v. Mangal Chand and another* (1905), reported in I. L. R. Allahabad series, vol. 28, page 41. At page 43, the Judges say that "If an unsuccessful claimant brings a suit and he seeks to establish his claim against both the decree-holder and the judgment-debtor, the latter is of course a necessary party". That observation is *obiter* to the question to be decided and no reasons are given for it. I myself can see no reason why the judgment-debtor should be made a party to an action brought by an unsuccessful claimant, for it is quite open to him to admit the title of the plaintiff, and, on the other hand, it is quite open to the judgment creditor, if he so chooses, to consent to judgment after having filed answer. In the former case, the admission made by the judgment-debtor would not bind the judgment-creditor. In the latter case, the fact that the judgment-creditor consented to judgment would not act as *res judicata* on the judgment debtor's title to property.

I am of opinion that the judgment-debtor is not a necessary party to an action brought by an unsuccessful claimant for the purposes only of section 247 of the Civil Procedure Code.

I set aside the order appealed from, with costs in both Courts, and remit the case for re-trial in due course. The costs of the second trial will be in the discretion of the Commissioner.

*Set aside.*