

Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and
Mr. Justice Middleton.

1906.
October 18.

TAMEL *et al.* v. PALANIAPPA CHETTY.

D. C., Chilaw, 3,311.

*Action under section 247—Civil Procedure Code—Scope of such action—
Title—Inquiry into claim—Possession—Consenting to dismissal of claim.*

In an action under section 247 of the Civil Procedure Code by an unsuccessful claimant, he is entitled to rely on his title to the property in dispute, whether as owner or lessee, for the purpose of having it released from seizure.

Judgment of Perera A.J. in *Abeyratne v. Suppramanian Chetty* (1) followed.

Where a claimant consents to his claim being dismissed on the ground that the judgment-debtor is in possession of the property claimed, he is not debarred thereafter from bringing an action under section 247 based on title to have it declared that the property is not liable to be seized and sold under the judgment-creditor's writ.

THIS was an action under section 247 of the Civil Procedure Code by an unsuccessful claimant against the execution-creditor. At the inquiry into the claim the claimant " consented to the claim being

(1) (1905) 2 *Bal.* 33.

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dismissed with costs, as defendant was in possession and, as claimant intended to bring an action under section 247 to decide the question of title." Thereupon the Court dismissed the claim with costs.

The claimant having brought this action under section 247, the judgment-creditor pleaded that the dismissal of the claim, with the consent of the claimant, operated as *res judicata*. The District Judge (W. L. Kindersley, Esq.) having over-ruled the objection and entered judgment for the plaintiffs, the defendant appealed.

H. J. C. Pereira (with him *A. St. V. Jayewardene*), for the appellant.—The order of the District Judge is wrong. The plaintiff by consenting to the claim being dismissed concluded that the property was liable to seizure; and he cannot dispute that in an action under section 247, whether he relies on possession or on title [D. C., Galle, 3,065, (1)]. In an action under section 247 the question involved primarily is one of possession, just as at an inquiry. An action under section 247 is not one for declaration of title, and no question of title is involved. The scope of an action under section 247 has been fully discussed in several cases, and it has been laid down that the questions at issue in the action are the same as those at the inquiry. He cited *Abdul Cader v. Annamalay* (2); *Samaranayeke v. Sidembrem Chetty* (3); *Muppurale v. Sidambram Chetty* (4).

Bawa, for the plaintiffs, respondents.—The question whether the order of dismissal of the claim is *res judicata* or not depends upon the construction of section 247. If in an action the only question is one of possession, then the order may operate as an estoppel; but if the scope of the action is wider and title could be relied on, then the order is not *res judicata*. It is submitted that in an action under section 247 a plaintiff may prove title which would entitle him to have the property released from seizure; and he is not confined to possession alone, as at an inquiry. In an action the scope of investigation is enlarged, and a plaintiff may rely on possession or title. The only evidence which a claimant can adduce at an inquiry is evidence of possession; and if he is unable to adduce such evidence, he may consent to the claim being dismissed, without prejudice to his right to bring an action under section 247 based on title. He cited *Abeyratna v. Suppramanian Chetty* (5); *Ponnambalam v. Paramanayagam* (6).

H. J. C. Pereira, in reply.

Cur. adv. vult.

(1) *S. C. Min.* February 9, 1896.

(2) (1896) 2 *N. L. R.* 166.

(3) (1903) 6 *N. L. R.* 354.

(4) (1904) 4 *Tambayah*, 56.

(5) (1905) 2 *Bal.* 33.

(6) (1905) 9 *N. L. R.* 48.

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This is an appeal from a judgment of the District Court of Chilaw allowing the plaintiff's claim in an action under section 247 of the Civil Procedure Code.

It appears that at the claim inquiry the claimant's Proctor, being unable to dispute the possession of the defendants, consented to the claim being dismissed as the claimant intended to bring an action under section 247 to decide the question of title.

The appellant now contends that the admission of the claimant that the lands were in the possession of the defendants debars him from succeeding in an action under section 247.

In support of this contention the appellant cites a judgment of Sir A. Lawrie in 23 D. C., Galle, 3,065 (unreported) which appears to bear out this contention. This judgment is however very brief, and I am unable to follow the reasoning on which it is based.

The decision of the question now before us depends directly upon the view which is taken of the scope of an action under section 247.

If the only question involved in an action under this section is one of possession, the appellant is concluded by his admission in the claim inquiry that the property was in the possession of the defendants. If, on the other hand, the scope of the action is wider and the matter in question is the title of the claimant, whether as owner or lessee, the admission of the appellants that the defendant was in possession would be no bar to their claim.

Authority can be found for both these constructions, but on the construction of the section and on consideration of the purpose which the section is designed to carry out, I have no doubt but that the latter view is the true one. I entirely agree with the interpretation given to these words by Mr. W. Pereira A.J. in *Abeyratna v. Suppramaniam Chetty* (1).

The action when brought by an unsuccessful claimant is to establish the right which he claims to the property in dispute, "that is to say," said the learned Judge, "if the action is brought by an unsuccessful claimant the question involved is whether the claimant has that right to the property which he advanced in making his claim so that when a claimant has claimed the property as owner or lessee he has to establish his right as owner or lessee."

This construction seems to me not only to be the natural meaning of the language, but the only one which would give effect to the intention of the section which is to decide whether certain property is exempt from execution on the ground that it is not the property of the execution-debtor.

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Taking this view of the scope of the section it follows that the claimants, by admitting in the claim inquiry that the defendant was in possession at the date of seizure, are not debarred from prosecuting their claim under section 247.

The appeal in my opinion should be dismissed with costs.

MIDDLETON J.—I entirely agree.
