

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA

Supreme Court Case No.

SC/Appeal/186/18

HCCA Mt.Lavinia Case No.

WP/HCCA/MT/44/2017/LA

DC Mt.Lavinia Case No.

4116/03/M

In the matter of an application for Leave to Appeal made under Article 127 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Article 154P (3) (C) and section 5 C (1) and other provisions of the High Court of Provinces (Special Provisions) Act No.19 of 1990 as amended by Act No. 54 of 2006 in respect of the delivered by the Provincial High Court of the Western Province (Exercising in its Civil Appellate Jurisdiction) holden in Mount Lavinia dated 01/08/2018.

Kahandawela Knitwear Industries (Pvt) Limited,
770, Pannipitiya Road, Battaramulla.

Plaintiff

Vs.

Swan Feather (Pvt) Limited,
566, Lake Road, Boralessgamuwa

Defendant

THERE AFTER

Kavin Polymers (Pvt) Limited,
566, Lake Road, Boralessgamuwa

Claimant

Vs.

Kahandawela Knitwear Industries (Pvt) Limited,
770, Pannipitiya Road, Battaramulla.

Plaintiff – Respondent

Swan Feather (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Defendant – Respondent

AND THERE AFTER

Kavin Polymers (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Claimant – Petitioner

Vs.

Kahandawela Knitwear Industries (Pvt) Limited,
770, Pannipitiya Road, Battaramulla.

Plaintiff- Respondent- Respondent

Swan Feather (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Defendant – Respondent- Respondent

AND NOW BETWEEN

Kavin Polymers (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Claimant – Petitioner – Petitioner

Vs.

Kahandawela Knitwear Industries (Pvt) Limited,
770, Pannipitiya Road, Battaramulla.

**Plaintiff- Respondent- Respondent-
Respondent**

Swan Feather (Pvt) Limited,
566, Lake Road, Boralesgamuwa

**Defendant – Respondent- Respondent
– Respondent**

Before: Buwaneka Aluwihare PC, J.

L.T.B. Dehideniya, J.

S.Thurairaja, PC, J.

Counsels: Chandana Liyanapatabendy PC with Hansini Bandaranayake and Sanduni Madubashini instructed by H.C.de Silva for the claimant – Petitioner- Appellant.

Nuwan Bopage with Chathura Weththasinghe for the Plaintiff- Respondent – Respondent- Respondent.

Argued on: 14.01.2020

Decided on: 08.12.2021

L.T.B. Dehideniya, J.

Plaintiff – Respondent – Respondent - Respondent (hereinafter sometime referred to as the Respondent) instituted an action for the recovery of money amounting to 320, 325 USD against The Defendant- Respondent – Respondent – Respondent - Swan Feather (Pvt) Ltd (hereinafter sometime refer to as the Defendant). The District Court of Mount Lavinia delivered the judgement dated 05.04.2011 in favour of the Respondent. The Defendant subsequently filed a notice of appeal but had not filed the petition of appeal. Thereafter the Respondent filed an application to execute a writ against the Defendant. The Defendant objected on the basis that the Defendant Company is not functioning. The Learned District Judge, upon an inquiry, issued an order enabling the execution of the writ against the Defendant. At the instance where the writ was to be executed, the fiscal had been informed about the non-functioning of the Defendant Company and the specific address given by the Defendant Company namely No.566, Lake Road, Boralesgamuwa is already occupied by the present occupants who claimed that they have no connection with the Defendants. Subsequently, the Respondent again made an application to execute the writ to seize the property; the District Court, after an inquiry, issued the writ. The fiscal, on the said writ, seized 02 vehicles parked at the same premises. Kavin Polymers (Pvt) Ltd- Claimant- Petitioner- Petitioner (hereinafter sometimes refer to as the Petitioner) claim that the said vehicles belong to the Petitioner and made a claim under Sections 241 and 839 of the Civil Procedure Code. The learned District Judge, after an inquiry, dismissed the application filed by the Petitioner. Subsequently, the Petitioner filed a leave to appeal application in the High Court of Civil Appeal under section 754(2) of the Civil Procedure Code against the order issued by the learned District judge.

At the stage of considering whether the leave to appeal should be granted, preliminary objection was brought forth by the Respondent on the ground that, an appeal is not available against the order made under the section 245 of the Civil Procedure Code and the Petitioner is not entitled to maintain a leave to appeal application under section 754 (2). The learned judges of the Civil Appellate High Court upheld the preliminary objection of the Respondents. Being aggrieved by the very decision of the learned judges of the Civil Appellate High Court, the Petitioner instituted a leave to appeal application from the said order to this court.

This Court granted leave to appeal on the following questions of law;

- 1) Is the said order contrary to Law?
- 2) Did the Court err in law in arriving at the said conclusions embodied in the said Order dated 01/08/2018, when dismissing the said application without going into the merits of same?
- 3) Did the Court err in law in arriving at such and Order based on an incorrect legal and factual positions?
- 4) In view of the inherent defects in the Order of the District Court dated 10/10/2017, had the Learned Judges of the High Court got an ample opportunity to revise and/or review and/or reverse and/or made Order that documents marked as “X3” and “X4” which are the Certificates issued by the Registrar of Motor Vehicles were *ex facie* established that the said properties were not subject to such the said Order dated 01/08/2018 erred in not giving sufficient consideration thereby?

At the very inception of the discussion pertaining to the case, it is apt to consider the law applicable to the factual context of this application. It is clear, the court has the power to investigate a claim or an objection filed against the seizure or the sale of an immovable/movable property seized in pursuant to an execution of a writ. This provision is enshrined in the section 241 of the Civil Procedure Code where it specifies that,

‘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 claim 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; Provided always that when any such claim or objection is preferred or offered in the case of any property so seized outside the local limits of the jurisdiction of the court which passed the decree or order under which such seizure is made, such report shall be made to, and such investigation shall thereupon be held by, the court of the district or division within the local limits of which such seizure was made, and the proceedings on such report and investigation with the order thereon shall, at the expiry of the appealable time, if no appeal has been within that time taken therefrom, but if an appeal has been taken, immediately upon the receipt by such court of the judgment or order in appeal, be forwarded by such court to the court which passed the decree or order, and shall be and become part of the record in the action; Provided, further, that in every such case the court to which such report is made shall be nearer to the place of seizure than, and of co-ordinate jurisdiction with, the court which passed the decree or order'.

Under the provisions of the law, the District Court had the power to inquire and investigate into the claim brought forth by the Petitioner in regard to the seizure of two vehicles. It is evident that, the learned judge of the District Court has conducted an inquiry in conformity with the provisions of the Civil Procedure Code.

Section 243 provides for the claimant to lead evidence to establish the claim. The section 243 of the Civil Procedure Code states,

'The claimant or objector must on such investigation adduce evidence to show that at the date of the seizure he had some interest in, or was possessed of, the property seized.

The section 243 is a clear indication on the fact that, the law imposes a burden on the claimant to prove his/her entitlement to the property in an instance of the vindication of rights. The conduct of the Claimant in the adducing of evidence has a significant impact on the order of the court which is issued under the section 245.

The section 245 of the Civil Procedure Code states,

'If the court is satisfied that the property was, at the time it was seized, in possession of the judgment-debtor as his own property, and not on account of any other person or was in the possession of some other person, in trust for him, or in the occupancy of a tenant or other person paying rent to him, the court shall disallow the claim'.

Further, section 247 of the Civil Procedure Code signifies the nature of the order given by the court at the instance of investigating in to a claim with the very remedy which is entitled to by a claimant against whom an order was issued. It is clear to this court that, the section in its essence provides the fact that, the conclusiveness of the order does not impede the potential claimant in seeking justice while instituting an action but not through an appeal.

'The party against whom an order under section 244, 245, or 246 is passed may institute an 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 action, if any, the order shall be conclusive'.

As per the very provision, in an instance where an order was issued against a claimant, the claimant is entrusted with a right to file a separate action within fourteen days from the order and thereby to establish the right to the seized property. The order which is issued against the claimant becomes conclusive. Thus, on the face of this statutory provision, it is clear that, the law has facilitated the aggrieved party against whom an order is made to resort into a remedial action and it is clear that, the law has not left the aggrieved party in desperation, without offering a way to vindicate the rights.

When considering the factual context of the present application, it is clear that, the Petitioner being the claimant, Kavin Polymers (Pvt) Ltd, made an application against the writ of execution of two vehicles seized in pursuant to an order given against the Defendant Company - Swan Feather (Pvt) Ltd by the District Court, Mount Lavinia. Subsequent to the dismissal of such application by the learned District Judge, a leave to appeal was directed to the Civil Appellate High Court, Mount Lavinia which upheld the preliminary objection raised by the Respondent in this regard. Thus, the very essence of the view of the learned High Court judge

was that, an order which has been issued under the Section 245 of the Civil Procedure is non-appealable.

As the Petitioner being the Claimant has made an application for leave to appeal to this court against the order of the learned judges of the Civil Appellate High Court, it necessitates this court to scrutinize the fact whether the Petitioner is legally entitled to appeal from the said order. As mentioned in the former discussion, the section 245 read with the section 247 of the Civil Procedure Code signifies that, an order made by the court under the section 245 is conclusive provided that the party against whom the order was given has the opportunity to institute a separate action within 14 days of the given order. It is apparent to this court that, the section 247 of the Civil Procedure Code has provided an alternative to the aggrieved party. The section itself manifests that, it is on the side of the party who is in need of the protection of his/her particular rights must institute an action. But, still the fact of the conclusiveness of the order does remain constant.

The non-existence of the right to appeal has been discussed in the case law jurisprudence. Thus, in *Marikkar v. Marikkar* 22 NLR 438, pg 441, it has been stated by his Lordship Justice De Sampayo that,

‘.....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 the 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’.

The essence of the view presented by his Lordship denotes that, a claimant has a legal duty to support his claim by adducing evidence. At a failure on the side of the claimant, the court is empowered to disallow the claim. It has been made clear that, order issued by disallowing the claim is equivalent to an order which is made after an investigation. Thus, such an order has the unquestionable conclusiveness.

A similar view was expressed in the case of *Muttu Menika v. Appuhamy* 14 NLR 329 where Wood Renton J. held that,

‘.....the object of the group of sections concerned with claims to property seized is to secure a summary inquiry into such claims, and to provide that the result of that inquiry shall be decisive as to the rights of parties, subject always to the

remedy indicated in section 247. I do not think that it is necessary to decide the question as to whether the Court has an inherent power to set aside ex parte orders, for I think that we are bound by the principle that, where 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.....'

The view expressed by his Lordship is of such a nature which gives out a balanced perspective. Thus, at one instance Justice Wood Renton insists on the inquiry and the decisiveness of the inquiry which has an influence over the rights of the parties. Secondly, his Lordship clearly elaborates on the remedy which is provided by the section 247 and lawfully upholds the very fact that, there is an intention on the part of the legislature to remedy a grievance directed towards the aggrieved party and the redress cannot be sought in the other form of proceedings. Thus, the same view can be applied to the present application.

In *Isohamine v. Munasinghe* 29 NLR 277, (at page 281), His Lordship Justice Garvin observed,

'.....But when the claimant who was bound by law to adduce evidence was not present in person and had not arranged for evidence to be adduced in support of his claim, the Court was, I think, entitled in the absence of such evidence to make an order disallowing the claim'

It is clear that, the court has the power to disallow the claim in an instance where it is legally obligatory for the claimant to present at the court in person and adduce evidence and the claimant has not complied with the legal requirements as mentioned in the statutes. The same view was held in *Marikkar v. Vanik Incorporation Ltd and Others* [2006] 1 Sri LR 281, where the claimant was absent on the date of inquiry and there was no readiness on the part of the counsel to proceed with the inquiry. Thus, the application to appeal was dismissed by the court, while signifying the necessity to comply with the provisions set out in the section 247 of the Civil Procedure Code.

The case *L.B.Finance Company v. Walisinghe and Others* [2012] BLR 294, emphasized the fact that, even though there is no appellate jurisdiction in relation to the section 247, the revisionary jurisdiction is capable of being exercised. But, in the present application, the learned High Court judge is of the view that, there are no exceptional circumstances with relation to this case which necessitates the exercise of the revisionary jurisdiction.

The Respondent further challenges the *uberima fides* of the Petitioner on the grounds of equitable principles. Thus, it is clear to this court that, the Respondent is making an attempt to strengthen the argument on the maxim 'He who comes into equity must come with clean hands'. The Respondent has argued on the matter that, both the Defendant and Petitioner companies engaged in the same business at the same premises and the transfer of the subject matter within the companies and shareholders. The Respondent's contention has been elaborated in ***Hatton National Bank v. Jayawardane and Others*** [2007]1 Sri LR 181 at pg 183, by his Lordship Justice Nihal Jayasinghe,

"The 1st and 2nd respondents cannot hide behind the veil of incorporation of Nalin Enterprises (Pvt) Ltd, whilst being the alter ego" of the said Company of which the 1st respondent has been the Managing Director and the 2nd respondent who is the wife of the 1st respondent has been a Director."

(2) Although the independent personality of the Company is distinct from its Directors and shareholders Courts have in appropriate circumstances lifted the veil of incorporation. In particular Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a devise to defraud creditors.'

It is clear to this court that, the Respondent also argues on the matter that, the companies must not be given opportunities to use the veil of incorporation and the interference of this court is expected when the veil of incorporation is used for illegal and improper purposes, specifically to defraud the creditors.

With the perusal of the case laws pertaining to the present application, it is clear that, the Appellant's very conduct of making an appeal has outlawed the Civil Procedure Code. The Appellant has a remedy in terms of section 247. This court being the apex court of the country cannot accept the very conduct of the Appellant in seeking a remedy which outlaws the procedure established by the statutory provisions.

I answer the questions of law as follows,

- 1) No
- 2) No
- 3) No
- 4) No

By considering the above circumstances, the application is dismissed.

Appeal dismissed

Judge of the Supreme Court

Buwaneka Aluwihare, PC, J.

I agree

Judge of the Supreme Court

S. Thurairaja, PC, J.

I agree

Judge of the Supreme Court