1896.
February 11 and 13.

PONAMPALAM *v.* CANAGASABY *et al.*

D. C., Batticaloa, 1,248.

Res judicata—*Striking off the roll of pending cases—Abatement—Amicable settlement of action—Civil Procedure Code, ss. 88 and 402.*

An order in an action in the following terms—"Parties having "failed to take any steps for more than a year and a day, it is "ordered that this case be and it is hereby struck off the roll of "pending cases for default of proceeding"—is not an order that operates as a bar to the institution of a fresh suit on the same cause of action.

Per LAWRIE, J.—The above order is of the same nature as an order under section 88 of the Civil Procedure Code.

Per WITHERS, J.—(1) An order of abatement under section 402 of the Civil Procedure Code would be a bar to a fresh suit on the same cause of action.

(2) Settlement of one action would be a complete bar to the institution of a fresh action on the same cause and between the same parties.

THE facts of the case appear in the judgments of their Lordships. It was argued on the 11th February, 1896.

Cur. adv. vult.

Bawa, for appellant.

Dornhorst and *Van Langenberg*, for respondent.

13th February, 1896. LAWRIE, J.—

In the District Court, Batticaloa, action No. 24,160, between these parties and another, the defendants were on the 4th November, 1886, in default of filing answer. On that day the plaintiff's proctor appeared and stated that the case was settled, and moved for the taxation of his bill of costs against his own client. Notice on the plaintiff was allowed.

Many years afterwards the plaintiff brought this action on the same bond against the surviving obligors. One of the parties to the former action was by this time dead.

On the trial day the learned District Judge examined the plaintiff, and considering the statement in the record of the former

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action, that the case was settled, he upheld a plea of *res judicata* and dismissed this action. Against that dismissal this appeal was taken.

It is too plain to need any word of explanation that the order in the former action was not *res judicata*, because it did not adjudicate on any right or issue,—it was a mere permission by the Court that a notice should issue on the plaintiff. It was the plaintiff's proctor, not the Court, who said that the case was settled. It is plain that there was no judgment.

But while it was conceded by the respondent in the appeal that the judgment of dismissal could not be supported on the grounds given for it by the District Judge, he urged that it was a right decree, because the former action was still pending and the plaintiff could not proceed with this second and unnecessary and vexatious action.

Is, then, the former action still pending, and if it is, is that a sufficient ground on which to dismiss this action?

In 1887 the then District Judge of Batticaloa, *ex mero motu* made this order: "Parties having failed to take any step for more "than a year and a day it is ordered that this case be and it is "hereby struck off the roll of pending cases for default of proceed-"ing." The action is no longer pending. The order made in it is of the same nature as an order made under section 88 of the Civil Procedure Code, which does not operate as a bar to the institution of a fresh action on the same cause of action.

I am therefore of the opinion that the judgment cannot be supported, and that it must be set aside and the cause remitted to be proceeded with according to law. The appellant will have his costs.

WITHERS, J.—

When it is pleaded or otherwise brought to the notice of the Judge, as the trial of a cause before him developes, that there is an action in his Court for the same cause between the same parties or their privies already instituted but not terminated by a judgment of the Court or compromise between the parties, I think a Judge cannot do better than follow the policy of our Code in dealing with the cause before him. Section 88 of our Civil Procedure Code enacts that where neither party appears on the day appointed for the defendant to appear and answer, or to put in an answer after time granted, or for the plaintiff to file a replication, the action shall be struck off the file of cases pending in the Court. But it provides that an order directing the action

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to be struck off the file shall not operate as a bar to the institution of a fresh action upon the same cause of action.

The 402nd section of the Code enacts that if a period exceeding twelve months in the case of a District Court elapses subsequently to the date of the last entry of an order or proceeding in the record without the plaintiff taking any steps to prosecute the action, where any such step is necessary, the Court may pass an order that the action shall abate.

By section 403 it is provided that when an action abates no fresh action shall be brought on the same cause of action.

If, then, there is an order of abatement in the former action, that should be treated as a bar to the current action, which should accordingly be dismissed.

If the order is to strike the action off the file of pending cases from the non-appearance of either party on the day appointed for the purpose of section 88, the current action should be proceeded with.

The record of what is said to be the *lis pendens* is before us. According to the formal entry of 4th November, 1886, the then Judge was informally advised of the settlement of the case between the parties. On the 15th December, 1887, Mr. Conolly, the then District Judge, ordered the case to be struck off the roll of pending cases because the parties had failed to take any steps in the action for more than a year and a day. If the case really was settled out of Court, it is easy to settle what steps either party could take. It cannot be said, on the one hand, that there is either a *lis pendens* or that there is an order tantamount to an order of abatement in the case resting on any negligence of the plaintiff to prosecute his cause. The decision of the District Judge on the issue before him is clearly premature. If the former action was for the same cause and between the same parties and was settled, that of course would be a complete bar to this action. But the journal entry to which I have referred is not a record of a compromise of the *lis pendens*, and that issue must be determined in a regular trial. Hence I concur in my brother's judgment.