1934 *Present :* **Akbar J.**

ASSOCIATED NEWSPAPERS OF CEYLON, LIMITED *v.* KADIRGAMER.

75—C. R. Colombo, 67,653.

Abatement of action—Failure to take necessary step—It must be a step obligatory in law—Regularity of order of abatement—Civil Procedure Code, s. 402.

In an action in the Court of Requests the Fiscal reported on the returnable date of summons that the defendant was not to be found at the address given in the summons and the Court made a minute to the following effect : "No order". Six months having elapsed thereafter, the Court made order for the abatement of the action under section 402 of the Civil Procedure Code.

Held, that there was no failure on the part of the plaintiff to take any step obligatory in law and that the order of abatement was irregular.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

N. E. Weerasooria (with him *Batuwantudawa*), for plaintiff, appellant.

Rajapakse (with him *D. J. R. Gunawardena*), for defendant, respondent.

Cur. adv. vult.

February 8, 1934. AKBAR J.—

In this action the plaintiff company sued the defendant, a law student, whose address was given as of the Y. M. C. A., Fort, Colombo, for the balance sum of Rs. 105.45 alleged to be due for the printing of a certain publication. On March 10, 1931, the Fiscal reported that no one by this name was to be found at the address given; and the journal entry on that date has this sentence signed by the Commissioner "Nor order". On October 1, 1931, there is this entry, "Six months having elapsed since the last entry without the plaintiff having taken any steps, it is ordered that this action do abate". On September 5, 1932, plaintiff filed an affidavit by a servant of the company that the reason why service could not be effected was due to the information that he had received that the defendant had left the Island and that the defendant had now returned to the Island, and moved to reissue summons. On March 15, 1933, the defendant

filed an affidavit that he had never left the Island and that the statement in the affidavit by plaintiff's employee was not correct and moved that the abatement should stand. On the question of fact the learned Judge held against the plaintiff, but appellant's counsel has addressed an argument on the law and, I think, he is entitled to succeed on it.

The point of law is as follows:—The relevant words of section 402 of the Civil Procedure Code under which the order of abatement was made are as follows:—"If a period exceeding . . . . six months in a Court of Requests, elapses subsequently to the date of the last entry of an order or proceeding in the record without the plaintiff taking any step to prosecute the action where any such step is necessary, the court may pass an order that the action shall abate".

In *Lorensu Appuhamy v. Paaris*[1] Wood-Renton J., the Chief Justice agreeing, held as follows:—"The appellants had within the meaning of section 402 taken every step incumbent upon them with a view to the prosecution of the action. I think that when that section uses the word "necessary", it means "rendered necessary by some positive requirement of the law". We ought not to interpret it as if the section ran "without taking any steps to prosecute the action which a prudent man would take under the circumstances". In the present case the appellants had done all that the law required of them. The duty of fixing the day of trial rested, under section 80 of the Civil Procedure Code on the Court (see *Fernando v. Curera*[2] and *Ponampalam v. Canagasabay*[3]).

These words were quoted with approval and followed by the Supreme Court in *Kuda Banda v. Hendrick*[4], and in *Seyado Ibrahim v. Naina Marikar*[5].

I see no reason why I should not follow these authorities on the correct interpretation of the word "necessary" in section 402. Was there any step which was "necessary" for the plaintiff to have taken to prosecute the action, or in other words, was there any step which the plaintiff was bound to take by some positive requirement of the law?

On March 10, 1931, the Fiscal reported that no one bearing the defendant's name was to be found at the address given, and the Court made the entry "no order". Under section 60 of the Civil Procedure Code when the Fiscal reports his inability to serve the summons "it shall be competent for the Court, on being satisfied by evidence adduced before it that the defendant is within the Island, to prescribe any other mode of service as an equivalent for personal service". Under section 69 summons may be served outside the Island if application is made by the plaintiff on motion supported by evidence. There is no provision of the law rendering it imperative that the plaintiff should proceed to have summons served under either section 60 or 69. If the Court, instead of making the entry "no order" on March 10, 1931, had definitely noticed the plaintiff to furnish a correct address or to proceed either under section 60 or section 69 and the plaintiff had failed to comply with this order and allowed six months to elapse from the date of the order, one would be justified in

[1] *11 N. L. R. 202.*
[2] *2 N. L. R. 29.*
[3] *2 N. L. R. 23.*
[4] *6 Supreme Court Decisions, p. 42.*
[5] *6 Supreme Court Decisions, p. 79.*

holding that the plaintiff had not taken a step rendered necessary by a positive requirement of the law. But when the last entry is " no order ", and there is no section making it obligatory on the plaintiff to take the next step, I cannot see how I can hold, on the authorities quoted by me, that the plaintiff had failed to take a step which it was " necessary " for him to take to prosecute his action.

In the cases quoted by me the order of abatement was set aside, as it was the duty of the Court under section 80 of the Civil Procedure Code to fix the date of trial even though a prudent person would, if the Court had failed to fix the date, have moved the Court to supply the omission.

The appeal is allowed and the order of abatement is set aside and the case is sent back to enable the plaintiff to prosecute his action by re-issuing summons. The costs incurred in the lower Court and the costs of appeal will be costs in the cause as the point of law mentioned by me was not taken in the Court below or in the petition of appeal.

Appeal allowed.