

1939

*Present : Wijeyewardene and Nihill JJ.*SELAMMA ACHIE *v.* PALAVASAM.

80—D. C. Colombo, 51,695.

Abatement—Death of plaintiff within twelve months—Power of Court to enter order of abatement—Civil Procedure Code, ss. 402 and 403.

A Court has no power to enter an order of abatement under section 402 of the Civil Procedure Code where the failure to prosecute the action for twelve months after the last order was due to the death of plaintiff within that period.

A PPEAL from an order of the District Judge of Colombo.

S. Nadesan, for appellant.

E. B. Wickremanayake (with him *M. Tiruchelvam*), for respondent.

Cur. adv. vult.

September 13, 1939. WIJEYWARDENE J.—

This is an appeal against an order of the District Judge refusing to set aside an order of abatement made under section 402 of the Civil Procedure Code.

The plaintiff instituted this action on a promissory note on February 10, 1933. On March 2, 1933, summons was issued returnable on March 25, 1933. The case was called on the latter date when the Court found that the summons had not been served on the defendant and ordered the

summons to be reissued for June 5, 1933. On June 5, 1933, the Court made an entry "no order" as the plaintiff had failed to take steps to have the summons reissued. On May 1, 1935, the District Judge made the following order:—

"A period exceeding twelve months having elapsed since the date of the last order made in this case without the plaintiff taking steps to prosecute this action it is ordered that this action do abate".

On October 18, 1938, the present appellant filed papers and moved that the order of abatement be set aside and that she be allowed to continue the action as the legal representative of the plaintiff. The affidavit filed by the appellant shows that the plaintiff died in India in March, 1933, and that the probate of the last will of the plaintiff has been issued to the appellant.

The order of abatement appears to have been made under section 402 and the District Judge dealt with the present application on that footing.

The appellant has contended *inter alia* both here and in the District Court that the order of abatement was bad as the plaintiff was not alive during the period of twelve months contemplated by section 402. The learned District Judge held against this contention and stated in the course of his order, "section 402 is a provision of Statute Law and the ordinary language of the legislature must be given effect to and considering section 402 in the light of section 403 of which it forms a part it is perfectly clear from section 403 that section 402 also contemplated a case where the plaintiff is dead because it says: 'But the plaintiff or the person claiming to be the legal representative of a deceased or insolvent plaintiff, &c.' Therefore it is perfectly clear that section 403 is sufficiently wide to include a case where the plaintiff dies and the action has abated".

Now section 402 enables a Court to enter an order that an action shall abate if a period of twelve months elapses subsequently to the date of the last entry of an order or proceeding in the record "without the plaintiff taking any (necessary) steps to prosecute the action". This section seeks to penalize a plaintiff for his laches. This must necessarily imply that the plaintiff should have been alive during the period of twelve months in question. If the legislature intended to empower a Court under this section to enter an order of abatement even where the absence of any attempt to prosecute the action for twelve months is due to the death of the plaintiff within that period, it appears to me that the legislature may have chosen its language more carefully to express its intention. The words "without the plaintiff taking any step" suggests to my mind that the section regards the plaintiff and not his legal representative as the person who had to take the necessary steps. If the view of the learned District Judge is to be accepted the word "plaintiff" in "without the plaintiff taking any step" should be construed to mean "the plaintiff or his legal representative". I do not feel justified in giving such an artificial interpretation to the meaning of the word "plaintiff". Moreover section 396 of the Code enables a Court in certain circumstances to enter an order of abatement when the plaintiff in an action dies. There was, therefore, no necessity for the legislature

to seek to make additional provision under section 402 when the action has lain dormant owing to the death of the plaintiff. I do not think that section 403 affords much help in the consideration of this question. It should be noted that section 402 is one of a number of sections grouped together under chapter 25 of the Code dealing with the "continuation of actions, after alteration of a party's status". Section 396 provides for an order of abatement being entered where the legal representative of a deceased plaintiff does not make an application to Court to have his name entered of record in place of the deceased plaintiff, while section 401 provides for the dismissal of an action in certain circumstances on the ground of plaintiff's insolvency and section 402 provides for the Court making an order of abatement where the plaintiff fails to take a necessary step to prosecute the action. Section 403 then enacts that "when an action abates or is dismissed under this chapter no action shall be brought on the same cause of action" and further proceeds to set out the mode of obtaining relief against such orders of dismissal or abatement. The draftsman had, therefore, to employ in the second paragraph of section 403 appropriate language to make the section applicable to the various earlier sections of the chapter under which orders of dismissal or abatement could be made. This appears to me to be the explanation for the draftsman using the words or "the person claiming to be a legal representative of a deceased" in section 403. In other words the clause in section 403 referred to by the District Judge has been inserted in order to enable applications to be made by "the plaintiff" against an order under section 402, by the person claiming to be the legal representative of a deceased "plaintiff" against an order under section 396, and by the legal representative of an insolvent plaintiff against an order under section 401. It is even possible to contemplate a case where the legal representative of a deceased plaintiff may seek relief against an order made under section 402, if the plaintiff died after the expiry of twelve months mentioned in the section.

I am therefore of opinion that the appeal should succeed on this ground.

I shall consider briefly two other points raised by the appellant's Counsel in support of the appeal. He argues that no order of abatement could be made under section 402 against a plaintiff dead at the time of making such an order as a Court should give notice of its intention to make such an order to all the parties interested and obviously no such notice could be given when the plaintiff is dead. I am unable to assent to this view as the decision of this Court in *Suppramaniam v. Symons*¹, which lays down that an order under section 402 could be made without notice to parties destroys the very foundation of the argument. I wish to add however that I think that the Judges of the original courts who desire to act *ex mero motu* under this section should not ignore the view expressed by the learned Judges who decided *Suppramaniam v. Symons* that it was "desirable that a Court before making an order of abatement should notice the parties as far as it conveniently can to give them an opportunity of showing cause against the order".

The last point raised by the appellant's Counsel was that as the last order made by the District Judge before entering the order of abatement

¹ (1915) 18 N. L. R. 229.

was "No Order" there was no failure on the part of the plaintiff to take any necessary step to prosecute the action. He relied on the *Associated Newspapers of Ceylon, Ltd. v. Kadirgamar*¹, and *Lorensu Apphamy v. Paaris*². I think this argument is based on a misconception of the nature of the order made by the District Judge on June 5, 1933. On March 25, 1933, the District Judge had ordered summons to reissue and when on June 5, 1933, he found that the plaintiff had taken no steps to carry out that order, the Judge wrote "No Order" meaning thereby that he was not making any further order and that the order of March 25, 1933, should be acted upon. There was therefore the order of March 25, 1933, which the plaintiff had to carry out and if the plaintiff failed to carry out such an order within a period of twelve months the District Judge could in an appropriate case order the action to abate under section 402. I hold that the appellant's third contention fails.

In view of the decision I have reached with regard to the first contention raised by the appellant, I would allow the appeal with costs and directed the order of abatement to be set aside. The appellant will also be entitled to the costs of the inquiry in the District Court.

NIHILL J.—I agree.

Appeal allowed.
