1962 *Present :* **T. S. Fernando, J., and Tambiah, J.**

P. SAMSUDEEN, Appellant, *and* EAGLE STAR INSURANCE CO. LTD., Respondent

S. C. 185—D. C. Colombo, 27306/M

Abatement of action—Circumstances under which Court can make order abating an action—Effect of an order " laying by " a case—Civil Procedure Code, ss. 80, 82, 83, 402.

An order of abatement of an action can be made under section 402 of the Civil Procedure Code only if the plaintiff has failed to take a step rendered necessary by the law.

Where an order " laying by " a case has been made by a Court, the duty of restoring the case to the trial roll rests on the Court and not on the parties.

The Supreme Court, upon an appeal by the plaintiff from an order of the District Court dismissing his action, sent the case back for a trial *de novo*. Trial was accordingly fixed by the District Judge for the 25th September, 1956. On that date the Court made order that the case should be laid by as certain material witnesses of the plaintiff could not be contacted. On the 29th November 1957, upon plaintiff's application, the case was laid by for a further period of six months to enable plaintiff to have certain evidence taken on commission in Egypt.

On the 15th December 1958 the defendant moved that, inasmuch as a period exceeding twelve months had elapsed subsequently to the date of the last order, an order of abatement should be entered in respect of the action. An inquiry was held, and the Court, purporting to act under section 402 of the Civil Procedure Code, delivered order on the 17th March 1959 abating the action.

Held, that the order of the Court laying by the case cast no duty on the plaintiff to restore it to the roll and, therfore, the order of abatement was wrongly made. The duty of fixing the day of trial rested on the Court. Unless the plaintiff had failed to take a step rendered necessary by the law to prosecute his action, an order of abatement could not be made under section 402 of the Civil Procedure Code.

APPEAL from an order of the District Court, Colombo.

C. Ranganathan, with *K. Viknarajah* and *Miss S. Wickramasinghe*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *V. J. Martyn* and *D. S. Wijewardene*, for the defendant-respondent.

Cur. adv. vult.

January 23, 1962. TAMBIAH, J.—

The plaintiff-appellant sued the defendant-respondent, an insurance company, for the recovery of the sum of Rs. 30,046/49 cts. alleged to be due on a policy of marine insurance marked "A" and annexed to the plaint, and insuring a cargo of 80 tons of potatoes shipped by one Mohamed Taha Abou El Kheir from Port Said to Colombo in the "S. S. Malancha" but discharged at Aden.

The cause of action pleaded in the plaint is that the plaintiff, as the assignee of the bill of lading relating to the cargo and of the policy of insurance covering the same, has suffered damages in the sum claimed by reason of the discharge of the cargo at Aden and that the defendant-company had repudiated liability.

The defendant-company admitted the issue of the said policy but took up various defences disclaiming liability. Although no specific issue was raised on the question of assignment, the learned District Judge dismissed the plaintiff's action holding that assignment had not been proved. The plaintiff appealed to this Court from the order of the learned District Judge and this Court, by order dated 26th April 1956, set aside the order of the learned District Judge and sent the case back for a trial *de novo*.

The record of the case, together with the judgment of the Supreme Court, was returned to the learned District Judge and the trial was fixed by him for the 25th of September 1956. On the 20th of September 1956, the plaintiff's proctor moved for a postponement of the trial fixed for the 25th of September 1956 as certain material witnesses in the case could not be contacted. The case was then mentioned on the 21st of September 1956 on which date both the plaintiff and the defendant were represented by counsel and, subject to the payment of costs, the Court made order that the case be taken off the trial roll. On the 25th of September 1956, the case was called again and on this date too both parties were represented by counsel. The Court made order that the plaintiff should pay the defendant Rs. 315 as costs and that the case should be laid by.

On the 29th of November 1957, the plaintiff stated in his motion that, as he had not been able to obtain a definite reply from his correspondents in Egypt in order to make arrangements to take preliminary steps towards

applying for a commission to that country to examine witnesses with a view of furnishing such evidence at the trial and as the case was due to be fixed for trial in terms of the order of the Supreme Court, the trial date should not be fixed and that the case should be laid by for a further six months to enable him to take steps to apply for the issue ot a commission. The learned District Judge, by order dated 29th of November 1957, allowed his application.

On the 15th of December 1958, the defendant moved, under section 402 of the Civil Procedure Code (Cap. 101), that an order of abatement should be entered in respect of the plaintiff's action. Notice was issued by the Court to the plaintiff's proctor on the 20th of December 1958. On the 13th of March 1959, an inquiry was held into this matter by the learned District Judge and he delivered order on the 17th of March 1959 abating the action. The plaintiff has appealed from this order.

The learned District Judge purported to act under section 402 of the Civil Procedure Code which enacts as follows :

> " If a period exceeding twelve months in the case of a District Court or 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."

The counsel for the appellant contended that the order made by the learned District Judge, laying by the case, cast no duty on the plaintiff to restore it to the roll and, therefore, the order of abatement was wrongly made. The counsel for the respondent, however, submitted that there was a duty cast upon the plaintiff to restore the case to the trial roll and, as the plaintiff has failed to perform his duty for a period of 12 months from the last order of the learned District Judge, the order of abatement was correctly made under section 402 of the Civil Procedure Code.

Section 402 of the Civil Procedure Code has been the subject of interpretation in a long series of cases and it is relevant at this stage to consider the more important case decisions on this matter in order to determine whether a duty is cast on the plaintiff to restore the case to the trial roll when a case was laid by.

In *Fernando v. Curera*[1] the District Court made order striking off the case from the trial roll until another connected case was decided in appeal. The District Judge, purporting to act under section 402 of the Civil Procedure Code, made an order of abatement on the ground that a period exceeding twelve months had elapsed subsequently to the date of the last order or proceeding on the record without the plaintiff taking any step in the case. The plaintiff appealed from the order of the District Judge and the Supreme Court set aside the order.

[1] *(1896) 2 N. L. R. 29.*

Bonser C.J., observed (at pages 29 and 30) : " The Court seems to have assumed that it was the duty of the plaintiff to make an application to fix a day for the hearing of the action ; but *it was the duty of the Court to fix a day for the hearing* ".

In *Lorensu Appuhamy v. Paaris* [1] the defendants had filed answer in a partition action but the Court did not fix any date of trial and the plaintiffs themselves did not take any further steps in the action for over a year. The District Judge ordered that the action should abate and, four years later, the plaintiffs moved that the order of abatement be vacated and this application was refused. The Supreme Court, on appeal, reversed the order of the District Judge and held that the order of abatement was wrongly made as the plaintiffs had not failed to take any necessary step in the action. Wood Renton J. (with whom Hutchinson, C.J., agreed) stated (at page 204) : " 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* ".

The ruling in the case of *Lorensu Appuhamy v. Paaris* (supra) has been followed in a series of cases. In *Kuda Banda v. Hendrick* [2] the plaintiff's proctor stated that his client was in jail and moved that the case might be postponed to the bottom of the roll, but the District Judge ordered that it be struck off the roll. Subsequently, the District Judge ordered the action to abate *ex mero motu* on the ground that no steps had been taken for more than a year. The Supreme Court held that the order of abatement was *ultra vires*, and that it should be vacated inasmuch as there was no step which was necessary for the plaintiff to take which he had not taken. It was held further that the duty of fixing the case for retrial rested on the Court. Lascelles C.J., (with whom Middleton, J., agreed) cited, with approval, the dictum of Wood Renton, C.J., in *Lorensu Appuhamy v. Paaris* (supra) quoted above.

In *Seyado Ibrahim v. Naina Marikar* [3] an action was instituted against the defendant as the executor of the estate of the deceased. Later an application was made for the case to stand over for a certain date till the defendant had obtained probate. On that date, the parties were absent and the defendant had not still obtained probate. The District Judge, purporting to act under section 402 of the Civil Procedure Code, made an order of abatement. On appeal, the Supreme Court, following *Lorensu Appuhamy v. Paaris* (supra),

[1] *(1908) 11 N. L. R. 202.* [2] *(1911) 6 S. C. D. 42.*
[3] *(1912) 6 S. C. D. p. 79.*

held that the order of abatement was wrongly made as the plaintiff had not failed to take any necessary step in the action and that the said order should be vacated.

In *Suhuda v. Sovena* [1] the case, which was instituted in 1906, had dragged its weary length for many years and although the record showed that the true cause of delay was the failure of the defendant to pay the fees of the Commissioner and that there was no fault on the part of the plaintiff, nevertheless the District Judge made an order of abatement under section 402 of the Civil Procedure Code. The plaintiff appealed and the Supreme Court followed the construction placed on section 402 of the Civil Procedure Code in *Lorensu Appuhamy v. Paaris* (supra) and held that the order of abatement could be made under section 402 only when the plaintiff has failed to take some step rendered necessary by some positive requirement of the law.

In *Setua v. Cassim Lebbe* [2] the defendant, in a partition action, put the plaintiff's title to the share claimed by him in issue and the Court, of consent, struck the case off the trial roll till the plaintiff vindicated his title in a separate action. Later, the District Judge made order of abatement on the ground that the plaintiff had not taken any steps six months from the last order of the Commissioner of Requests. On appeal, it was held that the plaintiff's failure to bring a separate action to vindicate his title could not be said to be failure to take steps for the purpose of prosecuting the action within the meaning of section 402 of the Civil Procedure Code. De Sampayo J. observed (at page 29) : " In such circumstances, it seems to me that *it is for the Court, if it thought fit, to restore the case to the trial roll*, and if it be found that the question of title could not be gone into in this partition action but that a separate action was necessary, it might be within the power of the Court to dispose of this matter on that ground . . . . ".

In *Associated Newspapers Limited v. Kadirgamar* [3], in an action instituted 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 the minute " 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. The plaintiff appealed and Akbar J. quoted with approval the dictum of Wood-Renton J., in *Lorensu Appuhamy v. Paaris* (supra) quoted above, and held that there was no failure on the part of the plaintiff to take any steps obligatory in law and that the order of abatement was irregular.

In *Tillekaratne v. Keerthiratne* [4] an order was made by the Court of Requests suspending further proceedings till a decision in a pending appeal was reached. The Court failed to fix a date for further hearing and, purporting to act under section 402 of the Civil Procedure Code, the Court later made an order of abatement on the ground that the plaintiff

[1] *(1913) 1 Bal. Notes 87.*
[2] *(1919) 7 C. W. R. 28.*
[3] *(1934) 36 N. L. R. 108.*
[4] *(1935) 14 C. L. Rec. 412.*

had not taken any steps for a period of six months from the last order of the Commissioner of Requests. On appeal, it was held that, in the absence of any failure on the part of the plaintiff or the defendant to take a step required by law, an order of abatement could not have been made. Garvin J., followed the ruling in *Fernando v. Curera* (supra).

In *Sellamma Achie v. Palavasam* [1] a Bench of two judges held that the Court had 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 the plaintiff within that period.

In *Chittambaram Chettiar v. Fernando* [2] one P, the administrator of the estate of a Chettiar, filed an action for the recovery of a sum of money due on a promissory note. After the action was fixed for trial, letters of administration issued to P were recalled and fresh letters were issued to S. The case was taken off the trial roll for substitution of the new administrator. P took no further interest in the action and S took no steps to get himself substituted. The judge made order abating the action. Thereafter, the appellant, one of the heirs of the deceased Chettiar, moved in the testamentary case to have letters issued to S recalled and to have himself appointed administrator, and his application was allowed. He then moved to have the order of abatement set aside. His appliction was disallowed on the ground of delay. On appeal, it was held, inter alia, that P was under no legal duty to get S substituted as plaintiff in his place and that this step, which he undertook, was not one necessary for him to take in order to prosecute the action under section 402 of the Civil Procedure Code; consequently, the order of abatement was void and of no effect. Jayetileke J., after citing some of the cases reviewed above, quoted with approval the dictum of Wood Renton C.J., in *Lorensu Appuhamy v. Paaris* (supra) cited above.

The long line of case decisions reviewed above favours the view that an order of abatement could be made under section 402 of the Civil Procedure Code only if the plaintiff has failed to take a step rendered necessary by the law.

The counsel for the respondent contended that section 80 of the Civil Procedure Code has no application to this case as the case was sent back for a trial *de novo*. But, in view of sections 82 and 83 of the Civil Procedure Code, after the Court has fixed the date for trial, it was the duty of the Court to postpone it for another date (vide sections 82 and 83 of the Civil Procedure Code), and it cannot be said that there is a duty cast on the plaintiff to restore the case to the trial roll.

The counsel for the respondent also contended that in view of certain rulings of this Court, a duty was cast on the plaintiff to restore the case to the trial roll. The cases which he cited may now be examined. In

[1] *(1939) 41 N. L. R. 186.*

[2] *(1947) 49 N. L. R. 49.*

Marikar v. Bawa Lebbe [1] the case was struck off the roll on the 17th of July 1890 as no steps had been taken in the case for twelve months. On the 19th of January 1892, the plaintiff filed petition and affidavit praying that he be allowed *to continue the action.* Order Nisi was allowed and a copy of the said order was served on the respondent. On the returnable date, the respondents were absent but the Court disallowed the petition on the ground that the cause alleged for not continuing the action was unsatisfactory. On appeal, Withers J., stated (at page 241): "The order of the 17th July 1890, was no doubt irregular for it was not in accordance with the provisions of section 402 of the Civil Procedure Code, *still the order operated in fact till the case was restored to the roll. No doubt, on a proper application, the District Judge would direct the case to be restored to the roll,* but then and there it would be within his discretion to pass an order that this action shall abate and no doubt he made such an order on the present materials". The *ratio decidendi* in this case, as we understand it, is that an order of abatement was operative till it was set aside and the plaintiff could not ask to continue an action, which has already abated, without his taking proper steps to set aside the order of abatement. This case, therefore, is no authority for the proposition that if a case has been laid by, then a duty is cast on the plaintiff to restore the case to the trial roll.

However, in *Suppramaniam v. Symons* [2], a different interpretation was given to the rule laid down in *Marikar v. Bawa Lebbe* (supra). An action was filed in 1889 and, on the 14th of August 1893, an order was made with the knowledge and consent of all parties striking off the case from the roll with a view of settlement. An order of abatement was made on the 5th of November 1896. After this order, nothing was done till 13th March 1911, when an application was made to have the order of abatement set aside. The District Judge held that although the order of abatement ought not to have been made, nevertheless as the plaintiffs had not complied with the conditions prescribed in section 403 of the Civil Procedure Code under which an order of abatement could be set aside, and as they had not made their application within reasonable time, the order of abatement should not be interfered with. On appeal, Wood Renton C.J. (with whom Ennis J., agreed) dismissed the appeal, but rested his decision upon different grounds. He stated (at page 230): "In the case of at least one of the previous postponements, the plaintiffs' proctor himself moved the Court that the action, which had been struck off the roll in the hope of settlement being reached, should be restored to it, and the case of *Marikar v. Bawa Lebbe* (supra), which is a decision of two judges, shows that in such circumstances it is the duty of the plaintiff to move that the action should be restored to the roll and that on such a motion it is within the discretion of the District Judge to make an order for its abatement. If such a motion had been made in the present case, the District Judge would, in my opinion, have been amply justified on the materials disclosed by the record in making such an order".

[1] *(1892) 1 S. C. R. 240.*

[2] *(1915) 18 N. L. R. 229.*

On a careful analysis, however, of the *ratio decidendi* in *Marikkar v. Bawa Lebbe* (supra), we are inclined to think that it has been assumed that this case has a wider application than its actual dicision warrants.

In *Wilson v. Sinniah* [1], the action was instituted on the 28th of January 1931 and the case was taken off the trial roll on the 17th of July 1934. On the 25th of April 1936, the Court ordered that the action should abate. On appeal, Poyser J., following the ruling in *Suppramaniam v. Symons* (supra), held that the order of abatement was correctly made. He said (at page 10): " It has been held in the case of *Suppramaniam v. Symons* (supra) that where the plaintiff's proctor had moved the Court that the action should be struck off the trial roll in the hope of settlement being reached, it was his duty to move that the action should be restored to the roll ". A relevant case, *Tillekeratne v. Keerthiratne* (supra), was referred to by Poyser J., but does not appear to have received consideration.

It seems to us that the decisions in *Suppramaniam v. Symons* (supra) and *Wilson v. Sinniah* (supra) are based on the view that *Marikar v. Bawa Lebbe* (supra) has a wider application than the actual decision warrants. We, therefore, prefer to follow the ruling in *Lorensu Appuhamy v. Paaris* (supra) which has been consistently followed in a number of weighty decisions. Where an interpretation has been placed by a long line of authorities on a rule of procedure, this Court would be reluctant to depart from such an interpretation. Both on principle and on authority it seems to us that unless the plaintiff has failed to take a step rendered necessary by the law to prosecute his action, an order of abatement should not be made under section 402 of the Civil Procedure Code. In the instant case, in our opinion, it cannot be said that the plaintiff has failed to take a step rendered necessary by the law.

For these reasons, we hold that the order of the learned District Judge abating the action should be set aside. The practice of " laying by " cases has been disapproved in certain judgments of this Court and, in our opinion, this practice should ordinarily be avoided and the practice indicated by Bonser C.J., in *Fernando v. Curera* (supra), observed. Where, however, an order " laying by " a case has been made by a Court, the duty of restoring the case to the trial roll rests, in our opinion, on the Court and not on the parties. We set aside the order of abatement and restore the case to the trial roll. The plaintiff is entitled to costs in both Courts.

T. S. FERNANDO, J.—I agree.

Appeal allowed.

[1] *(1938) 18 C. L. Rec. 9.*