Present : Wood Renton C.J. and Ennis J.

1915.

SUPPRAMANIAM *et al. v.* SYMONS *et al.*

38—D. C. (Inty.) Colombo, 1,477.

Order of abatement—Power of Court to make order ex mero motu.

A Court has power under section 402 of the Civil Procedure Code to make an order of abatement *ex mero motu.*

It is, however, 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.

If the plaintiff is injured by absence of notice he can proceed under section 403.

WOOD RENTON C.J.—People may do what they like with their disputes as long as they do not invoke the assistance of the courts of law. But whenever that step has been taken they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisers and of the Courts themselves to see that this is done. The work of the Courts must be conducted on ordinary business principles, and no Judge is obliged, or is entitled, to allow the accumulation upon his cause list of a mass of inanimate or semi-animate actions.

THE facts are set out in the judgment.

Bawa, K.C., and *Drieberg*, for the appellants.

Elliott and *Samarawickreme*, for the respondents.

Cur. adv. vult.

May 27, 1915. WOOD RENTON C.J.—

This is an appeal against an order by the District Judge of Colombo refusing to set aside an order made by one of his predecessors on November 5, 1896, under section 402 of the Civil Procedure Code, for the abatement of the action on the ground that a period exceeding twelve months had then elapsed without the plaintiffs having taken the further necessary steps for its prosecution. The action, which is one on a mortgage bond for the recovery of the sum of Rs. 51,000, was instituted as far back as March 25, 1889. I do not propose to trace its progress from that date up to the date of the order of abatement further than to say that it clearly results from the record that on August 14, 1893, it was, with the knowledge and consent of all parties, struck off the roll with a view to settlement. After the order of abatement nothing was done till March 13, 1911, when the present proctors moved to have the order of abatement set aside. It was not till

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February 10 in this year that the District Court found itself in a position to give a decision on that motion. The learned District Judge held that the order of abatement ought not to have been made, but that the plaintiffs had not complied with the conditions prescribed by section 403 of the Civil Procedure Code, under which an order of abatement can be set aside, inasmuch as they had not made their application within a reasonable time, and had not proved that they had been prevented by any sufficient cause from continuing the action. He further held that, apart from section 403, which was not applicable, he had no power to vacate his predecessor's order.

I agree with the learned District Judge in the result at which he arrived, namely, that the plaintiffs' motion must be dismissed. But I rest my decision upon different grounds. The journal entries clearly show that there had been prior postponements on the application of both sides with a view to a settlement of the litigation. These postponements were for a fixed period, and there can be no doubt that the order of November 5, 1896, should have been similar in this respect to those that preceded it. The parties were, however, fully aware of what the Court had done. 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 a settlement being reached, should be restored to it, and the case of *Marikar v. Bawa Lebbe*, [1] 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. Counsel on both sides admitted that no useful purpose would be served by reserving to the plaintiffs, while dismissing their appeal, the right to bring a fresh action, as any such right of action has long ago been barred by prescription. I would, therefore, dismiss the appeal with costs.

I desire, however, to say something upon an argument which was advanced by the plaintiffs' counsel at the hearing of the appeal. He said in effect that if the parties to a litigation of this description were content to allow it to slumber, neither of them suffered any prejudice, and it was no concern of the Courts to interfere. I entirely dissent from that proposition. People may do what they like with their disputes so long as they do not invoke the assistance of the courts of law. But whenever that step has been taken, they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisers and of the Courts themselves to see that this is done. The work of our Courts must

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

be conducted on ordinary business principles, and no Judge is obliged, or is entitled, to allow the accumulation upon his cause list of a mass of inanimate or semi-animate actions. We were referred by counsel to the older decisions—see *Fernando v. Curera*,[1] *Fernando v. Peris*,[2] and *Cave & Co. v. Erskine* [3]—to the effect that a Court cannot act under the provisions of section 402 of the Civil Procedure Code, except on the application of the defendant and on notice to the plaintiff. These decisions have, however, been strongly dissented from in recent years both in reported and in unreported cases. It is now, I believe, the practice in many of the District Courts for the Judge himself to take the initiative and to pass orders of abatement under section 402 after having given due public notice of his intention to do so. No hardship is caused by this practice, as it is always open to an aggrieved person to move the Court under section 403, and any attempt to interfere with its existence or growth on the authority of the old cases above referred to is very strongly to be deprecated. Such a delay in the prosecution of an action as is disclosed to us by the present case is itself a blot on the administration of justice. But for how many years after 1896 would this action have remained unabated if the District Judge had been compelled to wait until the parties themselves called for his aid? Much good would be done if every court of first instance in the Colony, as soon as possible after the expiry of the prescribed period, would, after such notice to parties as the circumstances admit of, systematically clear its rolls, in conformity with the provisions of section 402 of the Civil Procedure Code, of all actions that have become liable to abatement.

ENNIS J.—

This is an appeal against an order refusing to set aside an order of abatement made by the Court *ex mero motu* in 1896.

It appears that a day for the trial of the case had been appointed, and after several adjournments to fixed dates it was ordered of consent on October 31, 1892, that the case be struck off the roll. On March 10, 1893, application was made to restore the case to the roll. A date for hearing was fixed, and after another postponement an order was made on August 14, 1893, "Case called and struck off the roll with view to settlement." The parties took no further steps, and on November 5, 1896, the Court entered an order of abatement.

The points for consideration are, (1) whether the Court had power, under section 402 of the Civil Procedure Code, to make the order of abatement *ex mero motu*, and (2) whether it could do so in the circumstances of this case.

[1] (1896) 2 *N. L. R.* 29. [2] (1897) 3 *N. L. R.* 77.

[3] (1902) 6 *N. L. R.* 338.

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It was urged that under section 402 the Court could act only on the application of the defendant. I can see nothing in the section which prohibits the Court from acting *ex mero motu*. If the plaintiff is injured by absence of notice he can proceed under section 403. It is, however, 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.

It has next to be considered whether in the circumstances of the case the order of abatement should have been made. By section 402 such an order can be made only when the plaintiff has failed to take any necessary steps to prosecute the action. It was urged that it was the duty of the Court, and not of the plaintiff, to fix a day for trial. This would be so in ordinary circumstances, but in this case the case had been struck off the roll (presumably with the consent of parties), and whatever that order may mean, it was necessary for the plaintiff to get the case restored to the roll before there was any further obligation on the Court. This was held in *Marikar v. Bawa Lebbe*, [1] and that it was the practice of the Court is shown in the present case by the proceedings of March 10, 1893. I am therefore of opinion that the order of abatement could in the circumstances be made.

It remains only to consider whether on an application under section 403 to set the order aside there are circumstances which would justify the Court in setting it aside. The fact that the order of abatement was made without notice would ordinarily have weight, but in the present case a period of fourteen years was allowed to elapse before the application to set aside the order of abatement, and I agree with the learned District Judge that an application made after a lapse of so many years cannot in any case be considered to have been made within a reasonable time. There is, however, one other point. I am of opinion that an order striking a case off the roll is similar to the order contemplated in section 88, although not made in the circumstances enumerated in that section. From the wording of the section, it would seem that the file of pending cases is the file recording the days appointed by the Court for certain steps to be taken in the action, *i.e.*, the Court roll, and not the register of cases. The order in this case was made by consent, and the parties must be held to have contemplated that the order would not be a bar to the institution of a fresh suit upon the same cause of action. If the order of abatement prevented the plaintiff from asserting his rights by fresh action it would be reasonable to set it aside, but in the present case counsel agree that the plaintiffs' rights would now be barred by prescription, and in that case there is no good ground for interference with the order made.

I dismiss the appeal, with costs.

Appeal dismissed.

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