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Present : Garvin and Lyall-Grant JJ.

SHARIEFF *et al. v.* MARIKKAR *et al.*

225—D. C. Kalutara, 9,069.

Prescription—Action on mortgage bond—Death of defendants—Order of abatement—subsequent reversal—Date of commencement of action.

An action which has abated and which has been restored under section 403 of the Civil Procedure Code must be regarded as having commenced at the date of its original institution, for the purpose of a plea of prescription.

APPEAL from a judgment of the District Judge of Kalutara. The action was on a claim based upon a mortgage bond dated March 31, 1913. After the defendants had filed answer, and before the trial, the first defendant died. While his estate was being administered the second defendant also died. On March 6, 1923, the Court entered an order of abatement. On July 14, 1923, on the application of the plaintiffs the order of abatement was set aside and the plaintiffs were allowed to proceed with the action. At the trial the substituted-defendants pleaded that the action was prescribed, their contention being that the action must be deemed to have commenced on the date when the order of abatement was set aside. The District Judge overruled the contention, and gave judgment for the plaintiffs.

Drieberg, K.C. (with him *Cooray*), for substituted-defendants, appellant.

De Zoysa for plaintiffs, respondent.

April 1, 1926. GARVIN J.—

The question raised by this appeal is whether for the purposes of a plea of prescription, an action should be regarded as having commenced at the date of its original institution or at the date of an order setting aside an order of abatement made in the course of the proceedings. The action which was a claim based upon a mortgage bond dated March 31, 1913, was instituted on August 30, 1919. The claim was for principal and interest, and it was alleged that no interest had been paid since the execution of the bond. Summonses were served and the defendants filed answer. Before the trial the first defendant died, and while steps were being taken to administer his estate, the second defendant died. On March 6, 1923, no steps having been taken in the action for more than a year, the Court acting

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ex mero motu entered an order of abatement. This order was entered after notice had been given in the manner customary in this Court. The practice, as stated by the District Judge in his judgment was to affix to the notice board of the Court an intimation that an order of abatement would be entered after the expiry of one month, unless good and sufficient cause was shown to the contrary. On July 4, on the application of the plaintiffs the order of abatement was set aside, " and plaintiffs allowed to proceed with the action." By this date administration had been taken out to the estate of the two defendants and their respective administrators were duly substituted on the record. At the trial these substituted-defendants pleaded that ten years having elapsed since the execution of the bond and no interest having been paid thereon, the claim was prescribed. The foundation of the contention is that the action must be deemed to have commenced on the date when the order of abatement was set aside. The argument would seem to be that it is in the nature of a permission to institute a fresh action on the same cause of action. This interpretation seems to me to be in the very teeth of section 403, which is as follows :—

> " When an action abates or is dismissed under this Chapter, no fresh action shall be brought on the same cause of action.
>
> " But the plaintiff or the person claiming to be the legal representative of a deceased or insolvent plaintiff may, within such period of time as may seem to the Court under the circumstances of the case to be reasonable, apply for an order to set aside the order for abatement or dismissal ; and if it be proved that he was prevented by any sufficient cause from continuing the action, the Court shall set aside the abatement or dismissal, upon such terms, as to costs or otherwise, as it thinks fit."

The true meaning of the section is that no fresh action may be brought when an order of abatement has been entered, but that the plaintiff may apply to the Court to set aside the order made in the original action. The effect of setting aside such an order must surely be the same as in any other case in which an order is set aside, and that is, to restore the parties to the position which they occupied before the order, which was set aside, was made. The order of abatement and the order setting aside the order of abatement are both orders made in one and the same action. When the former is cancelled by the latter the only obstacle to the continuance of the action has been removed and the action proceeds. It is not a fresh action instituted as at the date of the order of abatement, but is the continuation of the action originally instituted. The rights of the parties to an action must be determined as at the date of the institution of that action. In the absence of the clearest

possible authority to the contrary, that rule must apply to the case of an action which has abated, and has been revived by an order under section 403. Counsel for the appellants relied on the case of *Murugupillai v. Muttelingam*,[1] where Lawrie A.C.J. expressed the opinion that in that case the action dated from the date on which the order of abatement was removed, but it is not a satisfactory case. The point does not appear to have been fully considered and it was not necessary to do so for the determination of the case, as the Judge held, that the claim was barred by limitation before the action was first instituted. Moreover in the case of *Cave & Co. v. Erskine*,[2] Grenier A.J. dissented from the proposition that the action for the purpose of a plea of prescription must be deemed to date from the date on which the abatement was removed, and sought to explain the *dictum* as one which had special reference to the special circumstances of the particular case. The only other case referred to in the course of argument was the case of *Cooray v. Perera*.[3] But the decision in that case has no real bearing upon the point with which we are here concerned. It decided that a conveyance made in the period which intervened between the making of an order of abatement and the order setting aside that order is not a transfer, which is affected by the rule of *lis pendens*. The judgments of Wood Renton C.J. and De Sampayo J., from which Pereira J. dissented, proceeded upon the view that the period which elapsed between the two orders is a dead period during which there is no *lis pendens* which is effective to bar the acquisition of rights by third parties. But the judges nowhere stated that as between the parties to the action this revival of the case had the character of a fresh action or that their rights are to be determined as at the date of the revival. Indeed, there are indications at least in the judgment of De Sampayo J, that he did not intend such a construction to be placed upon his judgment. He said " but, whatever the effect of an order of abatement and the subsequent cancellation of the order made under our law be as between the parties to the action, the real question is whether a third party who purchases *bona fide* during the interval is affected by the result of the revived action." But, whether this interval be regarded as a period during which the action is dead or is only in a state of suspended animation, it appears to be clear that the effect of the cancellation of the order of abatement is to revive the original action and to permit the plaintiffs to prosecute it to a conclusion, as though the original order of abatement had never been made. The foundation of an order of abatement is that the plaintiff has not been diligent in prosecuting his action. The cancellation of the order proceeds upon the assumption that he was not wanting in diligence and that he was prevented from prosecuting

[1] *3 C. L. Rep. 92.*

[2] *(1902) 6 N. L. R. 338.*

[3] *(1914) 17 N. L. R. 460.*

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the action by good and sufficient cause. It is difficult to see why the plaintiff, whose action was ordered to abate, because it was assumed that he was wanting in diligence, and who has subsequently shown that the assumption that he was wanting in diligence is mistaken, should be penalized further for want of diligence, of which he was not guilty.

For these reasons, I affirm the judgment of the Court below, and dismiss this appeal, with costs.

LYALL-GRANT J.—I agree.

Appeal dismissed.