1971 *Present :* **Samerawickrame, J., and de Kretser, J.**

P. L. NAGAPPAN, Appellant, *and* LANKABARANA ESTATES LTD., *et al.*, Respondents

S.C. 160/67 (Inty.)—D. C. Ratnapura, 3520/M

*Civil procedure—Action instituted by plaintiffs jointly in respect of a joint claim—Death of one of them—Case taken off trial roll for necessary steps—Power of Court to order action to abate—Remedies of the plaintiff to have the order of abatement set aside—*Ex parte *order—Remedy of party affected by it—Public Trustee Ordinance, s. 30—Civil Procedure Code, ss. 29, 394, 402, 403, 547*

Where two plaintiffs institute action jointly for the recovery of a sum of money which is due to them jointly, and the case is taken off the trial roll, at the instance of the Proctor, upon the death of one of them, the Court may make an order of abatement in respect of the action if it is made within jurisdiction and after notice. In such a case, if delay is caused by a connected testamentary action pending in a jurisdiction outside Ceylon in respect of the estate of a deceased person from whom the joint plaintiffs derive their rights, it is the obligation of the surviving plaintiff to have recourse to the provisions of section 30 of the Public Trustee Ordinance or to take other appropriate steps in order to continue the action instituted in Ceylon.

An *ex parte* order may be set aside on application to the court which made it. An order of abatement improperly made without notice may be set aside by the court which made it, in the way stated in *Bank of Ceylon v. Liverpool Marine and General Insurance Co. Ltd.* (66 N. L. R. 472).

Where, after service of notice on a plaintiff's Proctor to show cause, an order of abatement of action is made by the Court because no cause is shown, although the Proctor is present in Court, the order may be set aside by the Supreme Court on an appeal filed against it. If no appeal is taken from such an order, it is not open to the plaintiff to seek to have it set aside by making an application in the same case at any time in the same way as in the matter of an *ex parte* order. The plaintiff is entitled, however, to obtain from the original Court an order setting aside the order of abatement provided that he satisfies the conditions set out in section 403 of the Civil Procedure Code, viz., (1) that his application is made within a reasonable time, and (2) that he proves that he was prevented by sufficient cause from continuing the action.

APPEAL from a judgment of the District Court, Ratnapura.

M. Tiruchelvam, Q.C., with *K. Sivagurunathan, M. Sivarajasingham* and *S. C. Chandrahasan*, for the 1st plaintiff-appellant.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the defendants-respondents.

Cur. adv. vult.

September 30, 1971. SAMERAWICKRAME, J.—

This appeal is against the judgment of the District Court of Ratnapura dismissing an application for an order to set aside the order of abatement passed in the action.

The action was filed on 28th August, 1959, by the appellant and one Nachammai Achchi, the 2nd plaintiff, to recover a sum of money from the 1st and 2nd defendants-respondents. They averred that the debt was part of the assets of a Joint Hindu Family which was under the control and management of one P. N. Palaniappa Chettiar. They stated that Palaniappa Chettiar had died and that the right to collect the said debt belonged to them and the widow of the Chettiar whom they made a party defendant as she had refused to join as a plaintiff.

When the case came up for trial on 16th February, 1962, the proctor for the plaintiffs informed the Court that the 2nd plaintiff had died in India on 22nd November, 1961. The case was taken off the trial roll and was thereafter called on two dates for steps. On 11th February, 1963, the case was laid by for steps apparently because no application was made to have a legal representative appointed. As no steps were taken, on 28th April, 1966, notice was issued to the proctor for the plaintiffs to show cause why the case should not be abated and as no cause was shown an order of abatement was passed on 30th May, 1966. The appellant filed petition and affidavit on 19th April, 1967, and asked that the order of abatement be set aside. After inquiry the learned District Judge delivered judgment refusing the application and the appellant has appealed from that judgment.

There can be little doubt that the case was taken off the trial roll at the instance of the proctor for the appellant though the journal entry does not expressly state that it was so done. There can also be little doubt that the learned District Judge from whose judgment the appeal is taken is correct when he says that several dates were taken to have a legal representative appointed. The view has been taken that where a case is taken off the trial roll at the instance of the plaintiff or with his consent, it is necessary for the plaintiff to get the case restored to the trial roll—vide *Supramaniam v. Symons* [1], and *Wilson v. Sinniah* [2].

In a recent case Tambiah, J., dealt exhaustively with all relevant decisions and held that where an order "laying by" a case has been made the duty of restoring it to the trial roll rested on the court and not on the parties. He adopted the interpretation in *Lorensu Appuhami v. Paaris* [3] that the word "necessary" in section 402 of the Civil Procedure Code means "rendered necessary by some positive requirement

[1] *(1915) 18 N. L. R. 229.*

[2] *(1938) 18 Ceylon Law Recorder 9.*

[3] *(1908) 11 N. L. R. 202.*

of law". As the duty of fixing a day for hearing rested on the Court Tambiah, J., held that the plaintiff had not failed to take a step rendered necessary by law—vide *Samsudeen v. Eagle Star Insurance Co. Ltd*[1]. This decision has been followed in *Bank of Ceylon v. Liverpool Marine and General Insurance Co. Ltd.*[2]. In the earlier action the case had been taken off the trial roll and laid by for the purpose of settlement and in the later action, to enable the plaintiff to obtain evidence on commission from Egypt. In either of these cases had the Court fixed a day for hearing there was no legal obstacle to the trial taking place. in the present case, however, in the absence of a substitution of a legal representative in place of the 2nd plaintiff the trial could not have been proceeded with. This case is therefore distinguishable from the two cases which were the subject of the decisions referred to above.

The learned District Judge has taken the view that the claim of the plaintiffs was a joint one and that the action was brought jointly. In terms of Section 394 of the Civil Procedure Code, on the death of the 2nd plaintiff the action could not be proceeded with in the absence of a legal representative in her place. It was obligatory on the 1st plaintiff to prosecute the action by having a substitution made in place of the 2nd plaintiff and such a substitution was a necessary step that had to be taken by him.

Mr. M. Tiruchelvam, Q.C., submitted that the court and the parties had been under a misapprehension and that upon a correct view of the law it was open to the 1st plaintiff, the 2nd plaintiff and the 3rd defendant to have each maintained a separate action for his or her share of the debt and he cited authorities in support. He claimed that the appellant was entitled to proceed with the action in respect of his share of the debt. He even claimed that as a surviving plaintiff he was entitled to proceed with the whole action without substitution in place of the 2nd plaintiff. This position was taken up for the first time when the order of abatement was sought to be set aside and appears to be an afterthought on the part of the appellant. The way the plaint was drafted and the fact that the widow who refused to join as a plaintiff was made a party defendant show that the action was framed on the basis that the three parties were jointly entitled to prosecute the claim and were necessary parties to the action.

Having regard to the circumstances in which it came to be made I am of the view that the order of abatement cannot be regarded as arbitrary or capricious and that it is one made on probable grounds by a court competent to make it in the exercise of jurisdiction undoubtedly possessed by that court. This finding is sufficient to determine the questions that arise in this matter and it is not necessary to go further and decide whether the order was also correct.

[1] *(1962) 64 N. L. R. 376.*

[2] *(1962) 66 N. L. R. 472.*

An order of abatement entered on wrong or insufficient grounds without notice to the party who will be prejudicially affected by it and without an opportunity to show cause against it may be set aside by the court which made it in the same way as an *ex parte* order. It may be questioned in appropriate proceedings in the same case and at any time—vide *Bank of Ceylon v. Liverpool Marine and General Insurance Co. Ltd.* (supra) at 474. In accordance with a rule of practice which has become deeply ingrained in the legal system of Ceylon an *ex parte* order may be set aside on application to the court which made it—vide *Loku Menika v. Silenduhamy* [1]. Orders of abatement improperly made without notice are sometimes described as void or *ultra vires*. No more is meant than that such orders will be set aside in the way stated in the 66 N. L. R. case (supra).

Before the order of abatement was made in this case notice was served on the proctor for the appellant to show cause why such an order should not be passed. A point has been made that the notice should have been served on the appellant personally. The learned District Judge states that on the notice returnable date the proctor for the appellant was present in court and that no objection was taken by him either to the notice or to the proposed order of abatement and that it must be presumed that the plaintiff was aware of the notice. Section 29 of the Civil Procedure Code justifies the presumption that the notice must have been communicated to and made known to the party. In any event the appointment of the proctor had not been revoked; he later filed the application of the appellant on which the order appealed from was made. The service of notice on him was therefore proper. An order made after notice and after giving a party an opportunity of showing cause against it may be set aside on an appeal filed against it. If no appeal is taken from such an order it is not open to a party to seek to have it set aside by an appropriate application in the same case at any time in the same way as in the matter of an *ex parte* order.

The appellant was entitled, however, to obtain an order setting aside the order of abatement if he satisfied the conditions set out in Section 403. They are that (1) his application is made within such period of time as may seem to the court under the circumstances of the case to be reasonable and (2) he proves that he was prevented by sufficient cause from continuing the action.

The appellant made application on 19th April, 1967, to set aside the order of abatement that had been passed on 30th May, 1966. That is, his application was made after eleven months. The learned District Judge holds that there has been unreasonable delay. In view of the fact that the order of abatement was made in the presence of the proctor for the appellant I am unable to say that the finding of the learned District Judge in the circumstances of this case is wrong.

[1] *(1947) 48 N. L. R. 353.*

The appellant sought to put certain matters before court to show that he was prevented by sufficient cause from continuing the action. He stated in his affidavit :—

" 8*b*. The amount sued for or the greater portion thereof belonged to one PL. N. Palaniappa Chettiar who died on the 16th September, 1956, and the plaintiffs along with the 3rd defendant became the successors-in-title to the said PL. N. Palaniappa Chettiar to whose estate neither probate nor letters of administration have been issued as yet. It was realised that the plaintiffs could not maintain this action until probate or letters of administration were issued to the estate of the said PL. N. Palaniappa Chettiar.

(*c*) In case No. 17493/T in the District Court of Colombo the 3rd defendant who was the widow of the said PL. N. Palaniappa Chettiar applied for letters of administration and the 1st plaintiff, the major heir of the said Palaniappa Chettiar, counter-claimed for letters.

(*d*) During this time the plaintiffs and the 3rd defendant had a case in India, the country of their domicil wherein the title to the estate of the said PL. N. Palaniappa Chettiar was in dispute. That case was decided in favour of the 1st plaintiff in the original court and in appeal in the Madras High Court from where the 3rd defendant appealed to the Supreme Court of India, which court finally decided this case in the 1st plaintiff's favour on the 23rd January, 1967.

(*e*) Because of the conflict of claims between the plaintiffs and the 3rd defendant in India, the testamentary case No. 17493/T in the District Court of Colombo was not proceeded with ; but now that the conflict between the 1st plaintiff and the 3rd defendant has been finally decided in India, your petitioner hopes that letters of administration will be issued quite early. "

I will assume that Section 547 of the Civil Procedure Code is applicable to this action. Though a testamentary action to which the appellant was a party had been filed it appears not to have been proceeded with and to have been temporarily abandoned because a dispute had been raised and canvassed in litigation in India as to who was entitled to succeed to the estate of the deceased Palaniappa Chettiar. That dispute was taken up to and finally decided by the Supreme Court of India. There is provision made in Section 30 of the Public Trustee Ordinance to which recourse might have been had. The Section is :—

" 30. (1) Whenever any person has died leaving an estate within Ceylon, and the court having authority to appoint an administrator of the estate is satisfied that there is no person immediately available who is legally entitled to the succession to such estate, or that danger is to be apprehended of misappropriation, deterioration, or waste of such estate, before it can be determined who may be legally entitled to the succession thereto, or whether the Public Trustee is entitled to letters of administration of the estate of such deceased person, the

court may, upon the application of the Public Trustee or of any person interested in such estate, or in the due administration thereof, forthwith direct the Public Trustee to collect and take possession of such estate, and to hold, deposit, realize, sell, or invest the same according to the directions of the court ; and in default of any such directions, according to the provisions of this Ordinance so far as the same are applicable to such estate.

(2) (*a*) Any order of the court made under the provisions of this section shall entitle the Public Trustee—

(*a*) to maintain any suit or proceeding for the recovery of such estate or any part thereof ; and . . . "

Apart from action under the provisions of the Public Trustee Ordinance, it does not appear to me that administration of the Ceylon estate need have been delayed all these years. Even if it was not possible for the heirs or those who claimed to be heirs to agree that administration should be issued to one of themselves, it was surely possible to have a grant of administration made to the Secretary of the Court, the Public Trustee or a third party in whom they had confidence.

The appellant was aware that the action filed by him could not be proceeded with without administration to the estate in Ceylon of Palaniappa Chettiar, yet he does not appear to have made any effort to have administration to the estate made early or even in reasonable time. He refers to protracted litigation in India in which he participated which need not necessarily have held up the testamentary proceedings in Ceylon altogether. Palaniappa Chettiar died in September, 1956 and on 15th April, 1967, when the appellant affirmed to his affidavit letters of administration to his estate had not been issued though the appellant expresses a hope that they would be issued quite early.

I do not think that in the circumstances it is open to the appellant to claim that he was prevented by sufficient cause from continuing the action.

In this connection I adopt the dictum of Wood Renton, C.J., in *Supramaniam v. Symons* (supra) at 230 :— " 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 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 ".

It is of course open to us to act in revision and to consider whether the order of abatement was or was not correctly made. Though the amount claimed is large yet in the circumstances of the case I do not

think such a course is indicated. Apart from the laches and delay to which I have already referred, the claim or the greater part of it is alleged to have risen in September 1956 which is fifteen years ago. The 1st plaintiff-appellant has not invited us to act in revision.

In the circumstances the appeal fails and is dismissed with costs.

DE KRETSER, J.—I agree.

Appeal dismissed.