

1962      *Present : H. N. G. Fernando, J., and L. B. de Silva, J.*

BANK OF CEYLON, Appellant, *and* LIVERPOOL MARINE  
& GENERAL INSURANCE CO., LTD., Respondent

*S. C. 39/60—D. C. Colombo, 32412/M*

*Abatement of action—Scope of ss. 402 and 403 of Civil Procedure Code—Remedy of plaintiff.*

When a case is laid by with a view to a settlement, an order of abatement under section 402 of the Civil Procedure Code cannot be made by Court, *ex mero motu*, without notice to the plaintiff. The validity of such an order can be questioned by the plaintiff in appropriate proceedings in the same case at any time, without resort to the provisions of Chapter LX of the Civil Procedure Code relating to appeals notwithstanding lapse of time.

<sup>1</sup> (1962) 63 N. L. R. at 500.

**A**PPPEAL from a judgment of the District Court, Colombo.

*S. Nadrasan, Q.C.*, with *S. J. Kadirgamar* and *K. N. Choksy*, for Plaintiff-Appellant.

*H. W. Jayewardene, Q.C.*, with *V. J. Martyn*, for Defendant-Respondent.

*Cur. adv. vult.*

December 6, 1962. L. B. DE SILVA, J.—

On a joint motion filed by the parties that this case be taken off the trial roll as—

(a) The case was very difficult and needed a great deal of preparation for trial, and

(b) Negotiations for a settlement were then in progress, the learned District Judge on 7th October, 1955 allowed the Motion. The case was called on 28th November, 1955 and was laid by.

On 7th December 1956, the Court, acting *ex mero motu*, abated the action as a period exceeding twelve months had elapsed since the last Order without the plaintiff taking any steps to prosecute this action. The plaintiff had no notice of the Order contemplated or taken by the Court at that time.

Later the plaintiff moved to revoke the proxy granted to his proctor and on 4th January 1958 the Court made Order to take steps to vacate the Order of Abatement. On 29th September 1959, the plaintiff filed papers to set aside the Order of Abatement.

That application was refused by the learned District Judge and the plaintiff has appealed to this Court. The main question for decision on this Appeal was whether the learned Judge was empowered under section 402 of the Civil Procedure Code, to enter an Order of Abatement in this case.

It was argued before this Court that the Court was empowered to enter such an Order under section 402 only in cases where the plaintiff had failed to take any step to prosecute the action for the prescribed period *where any such step was necessary to be taken by him*.

The Counsel for the Appellant relied on the judgment of Wood Renton, J. in *Lorensu Apputhamy v. Paaris*.<sup>1</sup> Referring to section 402, Wood Renton, J. stated, "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'."

<sup>1</sup> (1908) 11 N. L. R. 202.

Once a case is laid by with a view to a settlement, there is no requirement under the Civil Procedure Code or in terms of any Order of Court, on the plaintiff to take any steps to prosecute the action.

The Counsel for the Respondent relies on the later decision of Wood Renton, C.J. in *Suppramaniam v. Symons*<sup>1</sup>. In that case on the application of the parties, the case was struck off the Roll, with a view to a settlement. As a period of one year had elapsed since that Order without the plaintiff taking steps to prosecute the action, the learned District Judge entered an Order of Abatement.

Wood Renton, C.J. cited the case of *Marikar v. Bawa Lebbe*<sup>2</sup>, and held that it was the duty of the plaintiff to move that the action be restored to the Roll and on such a motion, it is within the discretion of the District Judge to make an Order for its abatement. His earlier decision in *Lorensu Appuhamy v. Paaris (supra)* had not been brought to his notice nor had he considered the provisions of section 402 of the Civil Procedure Code.

As a result of these two decisions, conflicting views had been adopted on the question whether an Order of Abatement may be validly entered after a case had been laid by on the ground that the plaintiff had not taken steps to prosecute the action within the prescribed time. This question was considered very carefully in a recent judgment of this Court by Dr. Thambiah, J. in *Samsudeen v. Eagle Star Insurance Co., Ltd.*<sup>3</sup>, with reference to all the relevant decisions.

In that case, T. S. Fernando, J. and Thambiah, J. upheld the view taken in *Lorensu Appuhamy v. Paaris (supra)*. We see no reason to depart from the view taken in that case. We hold that the Order of Abatement was wrongly entered by the District Judge in this case as there was no step that was necessary to prosecute the action, which the plaintiff was required to take.

It was further argued on behalf of the respondent that once an Order of Abatement was entered under section 402, the only course open to the plaintiff was to make an application under section 403 to set aside the Order within reasonable time. The appellant contended that he was entitled to have the Order of Abatement set aside apart from the provisions of section 403, on the ground that it was not lawfully entered under section 402.

The Order of Abatement was entered without any notice to or knowledge of the plaintiff. Though the Court has acted *ex mero motu*, it is similar to any *ex parte* Order made by Court as the plaintiff had no opportunity to show cause against it.

We, therefore, hold that it was open to the plaintiff to question the validity of the Order in appropriate proceedings in the same case at any

<sup>1</sup> (1915) 18 N. L. R. 229.

<sup>2</sup> (1892) 1 S. C. R. 240.

<sup>3</sup> (1962) 64 N. L. R. 372.

time and that he is not bound to appeal from the Order of Abatement under the provisions of Chapter LX of the Civil Procedure Code for Appeals notwithstanding lapse of time.

We set aside the Order dismissing the plaintiff's application with costs and allow this Appeal. We set aside the Order of Abatement. The Appellant is entitled to the costs of this appeal. The costs of the plaintiff's application in the District Court will abide the result of the case.

H. N. G. FERNANDO, J.—I agree.

*Appeal allowed.*

