1914.

[FULL BENCH.]

Present : Wood Renton C.J., Pereira J., and De Sampayo A.J.

COORAY *v.* PERERA.

238—D. C., Kalutara, 5,554.

Lis pendens—*Action not* lis pendens *between date of order of abatement (402 C. P. C.) and the setting aside of the order.*

Per WOOD RENTON C.J. and DE SAMPAYO A.J. (PEREIRA J. *dissentiente*).—Where in an action an order of abatement is entered under section 402 of the Civil Procedure Code, and the same is subsequently set aside, the action cannot be regarded as having been *lis pendens* during the period between the passing of the order and its being set aside.

Per PEREIRA J.—If during the period referred to above the action is not to be regarded as *lis pendens*, the aim and object of the provision of the section allowing an order of abatement to be set aside would be defeated.

THE facts are set out in the judgment of De Sampayo A.J. as follows:—

The facts relevant to the point submitted for consideration may be shortly stated thus. One Isabella, wife of Juan, mortgaged the property in question to the plaintiff by bond dated March 9, 1897. Under writ of execution issued against Juan personally the Fiscal seized and sold the property to Aaron, to whom the Fiscal issued transfers dated November 11, 1899. Aaron sold the property to Kaitan. On December 14, 1900, the plaintiff brought the action No. 2,336 on the mortgage bond against Isabella, making Aaron and Kaitan also parties to the action, but the plaintiff not having duly prosecuted the action, the Court, on March 31, 1903, entered an order of abatement under section 402 of the Civil Procedure Code. Four years thereafter, viz., on January 20, 1907, Kaitan sold the property to the first defendant. Subsequently, on March 27, 1907, the Court, on the application of the plaintiff under section 403 of the Civil Procedure Code, set aside the order for abatement of the mortgage action, the case was proceeded with to decree, and the property was sold and purchased by the plaintiff himself.

In this action there is a contest as to title to the property between the plaintiff on the one hand, and the first defendant and the added defendant, to whom the first defendant has in turn transferred the property, on the other hand, the plaintiff contending that the sale to the first defendant in the above circumstances was pending the mortgage action and was, therefore, subject to the result of that action.

A. St. V. Jayewardene, for plaintiff, appellant.—The purchase by the defendant was after the order of abatement, and before the order setting aside the order of abatement. The purchase was, therefore, pending the mortgage action, and is therefore void as against rights enforcible under the mortgage decree. The mortgage action was pending at the date of the sale. It was held in *Allahakoon v. Wickremesinghe*[1] that an order of abatement does not terminate the action, but has generally on the effect of removing the case from the list of pending cases. See also *Cave & Co. v. Erskine*[2].

If a suit abates and is revived within a reasonable time, there is no suspension of a *lis pendens*. *Hukm Chand's Res Judicata, p. 698, s. 276.*

In the same page Hukm Chand goes on to say that the dismissal of a suit with liberty to proceed *de novo* does not impair the effect of *lis pendens* of the former suit; by the immediate filing of a new suit the plaintiff will be considered constant and continuous in the prosecution. Under our Code the Court has the power to reinstate a case in which an order of abatement was made. The dismissal of an action with liberty to proceed *de novo* and the setting aside an order of abatement is in effect the same thing.

Counsel also cited *29 All. 76*, at pages 79-81.

Bawa, K.C. (with him *Cooray*), for the defendants, respondents.—*Allahakoon v. Wickremesinghe*[1] would appear to be an authority against the appellant. It decides that an order of abatement has the effect of removing a case from the list of pending cases. How, then, could it be said to be a *lis pendens?*

Cave & Co. v. Erskine[2] is distinguishable. There the ground for the decision was that the order of abatement should never have been made.

In India there is a Land Transfer Act which applies to alienations pending cases. The Indian cases do not therefore apply to Ceylon.

There should be a registration of a *lis pendens* in England to affect the title of the alienee of land. See *Encyclopædia of the Laws of England, vol. VIII., p. 343.*

A suit must be continuously prosecuted to be treated as *lis pendens*. Counsel cited *Hukm Chand, p. 704, s. 279.*

The passage cited by appellant (*Hukm Chand 698*) does not apply, as the order of abatement is silent as to plaintiff's right to proceed *de novo*.

The respondent is an innocent purchaser, and he should not suffer by an order made subsequent to his purchase. It would be impossible to advise as to the validity of titles if the order setting aside the order of abatement be given the effect which the appellant seeks to give it.

[1] *(1908) 4 A. C. R. 8.*

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

1914.

Cooray v. Perera

A *lis pendens* is terminated by lack of diligent prosecution. In this case the plaintiff was not diligent.

Counsel cited 49—D. C. Negombo, 9,148;[1] *3 Lorenz 28; Caspersz on Estoppel 328; 324; Murugupillai v. Muttulingam;*[2] *Perera v. Silva.*[3]

Jayewardene, in reply, cited *Hukm Chand 707.*

Cur. adv. vult.

August 24, 1914. PEREIRA J.—

In this case the question referred to the Full Court for decision is whether, where in an action an order of abatement has been passed under section 402 of the Civil Procedure Code and the same has subsequently been set aside, the action could be said to have operated as *lis pendens* during the period between the passing of the order of abatement and the order setting it aside. Modern English authorities cannot help us in the decision of this question, because in England, by Statute 2 Vict. ch. 5, a *lis pendens* should be registered in order to bind an alienee of the land in dispute without express notice. Here, as in India, the doctrine applies generally in the form in which it existed before the statute referred to above In *Bellamy v. Sabine,*[4] a leading case on the point, it was held that the doctrine as to the effect of *lis pendens* on the title of an alienee is founded on the ground that it is necessary to the administration of justice that the decision of the Court in a suit should be binding, not only on the litigant parties, but on those who derive title from them. It seems to me that the aim and object of the provision of section 403 of the Civil Procedure Code, allowing an order of abatement to be set aside, would be defeated if the action were not to be regarded as *lis pendens* during the period referred to above, because the defendant might by conveying the land in dispute to a third party immediately after the entering up of an order of abatement render the whole action nugatory. An order setting aside an order of abatement could only be made where within a reasonable time the plaintiff applies to the Court for that purpose, and proves to the satisfaction of the Court that he was prevented by sufficient cause from continuing the action. That being so, it seems to me to be unreasonable that where an order of abatement is set aside, the plaintiff should at any time until the setting aside of the order be deemed to have neglected to take the necessary steps to keep the action afloat. Direct authority on the question under consideration cannot be expected, because neither under the Rules and Orders under the Judicature Acts nor under the Indian Civil Procedure Code is there anything similar to the provisions of sections 402 and 403 of our Code; but Mr. A. St. V. Jayewardene has cited certain passages from Hukm Chand's treatise on the law of *res judicata,* which are as much in point as they are sound in the exposition of the law dealt

[1] *S. C. C. Min., July 6, 1914.*
[2] *3 C. L. R. 92.*
[3] *(1910) 13 N.L. R. 81.*
[4] *1 De G. & I. 566.*

with. The learned author says : " If a suit abates, and is revived within a reasonable time, there will be no suspension of *lis pendens*. Nor is the effect of the former suit as *lis pendens* impaired by the dismissal of a suit with liberty to proceed *de novo;* and by the immediate filing of a new suit the plaintiff will be considered constant and continuous in the prosecution. " If the concluding words of this passage mean anything, they mean that during the interval between the two actions referred to the former action is to be deemed to have been pending. It has been said that the latter part of this passage does not apply to the present case, because the order of abatement is silent as to the plaintiff's right to reinstate the action. The mention of such a right in the order would have been entirely out of place and absurd. No Court would make itself guilty of such a proceeding. It is not provided for by the Code, but the Code itself substitutes for it a provision giving the plaintiff the right to move for and obtain an order setting aside the abatement. I fail, indeed, to see the difference (with reference to the question now under consideration) between an order of abatement (where the law is silent as to a right in the plaintiff to reinstate the action) expressly giving the plaintiff a right to reinstate, and an order of abatement (where the law expressly gives the plaintiff the right to reinstate the action) with no mention of such right in the order.

It has been said that *lis pendens* is terminated by lack of diligent prosecution of the action; but when an order of abatement is made, and is subsequently set aside, the presumption clearly is that there was no lack of active prosecution of the action, because, as observed above, it is only on application being made within a reasonable time, and the Court being satisfied that the plaintiff was " prevented " by sufficient cause from continuing the action, that an order of abatement is set aside.

Lastly, the learned counsel for the respondent urged that innocent purchasers would be greatly prejudiced by the doctrine of *lis pendens* being allowed to operate during the period mentioned above. I confess I cannot see the force of this argument. In our Courts cases sometimes last for years. How the addition of some further time to the life of a case by the period referred to above being deemed to be a part of the entire period of its existence can prejudice the purchaser of the property in litigation who would not otherwise be prejudiced I fail to see.

I think that the appellant is entitled to succeed in his contention, and I would uphold it and order the respondent to pay him the costs of the argument.

WOOD RENTON C.J.—

I regret that I have had to write my judgment in this case on circuit, without access to authorities which I should desire to discuss. But I have formed an opinion on the point argued before three

1914.

WOOD RENTON C.J.

Cooray v. Perera

Judges, and as it turns on the construction of section 402 of the Civil Procedure Code, and not primarily on the doctrine of *lis pendens* under Roman or English law, I shall not delay the further argument of the appeal by waiting till my return from circuit before recording it. I think that the fact that under section 402 there is an order of abatement at once deprives the action abated of the character of a *lis pendens*, and that the reinstatement of the action by a subsequent order under the proviso to section 403 of the Civil Procedure Code makes it a *lis pendens* again as from the date of that order alone. To construe sections 402 and 403 in any other sense would be productive of great hardship to innocent purchasers between the date of the order of abatement and that of the order setting the original order of abatement aside.

I agree to the order proposed by my brother De Sampayo as to the costs of the argument before three Judges. The case must be listed for argument on the other outstanding issues before two Judges.

DE SAMPAYO A.J.—

[His Lordship stated the facts, and continued]

The doctrine of *lis pendens* is well known in Roman jurisprudence, upon which our law is based, and the decisions under the English common law, which exhibits the same principles, have in practice been applied in Ceylon. It is well-settled law that *lis pendens* is terminated, not only by the final decree, but by want of active prosecution of the action, and our Civil Procedure Code appears to me to reduce to specific limits what active prosecution shall mean, for by section 402 it is provided that " if a period exceeding twelve months in the case of a District Court, or six months in the case of 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." In my opinion, where there is no diligent prosecution as so defined, and the Court passes an order for the abatement of the action, the *lis pendens* is thereby determined. This is in accordance with the whole scheme of the Code, which has in view the speedy and final determination of all litigation, and accordingly we find that section 403 provides that " when an action abates or is dismissed under the chapter, no fresh action shall be brought on the same cause of action." This latter provision means, and to my mind can only mean, that the *lis* by operation of the order of Court is finally determined. Indeed, I cannot conceive of a better way of putting an end to the action than by providing that no fresh action shall be brought. No doubt the section proceeds to enact, by way of proviso, that if the plaintiff makes application within a reasonable time, and on sufficient ground-

the Court shall set aside the order of abatement or of dismissal, and in that case the *lis* which had died revives. Mr. Jayewardene, for the plaintiff, citing a passage from page 698 of Hukm Chand's book on the law of *res judicata*, contended that on such revival the action must be taken to have been alive all the time for all purposes. The citation is to the effect that " if a suit abates and is revived within a reasonable time there will be no suspension of a *lis pendens*," and refers for its authority to certain American decisions which are not available to me. I do not know the actual rules of procedure prevailing in America on this subject, but certainly neither in the Indian Code of Civil Procedure nor in the English rules is there anything corresponding to section 402 of our Civil Procedure Code, and, as I have already indicated, an order made under that section seems to me to make all the difference. The citation from Hukm Chand proceeds: "Nor is this effect of the former suit as *lis pendens* impaired by the dismissal of a suit with liberty to proceed *de novo*, and by the immediate filing of his suit *de novo* the plaintiff will be considered constant and continuous in his prosecution." From this I cannot gather whether the learned author means that even during the interval the former action is to be taken as pending, but if he does mean it, I should feel it difficult to adopt that position. It is perhaps sufficient to say that in the order for abatement in the present case no liberty was given. But whatever the effect of an order of abatement and the subsequent cancellation of the order may in 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. No decision bearing on this precise point was cited at the argument, but counsel again relied on Hukm Chand, page 699, where a passage is quoted from an American text book. The quotation, however, expressly deals with the case of a purchase before the order of dismissal or abatement, and not of a purchase after the order, and therefore does not help the appellant. But Hukm Chand himself proceeds to discuss the latter case, and says: " The weight of authority appears to be in favour of the view that if the dismissal is with leave to reinstate within a time limited, and the case is reinstated within the time, there should be a *lis pendens*, but if the order of dismissal is silent as to the right to reinstate, the better opinion appears to be that there is no *lis pendens*." As already stated, the order of abatement in this was without any qualification, and the second position, stated in the above extract as the result of the authorities, appears to me to apply. But with regard to this, it is attempted to supply the silence in the order itself by reading into it the proviso in section 408 of the Civil Procedure Code. I do not think that this can be done. In the first place, no special time is limited by that proviso for an application to set aside the order of abatement. In the next

1914.

DE SAMPAYO A.J.

Cooray v. Perera

place, a proviso such as this, which leaves it to the party's own option to apply or not, is not the same thing as an express condition appearing on the face of the Court's order, for in the latter case third parties who wish to enter into any transaction are made aware of the exact situation. I do not think that the law intends to hang up titles to land and prevent all transactions indefinitely until such time as the plaintiff may be pleased to revive his action after it has been ordered to abate in consequence of his own default. In this connection it was suggested that the cancellation of an order of abatement would necessarily imply that the plaintiff was not in actual default, and that the order must be taken to be inoperative as though it had never been made. I cannot assent to this latter proposition. The point of time for consideration is the date of the purchase by the third party, and since at that date the order of Court stood on the record, the third party purchaser is not concerned with the question whether the order was wrong in view of the new facts subsequently put before the Court in support of the application for cancellation.

To uphold the contention on behalf of the plaintiff would be in effect to allow the doctrine of *lis pendens* to create pitfalls for intending purchasers, and I do not think that the law intends such a result. I think I may apply the analogy of a writ of error to section 403 of the Civil Procedure Code, for proceedings on a writ of error as distinguished from an appeal have not the effect of continuing the *lis pendens*, and any alienation in the meantime is not subject to the result of the writ. Another analogy is that of orders opening up judgments for default of personal service of process. With regard to such cases, Hukm Chand, page 699, says that the weight of authority is in favour of the position that judgments and decrees entered upon constructive notice are final and unconditional, and that sales made to *bona fide* purchasers are valid, and he refers to the American case of *Shudder v. Sargent*. Apart from such analogies as these and consideration of principles, I find that at page 698 of Hukm Chand, which is so largely depended on by counsel for the plaintiff, it is expressly stated that it is generally agreed that where the suit is dismissed for want of prosecution and is afterwards reinstated, the doctrine of *lis pendens* is not applicable to one who purchases after the dismissal and before the revival of the suit.

For the reasons above given, I am of opinion that the first defendant's purchase, having been effected before the plaintiff's mortgage action was revived by the cancellation of the order of abatement, is not subject to the ultimate result of the mortgage action. I would order the plaintiff to pay the costs of the argument on this point before the Full Bench.

Appeal dismissed after further argument on the facts.