

1939

*Present : de Kretzer J.*KAMALA *et al.* v. ANDRIS

242—C. R. Kalutara, 13,240.

*Abatement—Application to vacate order—Leave granted to file fresh action—  
Civil Procedure Code, ss. 403 and 839.*

Where an action has abated, a Court has no power to grant leave to institute a fresh action.

Section 839 of the Civil Procedure Code is not intended to authorize a Court to override the express provisions of the Civil Procedure Code.

**A** PPEAL from an order of the Commissioner of Requests, Kalutara.

L. A. Rajapakse (with him H. A. Wijemanne), for second and third defendants, appellants.

U. A. Jayasundere, for plaintiff, respondent.

March 21, 1939. DE KRETZER J.—

Mr. Rajapakse for the appellants raised two preliminary objections, viz., (i.) that the trial Court had no jurisdiction, (ii.) that an order of abatement had been made in a previous case brought by the plaintiff against the same defendant for the same subject-matter and on the same cause of action. P 10 is a copy of the relevant portion of that earlier case.

The second objection had not been taken in the trial Court nor in the petition of appeal but it was open to Mr. Rajapakse to raise the point as the necessary material was before the Court and Mr. Jayasundere, for the respondent took no exception.

In the previous case an order of abatement was entered on June 20, 1934, on July 5, 1934, an application was made to have the order of abatement vacated. The learned Commissioner of Requests ordered that the abatement should stand but he gave the plaintiff leave to file a fresh action.

Section 403 of the Civil Procedure Code enacts that when an action abates no fresh action shall be brought on the same cause of action. This section enacts a statutory bar which no Court can ignore.

Mr. Jayasundere contended however that the Court had power under section 839 of the Civil Procedure Code to grant leave to the plaintiff to file a fresh action.

In the first place the learned Commissioner has not purported to act on this section, for if he had he ought to have stated how the ends of justice would be met or abuse of the process of Court prevented by his order.

It is quite as likely that because in the Court of Requests provision is made for such leave being given when a plaintiff is in default, the Commissioner thought that such leave may be given when there is any default on the part of the plaintiff.

Section 839 was not intended to apply to such a case as this. It was intended to emphasise that the provisions of the Code were not exhaustive and that the Court may have occasion to make other orders of the nature indicated in the section. But it was never intended to override such express provision as had been made, and I find that the corresponding section in the Indian Code has been interpreted as not authorizing a Court to override the express provisions of the law.

Therefore the leave given by the learned Commissioner was irregular and the order of abatement is of full effect and the present action cannot be maintained.

It must therefore be dismissed. But as this objection was not taken in the trial Court there will be no costs of the trial in the Court below and the appellant will only have the costs of the appeal.

In the circumstances it is unnecessary to discuss the question of jurisdiction.

*Appeal dismissed.*