1936 *Present* : **Moseley J. and Fernando A.J.**

SUPPIAH PILLAI *et al. v.* RAMANATHAN *et al.*

157—D. C. Kandy, 44,936.

Action by plaintiffs in representative character—Common interest—Failure to follow directions of Court regarding notice—Civil Procedure Code, s. 16.

Where plaintiffs, representing a number of persons, sued the defendants for the return of money held by the latter for the benefit of the plaintiffs and those whom they represented,—

Held, that the plaintiffs had a common interest in bringing the action within the meaning of section 16 of the Civil Procedure Code.

Where the Court in giving permission to the plaintiffs to sue on behalf of the others directed them to give the required notice under the section in two publications,—

Held, that failure to comply with the order was a fatal irregularity.

APPEAL from a judgment of the District Judge of Kandy.

H. V. Perera (with him *C. E. S. Perera*), for defendant, appellants.

N. E. Weerasooria (with him *E. B. Wikremanayake*), for plaintiff, respondents.

[1] *4 N. L. R. 191.* [2] *2 T. R. 63.*

October 8, 1936. MOSELEY J.—

This is an appeal against a judgment of the District Court of Kandy in favour of the plaintiffs who, representing a number of claimants, sued the defendants for the return of money held by the latter for the benefit of the plaintiffs and those whom they represented.

In the plaint the plaintiff applied for the Court's permission to bring the action for and on behalf of themselves and a number of other Kanakapulles in terms of section 16 of the Civil Procedure Code. The permission was granted on a certain condition as to notice, to which I shall refer later.

The appellants *inter alia* challenge the propriety of the grant of permission to the plaintiffs to sue in a representative capacity on the ground that there is no community of interest.

No local authority in point has been brought to our notice. It is necessary, therefore, to seek elsewhere for guidance.

It should be observed that whereas in section 16 of the Civil Procedure Code the words "common interest" are employed, in the corresponding rule in the English and Indian Procedure, the expression is "same interest". I do not think, however, that the difference in phraseology implies any difference in the procedure to be followed in view of the following words of Lord Macnaghten in the case of *Duke of Bedford v. Ellis*[1].

> "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Now it was laid down in the case of *Jones v. Garcia Del Rio*[2], that where by reason of similar or identical frauds (I do not suggest that there is the slightest evidence of fraud in the present case) a man obtains several sums of money from numerous persons, his fraudulent object being common to them all, they not having any common object as between themselves, a representative action would probably be held not maintainable. But a distinction was drawn in the case of *Beeching v. Lloyd*[3]. In the course of his judgment Kindersley V.C. said :—

> "It appears to me to be a just principle that if an individual induces others to enter into a partnership and induces them by fraud to put money into what purports to be a common stock, it is impossible to say that each of those persons must file a separate bill. In such case there is not only a common object in the persons borrowing but a common object in those lending. Several persons here have been induced by fraud to concur in advancing money for the formation of a joint stock company; and it appears to me that in that state of things a bill may be filed by several of them . . . ."

Now applying that principle to the present case the elements of fraud and inducement being absent, the action, in my view, was properly

[1] *(1901) A. C. p. 1 at p. 8.*
[2] *(1823) T. and Russ. 297.*
[3] *61 Eng. Rep. 2 Drewry 227.*

brought by the plaintiffs on behalf of the class whom they claim to represent. That some subsequent adjustment of the rights of the individuals represented may be necessary appears to be immaterial.

I now come to the condition which the District Court attached to the grant of permission so to sue, viz., that notice should be given to all the contributors by publication in two issues of an English and Tamil newspaper respectively. Only one publication in each class of newspaper was actually made, and the appellants claim that the action must, therefore, fail.

It does not appear how the omission occurred, but the learned District Judge held that—"nothing turns on the omission to give the notice in another issue of the papers. The only persons entitled to complain are the other depositories, and as this action is at their instance and for their benefit, they naturally have not made any such complaint. The defendant is in no way prejudiced by such omission".

I am unable to fall in with this view. The Judge who tried the case was not the one who imposed the condition and there is nothing to show that the former knew what was in the mind of the latter when he made the order.

In *Shiam Lal v. Musammat Lalli*[1], Walsh J. said :—

> " . . . . Negligence to comply with the provisions of Order I., rule 8, is fatal to the granting of a decree to a plaintiff. Permission in terms of the rule is fundamental to representative procedure. The Court has no jurisdiction to ignore or to break its own rules or to grant the decree in the face of a breach of law . . . . "

The Court in this case referred to the failure of the original Court to issue notice as required by the rule, and where, as in this case, the Court in giving permission thought it necessary to have two publications of the notice an omission to comply with this order is, in my opinion, quite as fatal to the representative character of the action as the failure to publish the notice required by the section.

For these reasons I think this case must go back to the District Court in order that this condition may be complied with.

There is another point. Originally the plaint was filed against one defendant, who by his answer, claimed that that he was only one partner in a firm. The other partner was, therefore, added as a defendant. The plaint, however, was not amended in such a way as to claim any relief as against the added defendant, or to bring the added defendant specifically within the scope of the claim. Furthermore, the learned Judge, at the framing of the issues, refused to hear Counsel for the added defendant or to frame any issue suggested by him. Notwithstanding this it was held that the added defendant was represented by his attorney, the defendant, and was bound by the judgment.

In my view, the plaint should have been amended if the plaintiff desired to obtain a decree binding on the added defendant and the added defendant should have been heard at the trial.

[1] *(1922) 44 Allah. 231 at p. 237.*

I would, therefore, set aside the decree of the District Court and send the case back for the publication afresh of the notice in two issues of each of the two newspapers named by the District Judge in his order of February 28, 1934. The defendant will be given an opportunity to amend his answer and the added defendant may file an answer, if he so desires, and the case will proceed to trial *de novo*.

The respondents will pay to the appellants their costs of this appeal. The costs of the proceedings in the District Court will be costs in the cause.

FERNANDO A.J.—I agree.

Appeal allowed.