1936 *Present*: **Abrahams C.J.**

SILVA *v.* LOW-COUNTRY PRODUCTS ASSOCIATION.

55—*C. R. Colombo, 20,041.*

Action against unincorporated association—Application to serve summons on Secretary as representative—Date of action—Prescription—Civil Procedure Code, s. 16.

Where an action was instituted against an unincorporated association on March 15, 1936, and the plaintiff moved on May 20, 1936, to serve summons on the Secretary of the Association on behalf of the members and to give notice of action to all parties by advertisement in a public newspaper.

Held, the action may be deemed to have been instituted on May 20, 1936.

APPEAL from an order of the Commissioner of Requests, Colombo.

Colvin R. de Silva, for plaintiff, appellant.

No appearance for defendant, respondent.

Cur. adv. vult.

August 5, 1936. ABRAHAMS C.J.—

This is an appeal against the judgment of the Commissioner of Requests who dismissed the action of the plaintiff on the ground that it was prescribed. The respondent is not represented.

These are the facts. The plaintiff-appellant who was carrying on business under the name of "Luxman Press" supplied goods to the Low-Country Products Association which is a body composed of a number of persons. It is unincorporated. Under the impression that the Association was a body corporate, the plaintiff-appellant filed a plaint in which he described the defendant as a duly incorporated Company having its registered office at No. 54, Keyzer street, Colombo. The plaint was filed on March 13, 1936. On April 7, the Commissioner of Requests noted in the journal that summons was served by delivery to Mr. Wace de Niese, who is presumably the Secretary of the Association, and the note goes on, "The Low-Country Products Association is not a legal person. It consists of several members. The plaintiff should make application under section 16, C. P. C., to have one or more person or persons appointed to represent the Association." The facts are correctly stated and the direction of the Judge was a proper one in view of the section above quoted, which reads as follows:—

> "16. Where there are numerous parties having a common interest in bringing or defending an action, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend in such an action on behalf of all parties so interested. But the Court shall in such case give, at the expense of the party applying so to sue or defend, notice of the institution of the action to all such parties, either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable), then by public advertisement, as the Court in each case may direct."

On May 20, 1936, the journal states that the plaintiff's proctor moved to serve summons on the Secretary of the Association as and on behalf of the several members of the said Association. He also moved that he be allowed to give notice of this action to all such parties by advertising in the "Ceylon Independent". The Commissioner of Requests directed that the usual notice should be inserted in the "Ceylon Independent", returnable on June 8. On July 2 the journal entry states that the proctor for the plaintiff moved to issue the usual notice in the Ceylon Independent and this was allowed for July 20. It is not stated in the journal that the directions given on May 20 were complied with, and on June 8 there is an entry, "Call case, No appearance. No order". This is something which I am unable to understand.

Presumably in compliance with the directions of July 2 a notice was issued on the 10th of that month to the effect that in the case of *Baniel Silva v. Wace de Niese*, the proposed representative of the Low-Country Products Association, Baniel Silva had applied to the Court of Requests to appoint the above-named Wace de Niese as representative of the said Low-Country Products Association, in an action for the recovery of Rs. 123.38, and that the application would be granted unless sufficient cause is shown to the contrary on or before July 20, 1936. On July 20

the case was called and summons was ordered for September 9. Summons was served on Mr. Wace de Niese on September 9. The case was finally tried on December 1. At the trial the following were the issues :—

(1) Is the action properly constituted ?
(2) If not, can the plaintiff maintain this action ?
(3) Is the plaintiff's claim, if any, prescribed as when Mr. Wace de Niese was appointed on July 20 ?

The advocate for the plaintiff admitted that if the action was not considered to be filed until July 20, then the claim must be prescribed.

The learned Commissioner of Requests said the plea of prescription must prevail. The action must be taken to have been brought against the Association properly constituted on July 20 when Mr. Wace de Niese was appointed the representative of the Association and made a defendant, and that until such date the action was not properly constituted and therefore could not be said to have been filed against the defendant. He dismissed the action with costs. Leave to appeal was granted.

It is now argued on behalf of the appellant that this judgment was wrong because the real test is when was the action instituted, as section 16 of the Civil Procedure Code required that notice of the institution of the action must be given, not notice of the intended institution of the action. Now there is ample authority that an action must be deemed to have been instituted on the date that the plaint is handed in. See for instance *Mango Nona v. Menis Appu*[1]. "On May 20, as I have said, it was moved on behalf of the plaintiff that summons should be served on the Secretary of the Association, and the usual notice to interested parties was directed to be issued by the Court. Now at that point the proper course for the plaintiff would have been to get the plaint amended, but it must not be pressed against him that he did not comply with this technicality. In the Court of Requests one must consider the intention of the parties, and it is obvious that at that stage the plaintiff's proctor was intending to comply with section 16 and I think he must be taken to have done so, and the plaintiff ought to be regarded as being in the same position as he would have been if the plaint had been amended and if the action had been styled as being instituted against Mr. Wace de Niese as the proposed representative of the Low-Country Products Association.

I am of the opinion that an action can be said to be properly instituted against one member of an incorporated body in a representative capacity if the plaint is so drawn and filed, and it only remains to get the permission of the Court to sue him, that is to say, to proceed with the action against him. If that view is not correct, unfortunate consequences might follow for which a plaintiff could in no way be held responsible. There is no statutory obligation on the Court to issue notice of the institution of the action within any given period. There is certainly no statutory obligation on the newspapers to which the notice is sent to publish it within any given period, and, finally, there is no statutory obligation on the part of the Court to order that cause should be shown within any given period against the application to be allowed to sue. It is manifest that through delay in the stages contemplated above, time might run fatally against a plaintiff. No authority in our Courts has

[1] *31 N. L. R. 218.*

been cited to me in aid of the proposition that an action has been instituted against a person in a representative capacity within the meaning of section 16 of the Civil Procedure Code when the plaint is filed against him and not when permission is given to sue him. I have been unable to discover for myself any such local authority. However, the case of *Fernandez v. Rodrigues* [1], decided upon section 30 of the Indian Civil Procedure Code of 1882, the wording of which is the same as section 16 of the Ceylon Civil Procedure Code, is directly in point. In that case a Full Bench of the Bombay High Court decided that the permission of the Court required by that section may be given subsequently to filing the suit.

It follows then that the action in this case was instituted at the latest on May 20, 1936. Counsel for the appellant draws my attention to the case of *Velupillai v. The Chairman, Urban District Council, Jaffna* [2], and submits that on the strength of that case the action was really properly instituted on March 13, the date when the plaint was filed because although the defendant was said to be the Low-Country Products Association, an incorporated company, it was the intention of the plaintiff to sue the Association whether it was a legal person or a body of individuals, and the constructive amendment of the plaint on May 20 related back to the date of the original plaint—see *Lucihamy v. Hamidu* [3].

In view of what I have said above, that is to say, that the action could be taken to have been instituted on May 20 which is sufficient for the plaintiff's purpose, it is not necessary for me to decide whether this submission is founded on a correct inference or on a mere conjecture.

The appeal is allowed with costs and the case is remitted to the Court of Requests to be disposed of on its merits.

Appeal allowed.