

**FELIX PREMAWARDANE  
VS  
BASNAYAKE AND OTHERS**

COURT OF APPEAL.  
SOMAWANSA, J(P/CA).  
WIMALACHANDRA, J.  
CALA 50/2004 (LG).  
MAY 3, 2005.

*Civil Procedure Code, section 16 - Court making order to comply with section 16- Not complied with - Injunction refused - Application made again after a long period - Court refusing such application - Validity?*

Plaintiff–petitioner obtained an enjoining order but was asked to comply with section 16. As the plaintiff–petitioner had not complied with section 16-interim injunction was refused.

The defendant–respondent filed answer and the plaintiff - petitioner on 23.01.2004 sought permission to comply with the earlier order made to comply with section 16 on 25.10.2001

The Trial Judge refused the said application on the ground of delay.

**HELD:**

1. When Court granted permission for such publication on - 25.10.2001 the Court did not specify a particular date by which such publication was to be made.
2. Justice demands that such an application should be allowed. specifically so when the application is for to carry out a step for which the court had already granted permission.
3. As the trial had not commenced in the interests of justice, it would be most appropriate if the court had allowed the plaintiff-petitioner's application to comply with section 16.

**APPLICATION** for leave to appeal with leave being granted.

**Cases referred to :**

1. *Ranasinghe vs. Nandasena Abeydeera* 1997 Sri LR 41
2. *Suppiahpillai vs. Ramanathan* 39 NLR 30.

*Lucky Wickremanayake with Mohamed Adamelly for the petitioner.*

*Thilan Liyanage with Hessian Manikhewa for 1st, 4th, 5th, 7th, 8th, 10th, 12th, and 13th respondents.*

*Cur. adv. vult.*

June 3, 2005.

**ANDREW SOMAWANSA, J. (P/CA).**

This is an application for leave to appeal against the order of the learned District Judge of Colombo dated 23.01.2004 marked X6(a) wherein the learned District Judge refused permission to publish notice of the instant action by newspaper advertisement and or to comply with the Court's own previous order dated 25.10.2001.

This Court having heard both parties has made order granting leave on the question whether the learned District Judge should have considered the powers vested in court to grant permission to the plaintiff - petitioner to

comply with section 16 of the Civil Procedure Code notwithstanding his failure to act on the directions given by Court to publish the notice in terms of section 16 of the Civil Procedure Code. Thereafter both parties have agreed to resolve the matter by way of written submissions and both parties have tendered their submissions.

The relevant facts are, on an application of the counsel for the plaintiff - petitioner Court made order as follows :

- (a) granting permission to the plaintiff - petitioner to notice the other members of the Nugegoda Baptist church by way of newspaper advertisement in terms of section 16 of the Civil Procedure Code.
- (b) granting an enjoining order as prayed for and ;
- (c) to issue notice of injunction and summons on the defendants - appellants.

The defendants - respondents filed objections to the issue of an interim injunction and the extension of the enjoining order and at the inquiry both parties agreed to tender written submission. The Learned District Judge by his order dated 18.10.2002 refused to grant an interim injunction primarily on the basis that the plaintiff - petitioner has failed to publish notice in terms of section 16 of the Civil Procedure Code. The plaintiff - petitioner preferred an application for leave to appeal to this Court which was numbered CALA 439/02 wherein the substantial question of law that was to be decided was whether the plaintiff - petitioner's failure to publish notice of the action in the newspapers as permitted by court on 25.10.2001 was fatal to the grant of interim relief. This matter was inquired into and this Court by its order dated 10.12.2003 refused leave to appeal. However Court took the view that the Plaintiff - petitioner is entitled to make an application to the District Court for leave to comply with the order of Court dated 25.10.2001 and also that it is for the learned District Judge to consider that application after hearing both parties. The aforesaid order is marked X3.

In the meantime the defendants - respondents had filed their answers on 10.12.2003 and consequently to the aforesaid order made by this Court marked X3, the plaintiff - petitioner preferred a motion to the District Court

seeking permission of Court to comply with the Court's order dated 25.10.2001 permitting the publication of notice of the action in the newspapers. The said application was supported on 23.01.2004. The defendants-respondents objected to the aforesaid application of the plaintiff - petitioner and at the inquiry counsel appearing for the respective parties made oral submission. At the conclusion of the inquiry the learned District Judge made order refusing the application of the plaintiff - petitioner. It is from the aforesaid order that the plaintiff - petitioner has preferred this leave to appeal application. Leave to appeal was granted by this Court on 30.09.2004 on the questions of law formulated by this Court as aforesaid.

It is to be observed that the order of the learned District Judge was based on the ground that :

The plaintiff - petitioner made an application and had been given permission to take steps to comply with section 16 of the Civil Procedure Code on 25.10.2001 and that up to 23.01.2004 the plaintiff - petitioner has failed to take steps in terms of section 16 of the Civil Procedure Code. Accordingly the learned District Judge following the decision in *Ranasinghe vs. Nandanie Abeydeera*<sup>(1)</sup> wherein this Court held that it is imperative to issue notice as contemplated by section 16 of the Civil Procedure Code had rejected the aforesaid application. The said judgment delivered by another division of this Court followed the decision in *Suppaiahpillai vs. Ramanathan*<sup>(2)</sup> wherein the head note reads :

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."

My considered view is that none of the aforesaid decisions would apply to the facts of this case for unlike in those two cases the plaintiff - petitioner in paragraph 4 of his plaint specifically averred that :

“The defendants are made parties hereto in reference to the acts hereinafter morefully described, committed by them in the capacity of Committee Members and as representing the membership of the Nugegoda Baptist Church, it being impractical and inexpedient to cite the entire membership of the said Church as party defendants hereto”.

These facts were brought to the notice of Court and an application was made and the Court granted permission to notice the other members of the Nugegoda Baptist Church by way of newspaper advertisement in terms of section 16 of the Civil Procedure Code. It is to be noted that when Court granted permission for such publication the Court did not specify a particular date by which such publication was to be made. On the material placed before us it appears that trial had not commenced at the time the plaintiffs petitioner moved Court to obtain permission to comply with section 16 of the Civil Procedure Code in terms of permission granted by Court on 25.10.2001.

On an examination of the facts and circumstances of this case, I am unable to agree with the order of the learned District Judge in refusing the application made by the plaintiff - petitioner to comply with the provisions contained in section 16 of the Civil Procedure Code before the trial commenced. If the trial commenced without such notice then certainly the failure on the part of the plaintiff - petitioner to comply with the provisions of Section 16 would be a fatal irregularity. However as in the instant case where an application is made to Court seeking permission as per the order made by this Court to comply with the provisions contained in section 16 of the Civil Procedure Code justice demands that such an application should be allowed, specifically so when the application is for to carry out a step for which the Court had already granted permission.

In the interests of justice, it would be most appropriate if the learned District Judge had allowed the plaintiff - petitioner to comply with section 16 of the Civil Procedure Code as the trial had not commenced and no

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prejudice would be caused to any party in allowing this application to comply with the provisions contained in section 16 of the Civil Procedure Code.

For the foregoing reasons and in the interests of justice, I would answer the questions of law formulated by Court in the affirmative. Accordingly I would set aside the order of the learned District judge dated 23.01.2002 and direct the learned District Judge to grant the plaintiff - petitioner permission to comply with the requirement in section 16 of the Civil Procedure Code and thereafter proceed to hear and determine the action. The defendants - respondents will pay a sum of Rs. 5000 as costs of this application to the plaintiff - petitioner.

**WIMALACHANDRA, J.** – *I agree.*

*Appeal allowed.*

*Trial judge directed to grant permission to the plaintiff petitioner to comply with section 16 ; thereafter to hear and determine the action.*

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