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**RANJITH DE SILVA**  
**VS**  
**DAYANANDA AND OTHERS**

COURT OF APPEAL  
WIMALACHANDRA, J.  
CALA 331/2003 (L G)  
DC BALAPITIYA NO. 1794/SPL.  
FEBRUARY 17TH, 2005

*Civil Procedure Code, section 16 — Non compliance — Is it fatal? — Failure of plaintiff to take steps initially — Court ordering plaintiff to publish a notice of the institution of the action — Nunc pro tunc — Actus curiae neminem gravabit — Permissibility*

The plaintiff respondents instituted action seeking to invalidate the special general meeting of the CNAPT (Ambalagoda Branch) held on 28.01.1995 and to invalidate all decisions taken at the said meeting. In the course of the proceedings the 2nd to 7th defendants made an application to be added as defendants and moved court that a notice of the institution of the action be published under section 16. In the plaint the plaintiff has made only the Secretary of CNAPT as the defendant.

The trial judge made order to add the said defendants and permitted the plaintiff to publish a notice of the institution of the action to all parties concerned in the newspaper under section 16.

The 1A defendant-petitioner contends that non compliance with section 16 is a fatal irregularity, and that there was no averment in the prayer of the plaint seeking permission of court to take steps under section 16.

**HELD:**

- (1) The purpose of giving notice under section 16 by publishing newspaper advertisements is to give notice to those who are represented as having a common interest.
- (2) In the instant case the trial judge upheld the rule of tunc pro tunc permitting the plaintiff to take steps to publish the required notice in terms of section 16. This rule is based on the "maxim-actus curiae neminem gravabit.
- (3) the trial judge was convinced that the interests of justice would be served by the correct procedure being followed and averting a fatal irregularity which would have resulted, had the case proceeded to trial without complying with the provisions of section 16.

- (4) One of the conditions necessary to bring an action under section 16 is to obtain permission of court, even in the absence of a formal order granting permission, direction to publish notice is sufficient to infer permission being granted.

**Cases referred to :**

1. *Ranasinghe vs Abeydeera* (1997) 3 Sri LR 401 (distinguished)
2. *Caroline Soysa vs Lady Ratwatte* 45 NLR 553
- C. *J. Ladduwahetty* for substituted 1A defendant-petitioner.
- D. *M. G. Dissanayake* for plaintiff respondents.

*Cur.adv.vult*

October 12, 2005

**WIMALACHANDRA, J.**

The substituted 1A defendant-petitioner (1A defendant) filed this application for leave to appeal from the order of the learned District Judge of Balapitiya dated 26.08.2003. Leave to appeal was granted on 23.07.2004.

Briefly, the facts as set out in the petition are as follows :

The plaintiff-respondents (plaintiffs) instituted action in the District Court of Balapitiya seeking *inter alia* a declaration to invalidate the Special General Meeting of the Ceylon National Association for the Prevention of Tuberculosis-Ambalangoda Branch (CNAPT – Ambalangoda Branch) held on 28.01.1995 and to invalidate all decisions taken at the said meeting. In his plaint, the plaintiff named only the Secretary of the said Association as the defendant (who is now deceased and the 1A defendant has been substituted in the place of the deceased Secretary) In the course of the proceedings, the 2nd to 7th defendants made an application to be added as defendants and also moved court that a notice of the institution of the action be published in the newspapers under section 16 of the Civil Procedure Code for the benefit of all persons so interested. The learned District Judge made order adding them as the 2nd to 7th defendants and also held in the same order that the plaintiff who had failed to make an application for the permission of the court to publish a notice of the institution of the action to all parties concerned could now do so by publishing a public advertisement in the newspapers. The learned judge made this order based on the rule of *nunc pro tunc*. It is against this order this application for leave to appeal has been filed.

It is the position of the 1A defendant that non compliance with the provisions of section 16 of the Civil Procedure Code by the plaintiff is a fatal irregularity. The learned counsel for the petitioner contended, in his

written submissions, that the learned Judge had erred, by observing that the plaintiff had failed to take steps under section 16 of the Civil Procedure Code and then holding that the plaintiff can now publish a notice of the institution of the action in the newspapers by applying the rule of *nunc pro tunc* and ordering the plaintiff to so publish.

The learned counsel for the 1A defendant submitted that the learned District Judge had failed to consider that the plaintiff had not even prayed for an order seeking the permission of Court to take steps under section 16 of the Civil Procedure Code.

The learned counsel strongly urged that as decided by Weerasekera, J. in the case of *Ranasinghe vs. Abeydeera*<sup>(1)</sup> it is imperative for the plaintiff to have issued notice as contemplated by section 16 of the Civil Procedure Code and that the failure to comply with section 16 is a fatal irregularity and hence the District Judge had acted in excess of jurisdiction in ordering the plaintiffs to take steps under section 16 of the Civil Procedure Code when there is no averment or application in the prayer of the plaint seeking the permission of Court to take steps under such section.

The facts in the case of *Ranasinghe vs. Abeydeera* (*Supra*) are different from the facts in the present case before us. Unlike the case before us that case had proceeded to trial and judgment and the decree had been entered. The defendants appealed against the judgment and in the appeal took up the position that the plaintiff being an unincorporated body, section 16 of the Civil Procedure Code applies and that there had been non compliance with section 16 of the Civil Procedure Code. The Court of Appeal held that parties seeking to sue an unincorporated body should get permission of Court in terms of section 16 and the Appeal Court directed that the case to be heard *de novo* after application has been made afresh in terms of section 16 of the Civil Procedure Code.

In the case of *Caroline Soysa vs. Lady Ratwatte*<sup>(2)</sup> it was held *inter alia* that where permission is given by Court under section 16 of the Civil Procedure Code to a party to sue on behalf of a person having a common interest in bringing the action, the section imposes on the Court, after giving such permission, the duty of giving notice of the institution of the action to all persons on behalf of whom the action is brought.

In the circumstances, it is the Court that has to order the plaintiff to give required notice and also in what manner it should be published in the news papers. Accordingly, the complaint of the appellant that the plaintiff has failed to effect the publication has no merit. It is only after the Court directed the plaintiff to give required notice in newspapers and thereafter if the plaintiff fails to do so, it is only then the failure to comply with such an order amounts to a fatal irregularity.

In the instant case under consideration, the trial has not commenced and the case is still at the stage of pleadings. In the meantime, several intervenients have sought to be added as parties to the action under section 16 of the Civil Procedure Code and also made an application seeking an order from Court to permit the plaintiff to give required notice under section 16 by public advertisement. The learned District Judge after an inquiry into the application made by the intervenient-petitioners made order on 22.04.1999 adding them as added defendants and also made order permitting the plaintiff to comply with section 16 of the Civil Procedure Code by publishing a notice in the newspaper. The learned Judge would have been convinced that the interests of justice would be served by the correct procedure being followed and averting a fatal irregularity which would have resulted had the case proceeded to trial without complying with the provisions of section 16 of the Civil Procedure Code. It is only after the Court had directed the plaintiff to give required notice under section 16 of the Civil Procedure Code by publishing newspaper advertisements and the plaintiff fails to comply with such an order, then at that instance it amounts to a fatal irregularity.

The purpose of giving notice under section 16 of the Civil Procedure Code by publishing newspaper advertisements is to give notice to those who are represented as having common interest. In the instant case the learned Judge applied the rule of *nunc pro tunc* permitting the plaintiff to take steps to publish the required notice in terms of section 16 of the Civil Procedure Code. The rule *nunc pro tunc* is based on the maxim *actus curiae neminem gravabit*. That is an "act of the Court shall prejudice no man" Broom's Legal Maxims 10th edition at page 73 states thus :

**"This maxim is founded upon justice and good sense ;  
and affords a safe and certain guide for the administration of the law."**

One of the conditions necessary to bring an action under section 16 of the Civil Procedure Code is to obtain permission of Court. Even in the absence of a formal order granting permission, direction to publish notice is sufficient to infer permission being granted.

It appears to me that the procedure adopted by the learned Judge is appropriate as the averments in the plaint disclose sufficient material to grant permission of Court to bring an action under section 16 of the Civil Procedure Code and that the interest of justice would be served by the correct procedure being followed at the initial stages before proceeding to the trial stage.

For these reasons I do not propose to interfere with the order of the learned District Judge of Balapitiya dated 26.08.2003. The appeal is dismissed with costs fixed at Rs. 5000.

*Appeal dismissed.*