1944 *Present:* **Howard C.J. and de Kretser J.**

CAROLINE SOYSA *et al.*, Appellants, *and* LADY RATWATTE *et al.* Respondents.

80—D. C. (Inty.) Kandy, 457.

Action—Right to sue in a representative capacity—Persons having a common interest—Permission to sue granted—Notice to show cause—Proceedings irregular—Proper application of section—Civil Procedure Code s. 16.

Where permission is given by Court under section 16 of the Civil Procedure Code to a party to sue on behalf of persons having a common interest in bringing the action, the section imposés on the Court, after granting such permission, the duty of giving notice of the institution of the action to all persons on behalf of whom the action is brought.

Where the Court, after giving permission to sue, proceeded to direct notice of the application to sue to be given in the newspapers inviting persons interested to show cause against the application,

Held, that the notice was misconceived and that the proceedings were irregular. On an application for leave to sue under section 16 such objectors are not entitled to be heard.

Where the applicants for permission to sue on behalf of an Association claimed the right to represent a section of the members, who held certain views with regard to its management at the time of the institution of the proceedings, it is not a valid objection to the application that the whole body on whose behalf the proceedings are taken is not of the same opinion.

THE appellants applied to the District Court of Kandy for permission to sue one H. L. Ratwatte on behalf of certain members of an Association called the Sadachara Bauddha Kulangana Samithiya in order to terminate the said Ratwatte's management of a school established by the Association. The appellants also asked the Court to direct notice of the said application to be given to members by publication in a newspaper. The application was supported by an affidavit in which the appellants stated that they and a certain number of the members of the Association had the same interest in the action while certain others had acted in a way inconsistent with the duty they owed to the Association.

As a result of the notice the intervenients filed objections and the learned District Judge after hearing the objections dismissed the application. The learned Judge held that if the applicants are to be deemed members of the Association the intervenients are equally entitled to rights of membership. He further held that an application for a representation order cannot be entertained on behalf of one section of the Association.

H. V. Perera, K.C. (with him *N. Nadarajah, K.C.*, and *H. W. Thambiah*), for the petitioner, appellants.—This is an appeal from an order made under section 16 of the Civil Procedure Code. Section 16 contemplates a summary application by persons who desire to sue on behalf of all persons interested in bringing or defending the action. The scope and nature of

an inquiry under section 16 has been misunderstood by the District Judge It is clear that two or three persons of an Association cannot prevent an action being brought by the others against a wrongdoer. The only question before the District Judge was whether the petitioners could bring the action on behalf of the 77 members surviving out of the original 118 members of the Association. The only point for his consideration was whether there were numerous parties having a common interest. The issues framed by the District Judge were unnecessary at that stage. A dissenting minority, or even a dissenting majority, cannot wreck an action—*Wilson v. Church*[1]; *Fraser v. Cooper, Hall & Co.*[2]. See also the remarks of Lord Lindley in *The Taff Vale Railway Co. v. The Amalgamated Society of Railway Servants*[3], and *The Duke of Bedford v. Ellis*[4].

M. T. de S. Amerasekere, K.C. (with him *H. W. Jayawardene*), for the 1st to 9th intervenients, respondents.—The authorities cited for the appellants are not applicable to the facts and circumstances of this case.

Section 16 of our Civil Procedure Code differs from the Indian and English rules. Permission to sue can only be given if the parties have a common interest. It is competent for the judge to examine whether they have a community of interest—*Re Gregory*[5]. The Court is not precluded from considering whether the party applying could be allowed to sue in a representative capacity. In India institution of an action takes place before application to sue in a representative capacity—*Order I, rule 8; 2 Chitaley 1271.* There must be a " suit ", in an action instituted, before an application for a representative order can be made—*Bhicoobai v. Hariba Raghuji*[6]; *Sayad Anwar v. Mohideen Shamsudeen*[7]. The judge must exercise his judicial discretion as to whether there is a community of interest. In Ceylon permission is necessary before the bringing of action. In India, generally, permission is asked for after bringing of action—*(1918) I. L. R. 42 Bombay 556.* The Court has a right to ask how the common interest arose. The question is at what stage this has to be decided. If it is conceded that the Court can admit evidence of persons submitting affidavits, then this evidence is sufficient to establish that there is no such Association as is alleged by the petitioners *(1939) A. I. R.. Rangoon at p. 21.*

E. B. Wikremanayake (with him *E. A. G. de Silva*), for the 20th to 23rd intervenients, respondents.

H. V. Perera, K. C., replied.

Cur. adv. vult.

October 26, 1944. HOWARD C.J.—

This appeal raises an interesting question of law in regard to the powers of the Court on an application being made to bring a represntative action under section 16 of the Civil Procedure Code (Cap. 86). This section is worded as follows:—

" Where there are numerous parties having a common interest in bringing or defending an action, one or more of such parties may, with

[1] *(1878) 9 Ch D. 552.*
[2] *(1882) 21 Ch D. 718.*
[3] *(1901) A. C. 426 at p. 442.*
[4] *(1901) A. C. 1.*
[5] *(1943) 1 A. C. R. 293.*
[6] *(1917) A. I. R. Bombay 141 at p. 148*
[7] *(1932) A. I. R. Bombay 65.*

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 December 23, 1941, the appellants applied to the District Court of Kandy under this section for permission to sue one H. L. Ratwatte on behalf of the members of a certain Association known as the Sadachara Bauddha Kulangana Samithiya, Kandy. The appellants also asked the Court to direct notice of the said application to be given to the members by publication in the Newspaper "Ceylon Daily News". The application of the appellants was supported by an affidavit and a draft plaint. In these documents the appellants stated as follows:—

(1) That they are members of and contributors to an Association called the Sadachara Bauddha Kulangana Samithiya, Kandy, founded in 1924, with the object of establishing a Buddhist Girls' School at Kandy.

(2) That at the end of the year 1931 the number of members of the Association was 118, but since 1940 certain members of the Association set out in the list "B" had acted in a way inconsistent with the duty owed to the Association.

(3) That the present membership of the Association consists of 77 members set out in list "A" and the appellants and the members whose names are specified in this list have the same interest in respect of the said school.

(4) That the Association about November, 1931, established a Buddhist school for girls known as Mahamaya College on premises purchased by the Association.

(5) That about December, 1931, the Association appointed Adigar J. C. Ratwatte as Manager of the school. About November 1, 1932, one W. A. B. Soysa assumed the management of the school at the request of Adigar Ratwatte and managed it until April, 1938, when it was handed over by W. A. B. Soysa to one H. L. Ratwatte.

(6) That about April 7, 1940, the Association terminated the management of H. L. Ratwatte and requested him to hand over the school to the Association. The said H. L. Ratwatte failed to hand over the school to the Association or to give over the management to the person nominated by the latter and since April, 1940, wrongfully holds himself out as Manager and, though called upon to do so, fails to render an account of the management of the school showing sums received by him from April, 1938, to April 15, 1940.

(7) That it has become necessary to institute an action against the said H. L. Ratwatte to obtain a declaration—

(*a*) that he ceased to have the right of managing the said school on behalf of the said Association since the April 15, 1940;

(*b*) that the said H. L. Ratwatte had no right to represent himself as Manager of the said school; and

(*c*) that the said H. L. Ratwatte is liable to render an account of all sums received by him as Manager of the said school;

(*d*) that in view of the facts set out in the affidavit the appellants asked for leave to sue on behalf of the said members of the Association.

The application with affidavit and draft plaint was filed by a Proctor appearing on behalf of the appellants, who moved in accordance with such application. The order made by the Additional Judge was " Allowed. Publication on 21/1/42 ". Proof of publication was given on February 11, 1942. As the result of the publication in the " Daily News ", objections were filed on February 25, 1942, by a Proctor Mr. Vanderwall appearing on behalf of certain persons. On April 6, 1942, Mr. Vanderwall asked the Court, under section 102 of the Civil Procedure Code, to make an order for discovery of all documents. On May 27, 1942, the District Judge ordered the appellants to declare by affidavit documents in their possession or power they rely on in support of their allegation that they are members of the Association. On August 24, 1942, further proceedings took place before the District Judge who decided that the following " points seemed to require adjudication ":—

(1) Whether the petitioners were members of the Society at the date of the filing of the petition ?
(2) Whether the respondents numbered 4, 5, 7, 9, 10, 12, 13, 15 and 16 were themselves members of the Society ?
(3) Did the Society cease to exist in or about 1932 since the establishment of the Mahamaya College ?
(4) Was the said Society revived in or about March, 1940 ?
(5) Are the petitioners members of the revived Sadachara Bauddha Kulangana Samithiya ?
(6) Does the Mahamaya College constitute a *de facto* charitable trust ?
(7) If so, should any action relating to the said College or to its management be instituted under section 101 of the Trusts Ordinance ?
(8) In view of the provisions of the Education Ordinance, No. 31 of 1939, has this Court jurisdiction to entertain the application ?

With regard to these points Mr. Nadarajah, on behalf of the appellants contended the points for determination as issues (3) and (4) are based upon facts which are not only not pleaded, but are at variance with the averments in the statemeent of objections. He had, however, no objection to the question being framed as to whether the Society had ceased to function and not that it had ceased to exist. Mr. Nadarajah also stated that questions (6), (7) and (8) did not arise on the application. Evidence was then called both on behalf of the appellants and the intervenients who had filed objections. The hearing was adjourned on numerous occasions for further evidence to be called and legal argument to be adduced. On March 12, 1943, the learned District Judge gave judgment answering the points as follows:—(1) No. (2) No. (3) Yes. (4) No. (5) No. (6) Yes. (7) Does not arise. (8) Yes. Having regard

to his decisions on these points he dismissed the appellants' application with costs. In the course of his judgment the learned Judge held that the question whether the appellants and the others mentioned in list "A" or whether the intervenients constitute 'the members of the Association is one which does not fall within the ambit of section 16 of the Code and is moreover one that cannot be adjudicated upon in these proceedings. He further held that the first objection taken by the intervenients was sound and that before the appellants can be given permission to sue, their assertion that they are members of the Association must be established to the satisfaction of the Court. The learned Judge then examined at considerable length the history of the Association and the proceedings of various meetings during the relevant years and held that no valid meeting of the Association as such had been held since January, 1932. It was therefore idle for one set of persons to deny membership to any other set or any other person who was a member in December, 1931. The results of this holding was that if the appellants as well as those whose names appeared in list "A" are to be deemed to be members, those on list "B" were equally entitled to rights of membership. Applying the principle laid down in the case of *Hadji Saheed Hameed Lebbe v. Mohamed Caderpillai Marakayar & others*[1] he held that it was manifest that the application for a representation order on behalf of those in list "A" is one on behalf of one section of the body and is one that cannot be entertained, for a second suit will lie and can lie at the instance of those named in list "B".

The learned Judge also held that a further objection to the granting of the application was the fact that there were 118 members of the Association and the names enumerated in lists "A" and "B" were not exhaustive inasmuch as they left 18 members unaccounted for. These persons might have the same interest as the appellants or they might hold views opposed to those of the appellants. In order to bind them the application must be made on their behalf.

In my opinion the inquiry undertaken by the learned Judge was misconceived. In fact there seems to have been general misconception on the part of all concerned as to the ambit and purpose of section 16 of the Civil Procedure Code. On December 23, 1941, the Court was moved by Mr. H. A. C. Wickremeratne to give permission to sue on behalf of the Association. The second part of the motion, that is to say—(*b*), was for the Court to direct notice of the application to be given in the "Daily News." (*b*) was not in order inasmuch as the last part of section 16 merely imposes on the Court after granting permission to sue the duty of giving notice of the institution of the action to all parties on whose behalf the action is being brought. The learned Judge allowed this motion, that is to say, he gave permission to sue, and then proceeded to direct notice of the said application to be given to the said members by publication in the Newspaper "Ceylon Daily News." In view of the fact that permission to sue had been allowed on December 23, 1941, this notice was not in order inasmuch as it gave notice of the application and not as laid down in section 16 of "the institution of the action."

Although the application had been granted and permission to sue had

[1] *A. I. R. 1925 Madras 985.*

been given on December 23, 1941, the notice in the "Daily News" invited persons interested to show cause against the application on February 11, 1942. In my opinion all proceedings held after December 23, 1941, to hear objections to the application were *ultra vires*. On an application under section 16 for leave to sue such objectors were not entitled to be heard and had no status so far as the application was concerned.

Although the proceedings were *ultra vires*, it is relevant to consider whether, on the assumption that an application under section 16 was properly before him, the learned Judge's treatment of such application was in accordance with the law, and in refusing permission to the appellants to sue in a representative capacity he adopted proper legal principles. Section 16 of the Civil Procedure Code agrees almost word for word with Rule 8 of Order 1 of the Indian Civil Procedure Code. In *Bhicoobai v. Hariba Raghuji*[1], it was held that the Court should exercise a judicial discretion in granting permission to a person to sue in a representative capacity under the rule. In the second edition of Chitaley's Code of Civil Procedure, Vol. 2, pp. 1085—86, it is stated that the conditions for the applicability of the rule are—

"(1) The parties must be numerous; and
(2) They must have the same interest in the suit."

With regard to (1) the rule does not fix any particular number. I do not consider that it could be urged in this case that the persons alleged to have the same interest in the action, that is to say 77, were not numerous. With regard to (2) the appellants in the affidavit and in the plaint claimed to represent the interest not of the persons who originally formed the Association, but of a certain section of such persons whom, so they claimed, had the right to represent the Association at the time of the institution of proceedings. The true principle underlying the rule is that the suit, in form, be constituted into a representative one in order to prevent the defendant from being vexed by others. The rule does not require that the whole body on whose behalf the proceedings are taken should be of the same opinion. The rule was considered at some length in *Sayad Anwar v. Mohiddin Shamsuddin*[2]. In his judgment Patkar J. stated that it was not permissible for a Judge to dismiss the suit under Order 1, Rule 8, simply on the ground that some persons objected to the plaintiff carrying on the suit. Such persons could be brought on the record as parties. The following passages at pp. 67—68 from the judgment of Tyabji J. is of interest—

"Coming to the learned Judge's decision under O. 1, R. 8, the object of that rule is to provide facilities where numerous persons have the same interest in a suit. The rule provides a method by which such numerous persons can be before the Court as if they were plaintiffs or defendants without the necessity of making every one of them a party. The scheme of the rule is that in such a case one or more persons may be given leave to sue or to defend the suit on behalf of all persons interested. Leave may be given to one, or if necessary, to several representative persons. The leave may be sought on behalf either of the plaintiffs

[1] *A. I. R. 1917 Bombay 141.*

[2] *A. I. R. 1932 Bombay 65.*

or the defendants. When the leave is applied for, the Court may, of course, take steps to verify the allegations of the applicant or applicants. If the number of those who apply to the Court on the ground that they have the same interest is "numerous" (that is the word of the rule) the Court has jurisdiction to make the order. If an application is made on behalf of persons, as to whose willingness to be represented by the applicant or applicants, the Court desires to have some evidence there is no difficulty in this being insisted upon. As a further safeguard, it is provided that notice, in the manner laid down in the rule shall be given to all such persons, as are alleged to have the same interest in the suit. Finally, under sub-section (2), if these other persons are not satisfied by the plaintiff representing them, they may apply to be made parties.

This being an enabling rule, for the purpose of making it practicable to bring to trial, a suit in which numerous persons would otherwise have to be made parties, whose number might make the trial embarrassing, I am at a loss to understand what the learned Judge can mean when he says:

> "I hold that plaintiffs have no right to sue in the representative capacity, and that the suit is bad under O. 1. R. 8, Civil P.C."

Order 1, R. 8, does not make any suit bad or good. It only provides for a case where a number of persons are interested in a suit. A means is devised by which such a suit may be placed before the Court with greater facility."

In *Kali Kanta Surma v. Gouri Prosad Surma Bardeuri*[1] Banerjee J. at page 911 referred to the purpose of section 30 of the Code of Civil Procedure, now Order 1, R. 8, in the following passage:—

> "Section 30, as we understand it, requires that the Court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested, and it further requires the Court to give to the persons interested notice of the institution of the suit which must include a notice of the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them. Now in the present case no such thing was done. In the first place the Court did not give permission to any definitely named persons among those interested to represent the rest; and in the second place the notice issued by the Court did not show who the persons were that had been selected to represent the remaining persons interested. That being so, we think that the persons interested in the result of the suit who are necessary parties have not been properly made parties to it, and that the suit must fail by reason of defect of parties."

Again in *Adamson v. Arumugam*[2] it was held that section 30 of the Code of Civil Procedure was not intended to allow individuals to sue on behalf

[1] *17 Calcutta 906.*

[2] *9 Madras 464.*

of the general public, but to enable some of a class having special interests to represent the rest of the class. This case was followed in *Muhamad Bin Mianayo Mt. Atirajo Kuer.*[1]

In *Kalidas Jivram v. Gor Parjaram Hirji*[2] the plaintiffs were 208 in number and as they had the same interest in the subject matter of the suit, 13 plaintiffs obtained leave to sue on behalf of the rest under section 30 of the Civil Procedure Code. The following passage at page 311 of the judgment of Parsons J. is of interest—

> "The objection that s. 30 of the Code of Civil Procedure does not permit of the present suit is untenable, since here we have a case not of persons suing on behalf of a class, but of 208 persons suing for themselves, the 195 persons as per list (Ex. 5) having been actually brought up on the record as plaintiffs just as the 119 persons as per list (Ex. 6) have been brought on the record as defendants. The objection that under section 26 of the Code the plaintiffs cannot all be joined in this suit, is also, I think, one that we ought not to entertain. The issue by the defendants of the rules under date October 12, 1883, gave a cause of action to each of the plaintiffs. It also gave the same cause of action to all of them, since the rules prohibited their admission into the shrine of the temple for purposes of worship except on the production of passes to be obtained on payment. In so far as the issue of these rules gives the same cause of action to all the plaintiffs, I think the suit is rightly brought to have the obnoxious rules declared to be invalid, and this is really the main object for which it has been brought."

Representative actions in England are governed by Order 16, R. 9, which is as follows:—

> "Where there are numerous persons having the same interest in one cause or matter one or more of such persons may sue or be sued or may be authorised by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

The permission of the Court is therefore not required in order to sue, but authorisation is required to defend. In this connection it is of interest to observe the principles which have been followed by Judges in authorising persons to defend in a representative capacity under the rule. In *Wilson v. Church*[3], Jessel M.R. refused to allow the defendant to defend in a representative capacity on the ground that there was no evidence that he represented anyone, but himself. As the Master of the Rolls said, he cannot be "a representative without a constituency". In *Fraser v. Cooper, Hall and Co.*[4] the plaintiff, a bondholder of a Railway Company, sued "on behalf of himself and all the bondholders of the company other than the defendant B," but did not obtain an order under Order 16., Rule 9, that B, should be sued as representing all bondholders who dissented from the plaintiff's claim. One of the bondholders took out a summons whereby he stated that neither the plaintiff nor the defendant B, properly represented the interests of himself and certain other bondholders, and applied to be made a defendant. The

[1] *A. I. R. Patna 418.*
[2] *15 Bombay 309.*
[3] *(1878) 9 C. D. 552.*
[4] *(1882) 21 C. D. 718.*

applicant was joined as a defendant in a representative capacity because it appears that he represented bondholders who dissented from the plaintiff's view. In *Morgan's Brewery Company v. Crosskill*[1] a Company proposing to issue new preference shares ranking *pari passu* with its existing shares served on one of its preference shareholders (sued on behalf of himself and the other preference shareholders) an originating summons for the determination of certain questions with reference to the proposed issue, arising on the construction of the Articles of Association. Buckley J. refused to appoint the defendant to represent the preference shareholders unless a meeting of them was first called and nominated the defendant to represent them. From these cases it would appear that, in order to obtain authorisation to defend in a representative capacity, the applicant has only to satisfy the Judge that he does represent a class that dissents from the view of the plaintiff.

English cases on the interpretation of Order 11., R. 1, are also helpful in regard to the manner in which the Judge should exercise his discretion in allowing the service out of the jurisdiction of a writ of summons. In *Call v. Oppenheim*[2] the plaintiff, upon an *ex parte* application, obtained leave to serve the defendant with a writ out of the jurisdiction, whereupon the defendant took out a summons to rescind the order for service, on the ground that the claim had been determined by a foreign judgment, and that the matter was *res judicata*. It was held by the Court of Appeal that as there was sufficient doubt as to the effect of the foreign judgment, and therefore a question of law which might be reasonably argued, the service of the writ must be allowed. Again in *Burt and others v. Bowen and others*[3] when the plaintiffs were trying to make out a case against two foreign defendants, Lord Coleridge held, on an application to set aside an order of the Judge giving leave to serve the writ out of the jurisdiction, that it was not necessary to enter into the question of the merits which would be the question at the trial. This question was far too serious to be decided against the plaintiff summarily upon an application as to service or notice of the writ. In *Badische Anilin Und Soda Fabrik v. Henry Johnson & Co. and Basle Chemical Works, Bindschedler*[4] the Court of Appeal held that leave to serve the writ out of the jurisdiction should be granted where a *prima facie* case of a sale within the jurisdiction had been shown.

As I have already indicated, the proceedings by which the respondents were brought before the Court were *ultra vires*. But even on the assumption that they were in order, I am of opinion that the learned Judge has not correctly applied the law as formulated in the various cases to which I have invited attention. At pages 95—96 in his judgment he states as follows:—

> " In this case it is abundantly clear from what I have set out already that there is a real dispute between the parties as to whether the petitioners or the respondents are the members proper of the Samithiya; but what is more—and this concerns the Court in a special degree—

[1] *(1902) 1 Ch 898.*
[2] *1 Times L. R. 622.*
[3] *8 Times L. R. 28.*
[4] *(1896) 1 Ch 25.*

is whether the petitioners, respondents or any of them can claim to continue the identity and the life of the Samithiya that was in existence in 1931.

Without going at all into the difficult question whether the petitioners, respondents or any of them can be regarded as continuing the identity of the Samithiya, it is tolerably clear from a reading of section 16 of the Civil Procedure Code that the question whether the petitioners and the others mentioned in list " A " or whether the respondents constitute the members of the Association is one which does not fall within its ambit and is one that cannot be adjudicated upon in these proceedings. The effect of acceding to the application of the petitioners would be to recognise them as members of the Samithiya at least impliedly, for it is on this footing alone that they can be permitted to represent the general body of members. If in fact they be not members of the Association, then the result would be, if an order be made in their favour in terms of their application that the action instituted by them would be binding on the real members of the Association and tend to take away or prejudice their rights. The representation order would indeed have the effect of conferring on the petitioners *inter alia* the right to compromise the suit which they propose to institute and any such compromise would be binding upon the true and proper members of the Society who would thereafter be debarred from instituting an action on the same cause of action against the defendant—see *Krishnamachariar v. Chinnammal*[1]. It is therefore of the utmost importance that before the petitioners can be given permission, their assertion that they are members of the Association must be established to the satisfaction of the Court."

Then follows a long inquiry into the history of the Association with reference to various meetings and the validity of such meetings. The learned Judge then holds that neither the petitioners nor the respondents were members of the Association. If the respondents were not members of the Association it is difficult to comprehend how they were ever allowed to become parties and put forward objections. It seems to me that the learned Judge in the face of the decisions to which I have invited attention has on an application for a summons decided the case on its merits. In coming to the decision that the plaintiffs could not be given leave to sue under section 16 of the Civil Procedure Code, the learned Judge appears to have been guided by the case of *Hadji Saheed Hameed Lebbe v. Mohamed Caderpillai Marakayar*[2]. I am of opinion that this case is very much in point, but it seems to me that the learned Judge has misunderstood the implications of this decision. After citing the principles outlined in this case the learned Judge says—

> " Applying these principles it is manifest that the application for a representation order on behalf of those in list ' A ' is one on behalf of one section of the body and is one that cannot be entertained for a second suit will and can lie at the instance of those named in list ' B ' ".

This deduction is wholly contrary to the decision in the case which was

[1] *24 M. L. J. 192.*

[2] *A. I. R. 1925 Madras 985.*

cited as will be seen from the following extracts from the judgment of Srinivasa Iyengar J. on pages 985—986:—

> " The contention on behalf of the defendant is twofold. It is stated that there is a large body of worshippers who have not agreed with the plaintiffs either in the institution of the suit or in the proceedings that led up to it, and that, therefore, it cannot be stated that all the worshippers at this mosque have the same interest. It seems to me that, if the construction of the terms of O. 1 R. 8 C.P.C. should be that it is only where all the members of the body are of the same opinion with regard to the litigation as the plaintiffs that the rule should be applied, then the provision contained in the rule would be practically useless. Most of the cases that come up before Courts in which the provision contained in this rule is invoked are cases of temples or mosques in which we know that there are always two factions, one opposed to the other. If it should be stated that this rule should be applied only in cases where the whole body is of the same opinion: then, it follows that the rule cannot be applied to such cases at all
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> . . . .
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> I believe the true principle underlying this rule is that the suit should in form be constituted into a representative suit merely to prevent the defendant being vexed and molested, as he may well be, by similar suits by other persons of the body. For the application of this principle it is really unnecessary to determine whether or not all the members of the body on whose behalf the suit is sought to be instituted are of the same opinion. The order only means this; that all the members of the body on whose behalf the suit would, on the passing of the order, be constituted into a representative suit, would be prevented thereafter from instituting any proceedings on the cause of action alleged in the plaint; and such body being an indefinite body and the order being given only to sue in respect of all persons having the same interest, the order would have the effect only of preventing multiplicity of suits and would not be calculated in any manner or to any extent to prejudice the rights of any of the worshippers or of the defendant ".

Again in *Nadar and others v. Nana and others*[1] the principle laid down was to the same effect as will be seen from the headnote which is as follows:—

> " Although a caste is of a *quasi* corporate nature and can hold property as a person, O. 1, R. 8, is wide enough to cover suits by caste members for decision of questions affecting them, *inter se* and in respect of caste property.
>
> Although plaintiffs admit that caste affairs are decided by a majority of the caste members, yet the plaintiffs need not have obtained, as a condition precedent to their bringing the suit, the consent of the majority of the caste members.
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> Per Napier J.—It may be that the plaintiffs, if they are unable to prove that they have got the support of the majority of the caste

[1] *A. I. R. 192 (Madras 683.)*

members, cannot succeed in getting the relief which they seek. But there is no reason to introduce the condition precedent to the filing of the suit.

R. 8 is applicable to cases where one person seeks to represent a number of other persons who agree with him in the contention which he has raised in the suit as to the rights of the various members of the community.

The sole object of this section is to provide a simple means by which as many persons as possible, who are members of the same community or are equally interested in certain affairs, can be brought together and a judgment can be given which will bind them all ".

The appellants put forward their claim as representing a certain number of the original members of the Association. In putting forward this claim they maintained that at the time of filing the action they and they alone were entitled to represent the Association. This is a question which dealt with the merits of the action and could not be decided on an application for a writ of summons. If the plaintiffs are unsuccessful in regard to this question, their action fails. The only questions that should have been considered by the Judge at this stage was whether the plaintiffs represented a class of persons with the same interest in the suit and whether there was a *prima facie* case. The plaintiffs claimed to represent a certain number of the original members of the Association. They make no claim on behalf of the members who dissent from that view. There was a dispute between the appellants and certain other original members of the Association. Such other members had, so it was claimed, lost their rights. The plaintiffs claimed an account from the Manager. If they prove this claim to be the sole members of the Association, they are entitled to such an account and also the right to determine the managership of the defendant. The order to sue being given only in respect of the appellants will have the effect of preventing multiplicity of suits and will not be calculative in any manner or to any extent to prejudice the rights of any of the dissentient members or of the defendant.

I think the learned Judge's decision on point (7) was correct. The question as to whether the action should be instituted under section 101 of the Trusts Ordinance did not arise at this stage.

For the reasons I have given the appeal is allowed, the order of the District Court set aside, and the original application of the appellants to sue allowed. Notice of institution of action under section 16 is to be further published. I have given careful consideration to the question of costs The original formal application of the appellants was faulty inasmuch as it prayed for notice of " the application " instead of the " institution of the action ". This defect has been in great measure responsible for the procedure subsequently followed. Moreover although the draft plaint and petition made it clear that the proceedings were being instituted on behalf of certain members of the Association, the application for leave purported to be on behalf of the Association. For these reasons I am of opinion there should be no order as to costs.

DE KRETSER J.—I agree.

Appeal allowed.