1953 *Present:* **Gunasekara J. and K. D. de Silva J.**

C. A. ODIRIS SILVA & SONS, LTD., Appellant, *and* P. JAYAWARDENE, Respondent.

S. C. 234—D. C. Galle, X 876.

Amendment of plaint—Misdescription of defendant—Substitution of proper defendant—Prescription.

Where a plaint mistakenly named the defendant as " Odiris Silva & Sons " when, in fact, the defendant was Odiris Silva & Sons, Ltd., and the Court allowed the plaintiff to amend the caption of the plaint—

Held, that, for the purpose of reckoning the period of prescription, the action against the company must be taken to have been instituted on the date of the original plaint and not upon the amendment of the caption of the plaint.

APPEAL from a judgment of the District Court, Galle.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant appellant.

D. D. Atulathmudali, with *E. L. P. Mendis*, for the plaintiff respondent.

Cur. adv. vult.

November 10, 1953. GUNASEKARA J.—

This is an appeal from a judgment of the District Court of Galle directing the defendant-appellant, a limited company, to pay to the plaintiff-respondent a sum of Rs. 1,272 as the price of two consignments of empty oil drums which he alleged he had sold and delivered to the company on the 19th and 22nd July, 1948.

The plaintiff had consigned the drums by railway to " C. A. Odiris Silva and Sons " of Matara, and the defendant company's manager, Dharmasena, had taken delivery of them, signing the railway consignment notes on behalf of the company in the place intended for the consignee's signature and giving the company's address as " Oil Mills, Matara ". According to the plaintiff's evidence these consignments had been made in pursuance of an agreement between him and Dharmasena, but the latter, who was called as a witness for the defendant, denied that there had been such an agreement. He admitted that the consignment notes had been signed by him on behalf of the defendant company, but he stated that they had been brought to him by one Martin Silva, who had been supplying the company with drums, and that he had bought for the company from Martin Silva some of the drums included in the consignments in question and rejected the rest. The learned District Judge accepted the plaintiff's evidence and disbelieved Dharmasena's denial of the agreement alleged by the plaintiff, and there appears to be no sufficient ground for disturbing this finding.

The learned judge also rejected a plea of prescription that was set up by the defendant. The plaint had been filed on the 18th July, 1949, within the period of limitation, but it named as the defendant " C. A. Odiris Silva and Sons, Oil Mills, Matara," and not " C. A. Odiris Silva and Sons, Limited," which is the name of the defendant company. On the 23rd March, 1950, after the expiry of the period of limitation, the caption of the plaint was amended by insertion of the word " Limited " immediately after " C. A. Odiris Silva and Sons ". It is contended for the defendant company that the action against the company must be taken to have been instituted only upon the amendment of the caption of the plaint and that the plea of prescription should therefore have been upheld.

The learned judge's rejection of the plea is based upon a finding that it was the defendant company, on whose behalf its manager had bought the drums from the plaintiff, that the plaintiff intended to sue, though the plaint had given the defendant a wrong description. This is a finding of fact which, it seems to me, it was open to the learned judge to reach upon the evidence, and in this view of the facts no objection can be taken to the order allowing the plaintiff to amend the caption of the plaint. In similar circumstances, where it appeared that a plaintiff had intended to sue an Urban District Council but had filed a plaint mistakenly naming the chairman of the Council as the defendant, it was held that the plaintiff should be allowed to amend the caption : *Velupillai v. The Chairman, Urban District Council* [1]. The effect of the amendment in the present case was merely a correction of an error in the name by which the present defendant was described and was not the substitution of that defendant for another. I am therefore unable to accept the contention that the action against the defendant company must be taken to have been instituted only on the 23rd March, 1950.

The appeal must be dismissed with costs.

K. D. DE SILVA J.—I agree.

Appeal dismissed.

[1] *(1936) 39 N. L. R. 464.*