

1957

*Present* : Basnayake, C.J., and Pulle, J.

MUDALIGE, Appellant, and WILLIAM SILVA and others, Respondents

*S. C. 233—D. C. (Inty.) Colombo, 26026*

*Execution of proprietary decree—Decree—Must it contain names of parties?—Several judgment debtors—Omission of names of some of them in decree—Resistance to execution of decree—Petition to Court complaining of resistance—Duty to name all the judgment debtors as respondents—Civil Procedure Code, ss. 5, 188, 325.*

There is no requirement in section 188 of the Civil Procedure Code that a decree of the District Court should contain the names of the parties to the action. Therefore, even if the names of the judgment-debtors are as a matter of practice set out in the decree entered by the Court, any inadvertent omission of the names of some of the judgment-debtors can be supplied by the Judge *nunc pro tunc* the moment it is brought or comes to his notice.

The plaintiff-appellant obtained judgment against seven defendants, but in the formal decree drawn up by the Court against all the defendants the names of only the first four defendants were stated. In the petition filed under section 325 of the Civil Procedure Code in consequence of resistance to the execution of the decree, only the four defendants whose names appeared in the decree were named as respondents.

*Held*, that the omission to name all the seven judgment-debtors as respondents to the petition was a fatal irregularity.

**A**PPPEAL from an order of the District Court, Colombo.

*H. V. Perera, Q.C.*, with *E. B. Wikramanayake, Q.C.*, and *N. D. M. Samarakoon*, for Plaintiff-Appellant.

*M. C. Abeyewardene*, with *E. Gooneratne*, for 1st Defendant-Respondent.

*U. P. Weerasinghe*, with *J. G. Jayatileke*, for 8th and 9th Defendants-Respondents.

*Lyn Wirasekera*, with *N. U. Wirasekera*, for 10th Defendant-Respondent.

*Cur. adv. vult.*

June 17, 1957. BASNAYAKE, C.J.—

The question that arises for decision in this appeal is whether the appellant's petition under section 325 of the Civil Procedure Code satisfies the requirements of that section.

It would appear that the appellant obtained judgment against seven persons who were named as defendants to the action; but in the formal decree drawn up by the Court only the names of the first four defendants were stated. As the execution of the decree was resisted it became necessary to file a petition under section 325. In that petition only the four defendants whose names occur in the decree were named as respondents.

The learned District Judge held that the appellant's failure to name as respondents to his petition three out of the seven Judgment-debtors is fatal to his application.

Learned counsel for the appellant submitted that the petition was in order. He relied on the definition of the expression Judgment-debtor (S.5 Civil Procedure Code) which when used in the Civil Procedure Code, where the context does not otherwise require, means any person against whom a decree or order capable of execution has been made. As the decree did not contain the names of the last three defendants he contended that they were not persons against whom a decree had been made and were therefore not judgment-debtors within the meaning of section 325 and there was no legal obligation on the appellant to name them as respondents to his petition. I find myself unable to uphold this contention. The appellant's action was against the seven defendants against whom judgment was given. There is no requirement in section 188 of the Code that a decree of the District Court should as in the case of a decree of this Court (Sec. 776) contain the names of the parties to the action. Nor is there anything in Form No. 41 which makes it imperative that the defendants should be named in the decree. The omission of the names of the defendants from the decree does not therefore affect its validity.

The duty to draw up the decree is on the Court and even if the names of the defendants are as a matter of practice set out in the decree an inadvertent omission can be supplied by the District Judge *nunc pro tunc* the moment it is brought or comes to his notice. I am unable to hold that the three defendants ceased to be judgment-debtors merely because the decree did not contain their names. The decree that was drawn up by the Court was a decree against all the defendants in the case. The material portion reads: "This action coming on for final disposal before G. M. de Silva Esquire, Additional District Judge, Colombo, on the 11th day of March 1953 in the presence of Proctors on the part of the Plaintiff and Proctors on the part of the Defendants. It is ordered and decreed of consent that the Defendants and all those claiming through or from them be ejected."

It is clear that the defendants referred to are the defendants to the action and not only those who are named in the decree. Later on the decree provides—"In default of any payment Writ to issue for the money claimed and for ejectment against all the defendants." In my opinion the petition does not satisfy the requirements of section 325 in that all the judgment-debtors are not named as respondents. This Court has in the cases of *Kumarathy Fernando v. Hetu Etama*<sup>1</sup> and *Perera v. Silva*<sup>2</sup> held that the omission to name the judgment-debtor as respondent to a petition under section 325 is fatal. Counsel did not canvass the correctness of those decisions or their application to the present case in the event of our holding that the persons whose names were omitted from the decree were judgment-debtors.

The appeal is dismissed with costs.

PULLI, J.—I agree.

*Appeal dismissed.*

<sup>1</sup> (1908) 2 S. C. D. 43.

<sup>2</sup> (1928) 31 N. L. R. 94.