

PONNAMMA *et al.* v. KASIPATHI PULLE *et al.*

D. C., Batticaloa, 1,992.

1900.

October 9.

Civil Procedure Code, s. 17—Non-joinder of defendants—Necessity of naming the parties to be joined.

It is the duty of a defendant pleading non-joinder to state the name of the party to be joined, so that the plaintiff may have an opportunity of amending his plaint.

THIS was an action by plaintiffs, husband and wife, to recover Rs. 750 from the defendants on the footing of an agreement whereby the defendants and one Muttupillai, since dead, bound themselves, in consideration of the plaintiffs marrying each other, to erect a house for them of the value of Rs. 750 within one year of their marriage.

One of the issues framed in the Court below was, whether the action was bad for non-joinder of the legal representatives of the deceased Muttupillai.

1900.
October 9.

The District Judge upheld this objection in these terms:—

“ I think this is a fatal objection. All the parties to the joint obligation should have been sued at the same time, though they may not be liable in proportionate shares.”

“ Plaintiffs had an opportunity after answer was filed to remedy this defect, but they made no application to add the heirs of Muttupillai as defendants. I dismiss the suit with costs. See *I. L. R. 6 Cal. 815; 3 C. L. R. 90.*”

Plaintiffs appealed.

Wendt, Acting A.-G., for appellants.—It is specially provided that non-joinder should not defeat an action. Here the joint contractor is dead, and there is nothing to show that she left any legal representatives besides the defendants. If a plea is to succeed, there must be an averment as to who should be joined. The Indian case in *I. L. R. 6 Cal. 815* relied on by the District Judge does not apply to the present case. Our Code is different from the Indian Code on this point. If the plea of non-joinder of a defendant is to succeed, the names of the parties to be joined must be set forth, which the defendants have not done.

Walter Pereira, for respondents.—Although the plea put forward is non-joinder of defendants, yet the real objection is that the plaintiffs are not entitled to recover the amount in question from defendants only, but from others also, who are not before the Court. The true issue is whether the contract is a solid one or not (*1 Pothier on Obligations, 196*) The defendants have amply indicated in the answer who should be joined.

BONSER, C.J.—

This is an action, by a husband and wife against the wife's father and brother upon a notarial agreement which was made upon the occasion of a marriage between the plaintiffs. By that agreement the two defendants, together with the mother of the female plaintiff, who is now dead, agreed to build a house for the newly-married couple to the value of Rs. 750, and in default to pay that amount. The plaintiffs allege that no house was built, and they sue the two surviving parties to the agreement for damages. Various pleas were placed on the record by the defendants: that the agreement was prescribed: that the defendants paid the penalty at the request of the plaintiffs, who preferred the money to the building of the house; and then, as a last straw, they pleaded that the action could not be maintained because there was no legal representative of the deceased obligor—the mother—on the record.

The Judge held, in the face of section 17 of the Civil Procedure Code, that this non-joinder of a person, who for all we know is not in existence, was fatal, and he dismissed the action. In that, in my opinion, he was wrong. If the defendants were prejudiced by the non-joinder of a contracting party, they should state who that party is, so that the plaintiff may have an opportunity of amending his plaint.

It seems to me that this action must go back to have the issues tried.

The only issues to be tried are—first, as to the nature of the obligation, whether it is a solid obligation or not; and secondly, whether the plea of payment could be supported.

The respondents will pay the appellants' costs, because if the judge went wrong it is because they led him astray.

1900.
October 2.
BONNER, C.J.

