Present : Shaw J. and De Sampayo J.

1916.

RALPH MACDONALD & CO. *v.* THE COLOMBO HOTELS COMPANY.

11 and 12—D. C. (Inty.) Colombo, 41,574.

Discovery of documents—Interrogatories—Trial of issues of law before ordering discovery of documents—Partnership—Joinder of retired partners in actions by or against partners when necessary—Civil Procedure Code, ss. 17, 18, 102, 109, 147.

The defendants moved for an order for the discovery of certain documents. The plaintiffs objected to the discovery sought, on the ground that certain issues of law should be first determined, and which, if determined in their favour, would render the discovery sought unnecessary. The District Judge upheld the objection.

Held, on appeal, that as there was no preliminary issue of law which might dispose of the action, the District Judge was wrong in refusing to order discovery.

A retired partner ought, generally speaking, to join as a plaintiff, or be joined as a defendant, in every action to which, had he not retired, he would have been a necessary party.

But if on the retirement of a partner the debts due to the old firm are assigned to the new firm by writing, as provided by section 25 of the Judicature Act of 1873, the new firm can sue in respect of them.

THE facts are set out in the judgment.

Bawa, K. C. (with him *F. J. de Saram*), for appellants.

Elliott (with him *Samarawickreme*), for respondents.

Cur. adv. vult.

1916.

Ralph Macdonald & Co. v. The Colombo Hotels Co.

February 27, 1916. SHAW J.—

These are two appeals from interlocutory orders of the District Judge. The first is by the defendants, from a refusal of the Judge to order discovery of certain documents, on the ground that the application is premature, and from a refusal of the Judge to order the plaintiffs to answer certain interrogatories, on the ground that some are premature and others irrelevant. The second is by the plaintiffs, from an order of the Judge directing the plaintiffs to add certain persons as plaintiffs, and directing that if they decline to be added as plaintiffs they must be made defendants.

I will deal first with the defendants' appeal.

The action is brought by the plaintiffs, as members of a firm of (Ralph Macdonald & Company) building contractors, with whom the defendant company have entered into an agreement for the performance of certain work, for Rs. 251,108.67, damages for alleged wrongful cancellation of the agreement. The defendants by their answer pleaded that one of the plaintiffs, Mr. G. F. Stevens, was employed by them as their architect in respect of the work, and that it was on his recommendation that they entered into the agreement sued on. That he had falsely and fraudulently misrepresented to the defendant company his interest in the firm of Ralph Macdonald & Company, and concealed from them the fact that other members of his firm of Stevens & Company were members of the firm of Macdonald & Company, whereas the two firms were in fact practically one. They further alleged misrepresentation as to the cost of the work, and alleged that by means of false and fraudulent misrepresentations as to the qualities and materials used in the additions and extensions of the contract work, the plaintiffs had obtained payments to which they were not entitled, and claimed in reconvention Rs. 300,000, and damages for misrepresentations. The allegations in fact amount to a charge of fraud against the plaintiffs, which, if proved, would entitle the defendants to rescind the agreement and recover damages.

The discovery sought is of documents relating to the formation of the plaintiffs' firm and of accounts and documents relating to the contract sued on, sub-contracts entered into by them with other people for the performance of the work, and the prices paid for materials used in the buildings for extras.

Objection was taken by the plaintiffs to making the discovery sought at the present stage of the proceedings, on the ground that certain issues of law which they desire to raise should be first determined, which, if determined in their favour, would render the discovery sought unnecessary. The Judge has adopted this view, and has refused to grant the discovery at the present stage.

I am of opinion that the Judge is wrong. Our procedure provides for the trial of preliminary issues of law, but only of such issues of law that may dispose of the action. I am of opinion that there

is no preliminary issue of law that can dispose of this action. The plaintiffs' suggestion, as I understand it, is that the certificates of the architect, Mr. Stevens, are final, and that the defendants cannot re-open them. But the defendants allege that, not only the certificates, but the whole contract was a fraud, worked upon them by Mr. Stevens, and the firm of which the plaintiffs are members. This, if true, would entitle them to re-open any certificates given by Mr. Stevens, and it is partly for the purpose of establishing the alleged fraud and partly for the purpose of their claim to damages, should they establish it, that the discovery is sought. It is, in my opinion, highly inconvenient, and a cause of extra expense, for actions to be tried piecemeal, as is suggested should be done in the present case. I would order the discovery sought to be made.

With regard to the refusal to order interrogatories, the Judge has refused to order certain of them to be answered, on grounds similar to those on which he refused discovery. For the reasons above given I think he is wrong. Some of the other interrogatories he has refused to order I think are relevant.

I would direct the plaintiffs to answer interrrogatories 1, 3, 4, 6, 7, 11, 13, 18, 20, the first part of 21, the first part of 22, 23, 24, 25, and 27.

With regard to the plaintiffs' appeal, their contention is that the original partners, who it is desired to add as plaintiffs, have retired from the firm, and have assigned their interests to the present plaintiffs; and certain letters to the defendants have been produced giving notice to the defendants of the retirement from the firm of the persons it is now proposed should be added, and of the transfer of their interests.

Beyond the mere production of these letters there is no evidence that the retiring partners have, in fact, assigned their interest to the present plaintiffs. *Prima facie*, all the parties to the contract should join as plaintiffs; it is therefore, I think, the duty of the plaintiffs to bring the partners, who are said to have retired, before the Court, but not necessarily as co-plaintiffs, as that is inconsistent with the case they set up. I would vary the order of the Judge by directing the plaintiffs to add the partners who are said to have retired, either as plaintiffs or as defendants, and to make the necessary amendments and services.

I would give the defendants the cost of their appeal, and make no order as to the costs of the plaintiffs' appeal.

DE SAMPAYO J.—

I entirely agree with my brother Shaw that the appeal of the defendant company should be allowed to the extent which he has indicated in his judgment. With regard to the appeal of the plaintiffs, I desire to add a few words.

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DE SAMPAYO J.

Ralph Macdonald & Co. v. The Colombo Hotels Co.

The objection taken to the constitution of the action rests on the ground that the plaintiffs cannot proceed with the action in the absence of certain partners of the plaintiffs' firm. The contract upon which the action is brought was made by all of them jointly, and the other partners are said to have retired while the contract was still being carried on. There is no doubt that in the case of a joint contract all the co-contractors should join in an action upon it. This principle is applicable to partners also. The non-joinder would formerly have been fatal to the action, but section 18 of the Civil Procedure Code, corresponding to Order 16, Rule 11, of the English Rules of Practice, provides a means by which a defect as to joinder of parties may be rectified and the action proceeded with. The question is, whether, in the circumstances of this case, the partners who do not join are necessary parties to the action, and ought therefore to have been joined as plaintiffs or defendants? The allegation in the plaint that the partners in question had retired was denied in the answer, and before the hearing the defendant company specifically took the objection, which the District Judge stated in the form of an issue, thus: " Can plaintiffs maintain this action without joining the parties mentioned in paragraph 2 of the plaint, namely, George Mackenzie, Kenneth Edward Mackenzie, and Arthur Charles Payne?" The simple answer to the question is that they cannot, unless circumstances entitling the plaintiffs to depart from the rule are proved. It was incumbent on the plaintiffs, in the first place, to prove that the persons named had retired. There was no evidence given, except that the plaintiffs put in three letters by which they had informed the defendant company about the retirement of certain of their partners. I do not see how these letters furnish the necessary evidence. They may prove that certain communications were made to the defendant company, but they are not evidence of the fact of retirement. But, even if this fact be assumed for the purpose of this appeal, that does not advance the plaintiffs' position. *Lindley on Partnership (7th edition), page 323*, thus states the law on this point: " The retirement of a partner in no way affects his rights against or obligations to strangers in respect of past transactions. Subject, therefore, to the above observations, a retired partner ought to join as a plaintiff and be joined as a defendant in every action to which, had he not retired, he would have been a necessary party." The observations referred to are to the effect that if on the retirement of a partner the debts due to the old firm are assigned to the new firm by writing, as provided by section 25 of the Judicature Act of 1873, the new firm can sue in respect of them. This is expanded by Lindley at page 323, with the remark: " Probably it is not now necessary to join as a plaintiff a retired partner against whom the defendant has no claim, and who has no beneficial interest in what is sought to be recovered." Now, there is no proof of any assignment of the

interest of the partners who are said to have retired, except that one of the letters, which, as I have said, are not evidence, states that their shares in the partnership were acquired by the continuing partners. Nor are the other conditions satisfied. The defendant company have, against all the parties to the contract, a very large claim, which they have set up in reconvention. Even if the statements in the letters are evidence, it cannot be definitely concluded that the retired partners have no beneficial interest in what is sought to be recovered in this action. It is remarkable that the second plaintiff and the third plaintiff are among those who are said in the letters to have retired from the partnership, and I suppose that their joining as plaintiffs mean that they did not give up their beneficial interest, notwithstanding their alleged retirement. In my opinion it is not possible on these materials to hold that the partners who have not joined as plaintiffs are not necessary parties. That being so, the plaintiffs, I think, should have availed themselves of the provisions of section 18 of the Civil Procedure Code to bring in the other partners. Under similar circumstances, the Privy Council, in *Rajandranath Dutt v. Shaik Mohamed Lal*,[1] remarked: "The appellants have not on any occasion sought the assistance of the Court, as they might have done under section 73 of Act VIII of 1859, to make him a party to the suit. It was not the province, either of the High Court or the District Judge, to force that course upon him: The objection was clearly taken, and they, from motives of their own, deliberately abstained from making him a party to the suit." Their Lordships accordingly affirmed the judgment of dismissal which had been entered on the ground of non-joinder. Similarly, in *Banda v. Lapaya*,[2] Clarence J., referring to the wording of section 17 of our Code, said: "I take the meaning of that to be that when a non-joinder is apparent, in the face of which the Court cannot proceed, the Court, instead of dismissing the plaintiff's action, should allow the plaintiff to add parties. Here the plaintiffs make no proposal to add the missing co-shareholder as a party," and on that ground the Supreme Court refused to interfere with a decree of dismissal of the action. Here the District Judge allowed the plaintiff to add the missing partners as parties. I think his order is substantially right, but I agree to the modification suggested by my brother Shaw and to the order as to costs.

Set aside.

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[1] *(1881) I. L. R. 8 Cal. 42.*

[2] *(1891) 1 S. C. R. 98.*