July 27, 1911

Present : Wood Renton J.

SUPPIAH *v.* PALIAHPILLAI.

241—*C. R. Colombo*, 22,430.

Partnership—Action by manager of partnership—All partners must join in the action.

Plaintiff, who was manager of the Colombo Aerated Water Company, which was not an incorporated company, sued the defendant, who was employed by him for hawking aerated waters, for the recovery of Rs. 164·04, being the value of empty bottles not returned and the balance cash proceeds of sale of waters.

Held, that all the partners of the firm should have joined in the action.

"The defendant did not contract with the plaintiff on the footing that the latter was an agent pledging his credit as principal. The plaintiff could not therefore maintain this action as agent, and that being so, he is unable to maintain it as partner."

THE facts are set out in the judgment of Wood Renton J.

Bawa (with him *Morgan de Saram*), for appellant.—Plaintiff is the manager of the Colombo Aerated Water Company, which is not an incorporated company. He could not therefore sue on any contract with the company. All the partners should have joined in the action.

Counsel cited *Boustead on Agency, art.* 128 ; *Dicey's Parties to an Action, p.* 115 (1870 *ed.*)

Tambyah, for the plaintiff, respondent.—There was a contract between plaintiff and defendant. [Wood Renton J.—Was the contract between plaintiff as principal and the defendant ? If the contract was with plaintiff as manager, can he sue as manager ?] Where the contract is made with the agent himself, *i.e.*, when the agent is treated as principal, the agent may sue. *Dicey, p.* 136, *exception* 4 ; *Fisher v. Marsh*[1].

[Wood Renton J.—That refers to the case of an undisclosed principal. It clearly refers to cases where the agent himself pledges his own credit.] Counsel referred to *Dicey, p.* 153.

[Wood Renton J.—May not the Commissioner give leave in Courts of Requests to any person to represent another ?] *Bawa :* That must be on leave obtained before trial.

[Wood Renton J.—I think so.]

[1] *34 L. J. Q. B. 178.*

No action should be defeated by reason of non-joinder or misjoinder of parties. (Civil Procedure Code, section 17.) The defendant should have moved to bring the others in.

Bawa, in reply.—The case of *Fisher v. Marsh* is the case of an auctioneer, and clearly he can sue. Section 17 does not contemplate a case like this, where the necessary partners have been left out. Where a wrong party comes into Court, the Judge could not add the proper party as well.

Cur. adv. vult.

July 27, 1911. WOOD RENTON J.—

The plaintiff-respondent as manager of the Colombo Aerated Water Company, Slave Island, sues the defendant-appellant in this action for the recovery of a certain sum of money as the value of bottles not returned and cash due by him. The learned Commissioner of Requests has given judgment in favour of the respondent for a portion of his claim. There is no appeal by the respondent on the ground that his whole claim has not been upheld, and the appellant's counsel stated that, if the decision of the Commissioner of Requests was sound in law, he would not dispute the accuracy of his finding as to the sum due to the respondent. Two points of law have been argued in support of the appeal : (1) That the action is not maintainable, inasmuch as the contract, if contract there was, between the appellant and the respondent was made with the latter only as agent for the Colombo Aerated Water Company ; and (2) that there was in fact no contract between the appellant and the respondent at all.

I will deal with the latter point first. The facts of the case are clearly and fully set out in the judgment of the Commissioner of Requests, and I adopt his statement of them. The evidence shows that the appellant, who, according to the respondent, was employed as a carter under the Colombo Aerated Water Company, acted as such only temporarily, while the real employee of the Company, one Kuttisamy, was absent in India. Although Kuttisamy was away the accounts were still kept in his name. The appellant contends on the evidence that his contract was with Kuttisamy and not with the company. The learned Commissioner of Requests has over-ruled this contention, and I think that he was right in doing so. It is true that Kuttisamy introduced the appellant to the respondent, but the respondent expressly says, and the Commissioner has believed him, that he engaged the appellant and explained his duties to him, and that, according to the custom of the trade, the appellant was responsible for the liabilities incurred by him during his temporary employment, although the accounts were entered in the company's books under Kuttisamy's name. There is ample corroboration of the respondent's evidence on that point.

July 27, 1911

WOOD RENTON J.

Suppiah v. Paliahpillai

I come now to the more difficult question raised by the issue as to whether or not the action is maintainable. It would appear that the Colombo Aerated Water Company is not an incorporated company, but is merely a firm consisting of several partners, of whom the respondent, its manager, is one. The respondent sues as manager, and the issue framed at the trial on the point with which I am now dealing raised the question of his title to sue as manager alone. I find, however, in the record, immediately under that issue, an entry in the following terms : " It is admitted there are several partners of this company." The learned Commissioner of Requests seems to have treated this issue as raising the question whether the plaintiff could not maintain the action as a partner of the firm, and he answered this question in the affirmative, on the ground that while, as a general rule, all persons who are partners in a firm may join in an action for the breach of a contract, one partner may sue alone on contracts made with him on behalf of the firm in the same cases in which an agent may sue alone on contracts made with him on behalf of his principal. The agent, says the learned Commissioner of Requests, may sue where the contract is made with the agent himself on his personal credit. Applying these principles to the present case, the Commissioner says that the deed of partnership, which was produced at the trial, appoints the respondent manager of the partnership, and that the appellant treated him as " the party to the contract." The formal deed of partnership was in point of fact posterior in the date of its execution to the contract sued upon. But, apart from that, I am unable to agree with the Commissioner that the evidence in this case shows that the appellant contracted with the respondent on the footing that the latter was an agent pledging his credit as principal. The respondent could not, therefore, maintain this action as agent, and that being so, he is clearly unable to maintain it as partner. The evidence does not prove that the appellant contracted with him as with a single partner pledging his personal credit. There remains, however, the question as to the order which ought to be made in appeal. The case is one in the Court of Requests. The facts have been fully gone into on both sides. The appellant's counsel, as I have said, did not dispute, for the purposes of the appeal, the finding of the Commissioner of Requests as to the amount due to the respondent, and both the terms of the judgment of the Commissioner and the admission above referred to as to the number of partners in the firm incline me to believe that the question of the position of the respondent as partner was before the minds of both parties at the trial. Under these circumstances, I am not prepared to dismiss the respondent's action altogether, and I make the following order. I set aside the decree under appeal, and send the case back to the Court of Requests, with liberty to the plaintiff-respondent, within such time as the Court of Requests may fix, to amend his plaint by adding his

co-partners as co-plaintiffs, and by making such modification in the plaint itself as the addition of the co-partners may render necessary. If the respondent does not so amend his plaint within the time fixed by the Commissioner of Requests, his action will stand dismissed with all costs of the action and of the appeal. If, however, such an amendment of the plaint is duly made, there will be further inquiry into and adjudication upon the case in the Court of Requests. The evidence already taken may stand, and either side may recall any witness or witnesses already examined for further examination or cross-examination, and adduce any further evidence that may be thought desirable.

The appellant will have in any event the costs of the appeal and of the action up to and including the filing of the original answer, and also the costs of the filing of an amended answer, or of any amendment of the answer, that may be rendered necessary by the amendment of the plaint.

All other costs will be costs in the cause.

Sent back.