1937 *Present :* **Moseley J. and Fernando A.J.**

AVICHCHY CHETTIAR *v.* PERERA.

56—D. C. Negombo, 9,776.

Appeal—Failure to add necessary parties as respondents—Exercise of Supreme Court's discretion—Civil Procedure Code, s. 770.

The plaintiff sued the first defendant-respondent to recover a certain sum of money by way of principal and interest due on a mortgage bond and joined the second and third defendants as parties, who held subsequent incumbrances over the property mortgaged.

Judgment was entered in favour of the plaintiff for an amount less than that claimed by him and the plaintiff appealed, the first defendant alone being made respondent.

Held, that it could not have been obvious to the appellant that the second and third defendants were necessary parties to determine the amount payable to the first defendant, although their rights would have been affected if the appeal was allowed; and that the Supreme Court should exercise its discretion under section 770 of the Civil Procedure Code, and give leave to the appellant to add the second and third defendants as parties.

APPEAL from a judgment of the District Judge of Negombo.

L. A. Rajapakse, for plaintiff, appellant.

D. W. Fernando, for first defendant, respondent.

Cur. adv. vult.

December 15, 1937. FERNANDO A.J.—

Counsel for the respondent has taken the preliminary point that this appeal is not properly constituted, inasmuch as the second and third defendants who are also necessary parties to this appeal have not been made respondents. The plaintiff appellant claimed a sum of Rs. 622.30 as principal and interest due to him from the first defendant on a mortgage bond executed by him on April 26, 1929. In paragraph 3 of the plaint, he stated that the first defendant had paid a sum of Rs. 488.95 on the bond, and had thereafter failed to pay any sum to the plaintiff. The first defendant filed an affidavit in which he stated that he had paid Rs. 782.32 on account of the bond, and not Rs. 488.95 as mentioned by the plaintiff.

It will be noted that the bond provided for the payment of the principal sum of Rs. 300.10 with a further sum of Rs. 480.06 as interest for six years by 36 instalments, each of Rs. 35.56. The learned District Judge held that as the first defendant had paid 22 instalments up to June 22, 1933, the plaintiff was not entitled to anything more than the balance principal and interest due thereon from December 22, 1932, and entered judgment accordingly for Rs. 311.15 as balance principal and for interest up to December 22, 1932, on the rate stipulated in the bond, and thereafter interest at the rate of 9 per cent. on the aggregate amount till payment in full.

Now the second and third defendants were made parties to the action because they held subsequent encumbrances over the mortgaged property. The second and 3rd defendants filed no answer and did not appear at the trial. The decree that was entered ordered the first defendant to pay the sums fixed by the learned District Judge by certain instalments fixed by the Court, and that in default of payment of any instalments on the due date an order to sell do issue in respect of the mortgaged property.

There is no reference in the decree to the second and third defendants, but as they have been made parties to the action in the District Court, it cannot be doubted that the second and third defendants are themselves bound by the decree, and their rights on the encumbrances in their favour must be subject to that decree. In this appeal, the plaintiff appellant contends that he is entitled to have judgment entered for the sum prayed for by him, and the second and third defendants will no doubt be affected prejudicially if the appeal is allowed, inasmuch as their rights either to pay the amount decreed to the plaintiff-appellant or to claim any balance that may exist after the property is sold, and the plaintiff's claim is realized, will depend on the amount that is payable to the plaintiff.

It seems clear, therefore, that the second and third defendants were necessary parties to the appeal, and that the appeal is not properly constituted inasmuch as they have not been made parties.

Counsel for the appellant argues that this is a matter in which we should adjourn the hearing of the appeal in terms of section 770 of the Civil Procedure Code, and that the second and third defendants should now be made respondents to the appeal. The provisions of section 770 were considered by a Bench of Four Judges in *Ibrahim v. Beebee* [1], and Shaw J. in that case expressed his opinion that an order adding parties under section 770 was entirely discretionary. "I should not myself be disposed", he adds, "to amend the proceedings when the appeal is actually before the Court for hearing, unless some good excuse was given for the non-joinder, or unless it was not very apparent that the parties not joined might be affected by the appeal". Wood-Renton C.J. agreed entirely with the observations of Shaw J. and stated that he was prepared to act under section 770 in view of the possibility that the necessity of the first defendant being made a party respondent to that appeal may have been overlooked, inasmuch as the only question immediately involved was whether or not the inquiry should proceed". Ennis J. thought that there were three courses open to the appeal Court: (1) to hear the appeal

[1] *19 N. L. R. 289.*

as it stands, (2) to add and give notice to parties under section 770, or (3) dismiss the appeal for defect of parties. Which of the three courses the Court will follow will depend on the circumstances of the particular case, and as stated in *Dias v. Arnolis* [1], is a matter for the decision of the Judge who hears the appeal.

We have been referred to certain later decisions. In *Kaderasen Chetty v. Perera* [2], Dalton and Lyall-Grant JJ. rejected the appeal because they thought that an appeal should be dismissed unless the defect of parties was not one of an obvious character which could not reasonably have been foreseen and avoided. Apparently no excuse was offered for the omission to make them parties to the appeal. In *Ramasamy Chettiar v. Mohamed Lebbe Marikar* [3], Poyser and Soertsz JJ. following *Kaderasen Chetty v. Perera* allowed the addition of certain parties as respondents to the appeal under section 770 for the reason that there was an error in the decree, and that in those circumstances there was some excuse for the non-joinder of the second and third defendants. The second and third defendants in that action were joined as lessees of the property in respect of which the plaintiff brought a hypothecary action. They did not appear at the hearing in the District Court, nor did they file answer. It would appear that the judgment of the District Court purported to dismiss plaintiff's action against all the defendants, but the decree only dismissed the action of the plaintiff against the first defendant. For these reasons the appellant was allowed to join the second and third defendants as respondents to the appeal on certain terms.

In the case of *Wickremasuriya v. de Silva* [4], which came before the same two Judges, they refused to exercise the discretion under section 770 because there was no good excuse for the non-joinder. That was an action on a mortgage bond in which the first defendant was principal and the second defendant was surety. The first defendant contested the action and judgment was entered against him. The second defendant did not appear and defend. When the first defendant appealed, objection was taken that he had not made the second defendant a party. If I might say so with all respect, the appellant in *Wickremasuriya v. de Silva* must have known that the second defendant was a party to the action, and it must have been obvious to him that the second defendant would be affected if his appeal succeeds, and the order made was clearly right. We have also been referred to the case of *Fernando v. Fernando* [5], in which my brother and I held that certain parties who had not been made respondents to an appeal should be joined under section 770 because if the appeal succeeds the result would be to increase the share of the eighth to eleventh defendants who had not been joined. But I do not think that case is of any assistance with regard to the principle that should be applied here. The only question that arises on this appeal is whether it was obvious to the appellant that the second and third defendants should also be made respondents to this appeal. They did not take part in the contest in the lower Court. The order made in the lower Court was for

[1] *17 N. L. R. 200.*
[2] *8 Ceylon Law Recorder 172.*
[3] *7 Ceylon Law Weekly 64; 17 Ceylon Law Recorder 14.*
[4] *8 Ceylon Law Weekly 29.*
[5] *7 Ceylon Law Weekly 133.*

the payment of instalments by the first defendant, and the plaintiff's appeal is against the amount which the first defendant has been ordered to pay. My own view is that it could not have been obvious to the appellant that the second and third defendants were also necessary parties to determine the amount payable by the first defendant, although they are in a sense interested in the amount inasmuch as their rights on the encumbrances in their favour will be affected if the amount ordered by the learned District Judge is increased in appeal.

For these reasons, I think this is a case in which we should exercise the discretionary power given to us by section 770. I would therefore follow the order made by Poyser J. in *Ramasamy Chettiar v. Mohamed Lebbe Marikar* (*supra*) and give the appellant leave to add the second and third defendants as respondents to the appeal, subject to payment by him of Rs. 52.50 as costs to the first defendant-respondent. Let the hearing of this appeal be adjourned for November 13, and let the second and third defendants to this action be made respondents to this appeal, and let notice of appeal be issued to the Fiscal for service on them.

These steps will be taken on payment by the appellant of the sum of Rs. 52.50 as ordered before, or on production by him of a receipt from the Proctor of the appellant to the effect that that sum has been paid.

MOSELEY J.—I agree.

Appeal allowed.