1971 *Present* : H. N. G. Fernando, C.J., Alles, J., and de Kretser, J.

S. WIJERATNE and another, Appellants, *and*
N. WIJERATNE, Respondent

S. C. 223/67 (Inty.)—D. C. Galle, 2987/P

Appeal—Necessary party—Failure to name him as a respondent—Liability of the appeal to be dismissed—Civil Procedure Code, s. 756—Supreme Court Appeals (Special Provisions) Act No. 4 of 1960, s. 4 (1).

Where the failure to name a necessary party as a respondent to an appeal is a defect of an obvious character, the appeal is liable to be dismissed. In such a case the decision of the Full Bench in *Ibrahim v. Beebee* (19 N. L. R. 289) continues to be binding despite the enactment of the Supreme Court Appeals (Special Provisions) Act No. 4 of 1960.

APPEAL from an order of the District Court, Galle.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte, Ben Eliyatamby* and *G. M. S. Sameraweera*, for the 11th and 28th defendants-appellants.

Harischandra Mendis, with *N. T. S. Kularatne* and *Bimal Rajapakse*, for the plaintiff-respondent.

Cur. adv. vult.

May 7, 1971. H. N. G. FERNANDO, C.J.—

This was an action for partition of a land described as " the western portion of Bogahawatte ". In the plaint shares were allotted among others to the plaintiff, to the 11th defendant, and to the 19th defendant. Upon a commission issued by the Court, Plan No. 385 of August 1963 was prepared, showing Lots A, B, C and D as comprising the land described in the plaint.

At the instance of the 11th defendant and her husband the 28th defendant, a second commission for survey was issued, and plan No. 502 was prepared in June 1964. Thereafter the 11th and 28th defendants filed an amended answer, stating that the western portion of Bogahawatte consisted only of the Lots A1, B, C and D shown in Plan No. 502, and that Lot A2 shown in that Plan formed a part of the eastern portion of Bogahawatte. According to this answer, more than half of the extent

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of Lot A depicted in the first Plan No. 385 fell outside the corpus claimed in the plaint. The 11th and 28th defendants also contested the devolution of title set out in the plaint. If their contention was correct, the shares allotted in the plaint to the plaintiff and to the 19th defendant would have to be reduced.

The 19th defendant is the husband of the plaintiff; he admitted in cross-examination that he had worked up the case on behalf of the plaintiff. At first he appeared content to rely on the fact that a 1/6 share of the corpus had been allotted to him in the plaint. But after the 11th and 28th defendants raised the disputes maintained above, the 19th defendant also filed a statement of claim, in which he averred that the corpus of the action consisted of the Lots A, B, C and D depicted in the first Plan No. 385. He was represented throughout the trial by a separate proctor and not by the proctor and Counsel who conducted the case for the plaintiff. After the plaintiff gave evidence, the 19th defendant himself gave evidence in which he contradicted the case for the 11th defendant, both in the matter of the extent of the corpus and in the matter of the devolution of title. He also produced receipts for municipal taxes paid by him in respect of the property. His proctor cross-examined both the plaintiff and the 11th defendant.

The learned District Judge entered judgment on 23.10.1967 rejecting the claims of the 11th and 28th defendants, who filed a petition of appeal, in which they named only the plaintiff as respondent. On 6.11.1967, after the appealable time had elapsed, their proctor stated to Court that "the petition of appeal also affects the 19th defendant", and he tendered a copy of the petition of appeal, with notice of appeal and notice of security for service on the 19th defendant. But subsequently, on 28th December 1967 the proctor stated to Court that it is not necessary to issue notices on the 19th defendant.

In the result, the 19th defendant is not a party to this appeal, and Counsel for the plaintiff-respondent has on that ground taken a preliminary objection to the hearing of this appeal. In 1916, a Full Bench of this Court, in the case of *Ibrahim v. Beebee*[1], ruled as follows upon a similar objection :—

> "I have no doubt as to the power of the Supreme Court to dismiss an appeal, on the ground that it has not been properly constituted by the necessary parties being made respondents to it, and I am equally clear that that power should be exercised, unless the defect is not one of an obvious character, which could not reasonably have been foreseen and avoided."

That ruling has been consistently followed. The question therefore is whether, in the circumstances of the present case, the failure to join

[1] *(1916) 19 N. L. R. 239.*

the 19th defendant as a party to the present appeal is or is not a defect of an obvious character. Considering that the 19th defendant actively participated in the action, and that his interests would undoubtedly be affected by the appeal (a matter which was indeed admitted by the appellants' proctor on 6.11.1967), I can see no excuse for failure to make him a respondent to the appeal, or for the proctor's statement on 28th December 1967 that the 19th defendant need not be served with the requisite notices.

Counsel for the appellants submitted that the decision in *Ibrahim v. Beebee* may no longer be binding, in view of the Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960. The relevant provision of that Act for present purposes is the provision in s. 4 (1) that " the Supreme Court shall not exercise the powers vested in such Court by any written law to reject or dismiss that appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions of any written law relating to such appeal, unless material prejudice has been caused thereby to the respondent to such appeal ".

The requirement, that every necessary party must be named as a respondent to an appeal, is not a requirement of any written law, but is instead a rule of procedure laid down by the Courts. If a party is named a respondent to an appeal, then the provisions of s. 756 of the Civil Procedure Code which require notice of appeal and notice of security to be furnished to the named respondents is a requirement of written law, and therefore the provisions of Act No. 4 of 1960 are applicable in the case of a breach of that requirement. The Act was enacted in consequence of the decisions of this Court in cases such as *Thenuwara v. Thenuwara*[1] and *Leelis Singho v. John Singho*[2] and enables the Supreme Court to grant relief for omissions or delays which were referred to in those decisions. But the decisions did not touch upon the consequences of the failure to join a necessary party as a respondent to an appeal. I am therefore of opinion that the decision of the full Bench in *Ibrahim v. Beebee* continues to be binding despite the enactment of Act No. 4 of 1960.

The preliminary objection has accordingly to be upheld, and the appeal is rejected with costs.

ALLES, J.—I agree.

DE KRETSER, J.—I agree.

Appeal rejected.

[1] *(1959) 61 N. L. R. 49.*

[2] *(1959) 61 N. L. R. 209.*