1972 *Present :* **Pathirana, J., and Rajaratnam, J.**

W. R. M. KIRI MUDIYANSE and another, Appellants, *and* W. R. M. BANDARA MENIKA, Respondent

S. C. 173/69 (Inty.)—D. C. Kurunegala, 1393/P

Appeal—Necessary parties—Non-joinder of some of them as respondents—Discretionary power of the Supreme Court to have them added—Civil Procedure Code, s. 770.

In a partition action instituted by the plaintiff against eight defendants in respect of a land consisting of five lots, the only contesting defendants were the 4th and 5th defendants-appellants who claimed that only lots 1, 2 and 3 formed the corpus and that the other two lots formed separate and distinct lots exclusively possessed by them. The trial Judge held that all five lots formed the corpus. He also held that the plaintiff and the eight defendants had certain shares in all these lots.

In the present appeal filed by the 4th and 5th defendants, the plaintiff-respondent raised a preliminary objection that the appeal was not properly constituted because the 1st, 2nd, 3rd, 6th, 7th and 8th defendants who had been granted shares in the judgment were not made parties respondents to the appeal. It was conceded that those defendants would be prejudicially affected if the appellants succeeded in the appeal.

The Proctor who filed the petition of appeal for the 4th and 5th defendants stated in the petition that the other defendants were not made parties respondent because, at the trial, they took no part in the contest, which was one between the plaintiff-respondent and the appellants only, as to the corpus.

It was contended by the plaintiff-respondent, on the basis of the Full Bench decision in *Ibrahim v. Beebee* (*19 N.L.R. 289*), that where necessary parties have not been made respondents an appeal is not properly constituted and should be dismissed " unless the defect is not one of an obvious character which could not reasonably have been foreseen and avoided ".

Held, that the Supreme Court had the discretionary power under section 770 of the Civil Procedure Code to direct the 1st to the 3rd and the 6th to the 8th defendants to be added as respondents. The exercise of the discretion contemplated in section 770 is a matter for the decision of the judge who hears the appeal in the particular case. Furthermore, it should be exercised when some good reason or cause is given for the non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously.

Per PATHIRANA, J.—" Intrinsically there is nothing in section 770 either expressly or by necessary implication to inhibit the discretion to the principles that have been set out in the case of *Ibrahim v. Beebee* as to do so will be tantamount to saying that the exercise of the discretion is cribbed, cabined and confined exclusively to these principles, limiting the exercise of the discretion in a particular way, and thereby putting an end to the discretion itself."

Dias v. Arnolis (17 N. L. R. 200, F.B.) and *Ibrahim v. Beebee* (19 N. L. R. 289, F.B.) discussed.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, with *Everard Ratnayake*, for the 4th and 5th defendants-appellants.

W. D. Gunasekera, for the plaintiff-respondent.

Cur. adv. vult.

November 23, 1972. PATHIRANA, J.—

The Counsel for the plaintiff-respondent has raised a preliminary objection that the appeal is not properly constituted as the 1st, 2nd, 3rd, 6th, 7th and 8th defendants who had been granted shares in the judgment of the learned District Judge have not been made parties respondents to this appeal and that only the plaintiff-respondent has been made a party respondent.

The plaintiff-respondent instituted this action to partition the land called Hitinawatta depicted as Lots 1, 2, 3, 4, 5 and 6 in Plan 'X' filed of record. The 4th and 5th defendants-appellants took up the position that only Lots 1, 2 and 3 formed the corpus which should be partitioned and that Lots 4, 5 and 6 formed separate and distinct lots exclusively possessed by them. At the commencement of the trial, Lot 4 was excluded by consent of all the parties and the contest was whether Lots 1, 2, 3, 5 and 6 formed the corpus or whether as stated by the 4th and 5th defendants-appellants only Lots 1, 2 and 3 formed the corpus. The learned District Judge held that Lots 1, 2, 3, 5 and 6 formed the corpus. He also held that the plaintiff-respondent and the 1st to the 8th defendants had certain shares in these lots.

Mr. Jayewardene for the defendants-appellants conceded that the rights of the 1st, 2nd, 3rd, 6th, 7th and 8th defendants would be prejudicially affected in the event of the appellants succeeding in the appeal. While conceding that the appeal is defective owing to the non-joinder of necessary respondents, he has, however, submitted that this defect could be remedied by an order of Court under Section 770 of the Civil Procedure Code directing that the defendants omitted be added or noticed as respondents.

Mr. Jayewardene submitted that the Proctor who filed the petition of appeal for the 4th and 5th defendants-appellants has in para. 9 of the petition of appeal given his reasons for not making the other defendants parties respondents. According to the Proctor for the appellants, the 6th, 7th and 8th defendants who had filed statements of claim took no part in the contest and that at the trial the contest was one between the plaintiff-respondent and the 4th and 5th defendants-appellants as to the corpus.

The proceedings of 19.6.69 which was the trial date show that the statements of the 6th, 7th and 8th defendants had been filed by Mr. Ihalagama who was not present in Court on that day. Mr. Advocate Kulawansa who appeared for them had stated that he had no instructions from the 6th, 7th and 8th defendants. The 6th defendant was present and stated that, " he is not contesting ". The learned District Judge had further made this note :

> " Now the contest will be, according to the plaintiff, that Lots 1, 2, 3, 5 and 6 in Plan 4111 is the corpus while the 4th and 5th defendants state that only Lots 1, 2 and 3 formed the corpus."

One of the points of contest was stated as follows :—

> " Does the corpus sought to be partitioned consist of Lots 1, 2, 3, 5 and 6 in Plan 4111 as pleaded by the plaintiff or Lots 1, 2 and 3 only as stated by the 4th and 5th defendants? "

The learned District Judge held that Lots 1, 2, 3, 5 and 6 formed the corpus as pleaded by the plaintiff. The appeal is against this finding.

The proceedings, therefore, reveal that to all intents and purposes the contest was between the plaintiff-respondent and the 4th and 5th defendants-appellants regarding the corpus. One cannot, therefore, say that the Proctor who drafted the petition of appeal had deliberately made an incorrect statement in the petition of appeal that the contest in regard to the corpus at the trial was not one between the plaintiff-respondent and the 4th and 5th defendants-appellants. His reasons, of course, for not joining the other parties as respondents to this appeal may not have any legal justification, but he did say in his petition of appeal that for this reason he did not think it was necessary to join the other defendants who got shares in the judgment of the learned District Judge as parties respondents to this appeal.

Mr. Gunasekera for the plaintiff-respondent has cited a number of cases in support of his contention that the Court should not exercise its discretion under Section 770 of the Civil Procedure Code and he stated that this Court was bound by the decisions in these cases. He referred to the case of *Ibrahim v. Beebee*[1], 19 N.L.R., 289 which was a judgment of the Bench of four Judges. Wood-Renton, C.J. in this case stated :

> " But the question remains whether, as a matter of discretion, we ought not to allow his name to be added under Section 770 of the Civil Procedure Code. 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."

[1] *(1916) 19 N.L.R. 289.*

Shaw, J. in the same judgment has also stated :

> "An appeal, defective owing to non-joinder of necessary respondents, can be remedied, in a proper case, by an order of the Court under Section 770 directing those parties to be added or noticed. Such order would seem to be entirely discretionary, and I should not myself be disposed 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 notice,* or unless it was not very apparent that the parties not joined might be affected by the appeal."

So that, Shaw, J. has given an additional ground when the discretion should be exercised, namely, where there is some good excuse given for the non-joinder or notice. Subsequent decisions, for example, *Avichchy Chettiar v. Perera,*[1] 40 N.L.R. 65 ; *Kaderason Chetty v. Perera,*[2] 8 C.L.Rec. 172 ; *Ramasamy Chettiar v. Mohamed Lebbe Marikkar,*[3] 7 C.L.W. 64 ; *Wickremasuriya v. De Silva,*[4] 8 C.L.W. 29 have followed the principle that the discretion should be exercised under Section 770 of the Civil Procedure Code when the defect was not one of an obvious character which could not reasonably have been foreseen and avoided.

The extent to which this principle, on which the discretion under Section 770 could be exercised by this Court had in the process of time hardened and crystalised into a virtual rule of law, is apparent from the judgment of Gunasekara, J. in *Suwarishamy v. Thelenis,*[5] 54 N.L.R. 282. Gunasekara, J. stated :

> "The principles upon which that discretion should be exercised have been laid down by a Bench of four Judges in the case of *Ibrahim v. Beebee.* It was there held that where an appeal has not been properly constituted by the necessary parties being made respondents to it the appeal should be dismissed 'unless the defect is not one of an obvious character which could not reasonably have been foreseen and avoided.'..... In these circumstances it is not possible to say that it was not obvious that the 3rd plaintiff was a necessary party or that the defendant was not one that could not reasonably have been foreseen and avoided. ..... I am afraid I cannot agree that we can allow the application without departing from the principles laid down in *Ibrahim v. Beebee.* We are bound by an authoritative judgment of this Court and can exercise our discretion only in conformity with the principles there laid down."

The subsequent cases of *Gunasekera v. Perera,*[6] 74 N.L.R., 163 and *Wijeratne v. Wijeratne,*[7] 74 N.L.R., 193 have followed the principle laid down in these cases on the ground that the ruling in *Ibrahim v. Beebee* has been consistently followed.

[1] *(1937) 40 N. L. R. 65.*
[2] *(1927) 8 C. L. Rec. 172.*
[3] *(1937) 7 C. L. W. 64.*
[4] *(1937) 8 C. L. W. 29.*
[5] *(1952) 54 N. L. R. 282.*
[6] *(1971) 74 N. L. R. 163.*
[7] *(1971) 74 N. L. R. 193.*

Section 770, in my view, gives a very wide discretion to this Court and there is room for introducing other principles by which the Court can exercise its discretion. The relevant portion of Section 770 reads as follows :—

> "if it appears to the Court at such hearing that any person who was a party to the action in the Court against whose decree the appeal is made, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day, to be fixed by the Court, and direct that such person be made a respondent, and may issue the requisite notices of appeal to the Fiscal for service."

Intrinsically there is nothing in Section 770 either expressly or by necessary implication to inhibit the discretion to the principles that have been set out in the case of *Ibrahim v. Beebee* as to do so will be tantamount to saying that the exercise of the discretion is cribbed, cabined and confined exclusively to these principles, limiting the exercise of the discretion in a particular way, and thereby putting an end to the discretion itself. In this connection I would quote the observations made by Lord Wright in *Evans v. Bartlam*,[1] 1937, 2 A.E.R., 646, at 655 :

> " To quote again from Bowen, L.J., in *Gardner v. Jay*, at p. 58 ;
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> When a tribunal is invested by Act of Parliament or by rules with a discretion without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the judge why should the Court do so ?
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> Similarly, it has been held by the Court of Appeal, in *Hope v. Great Western Railway Company* (7), that the discretion to grant or refuse a Jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, though in matters of discretion no one case can be an authority for another. As Kay, L. J., said in *Jenkins v. Bushby* (8), at p. 495 : the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.
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> A discretion necessarily involves a latitude of individual choice, according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae*, once the facts are ascertained."

With all due respects to the decisions that have been followed regarding the principles on which the discretion had been exercised in respect of Section 770, while admitting that there may be much to be said for the

[1] *(1937) 2 A. E. R. 646 at 655.*

principles enunciated in these cases, I am of opinion that the Court cannot be fettered in exercising a discretionary power which is given so widely by Section 770 by being bound to exercise the discretion only in conformity with the principles laid down in those cases.

To emphasise my point that the principle laid down in *Ibrahim v. Beebee* is not the sole criterion for exercising the discretion under Section 770, I would refer to the case of *Dias v. Arnolis*,[1] 17 N.L.R. 200 which is a full bench decision. The report states that the matter was referred to a full bench in view of the decision in *Buultjens v. Uparis* [2], 1910, 2 Cur. L.R. 195. It was argued that the decision in *Buultjens v. Uparis* was opposed to the very words of Section 770. Lascelles C.J. observed in the full bench case :

> " There can in my opinion, be no question but that this power is expressly and plainly conferred on the Judge by the above-named Section. The only difficulty which has arisen in the case is in connection with the decision in the case of *Buultjens v. Uparis et al.* Although in that case the Court did not exercise its powers under the Section, there is, in my opinion, nothing in that judgment which can be construed to question the power of a Judge to direct a respondent to be added in terms of Section 770 of the Civil Procedure Code. Whether or not a respondent ought to be added in any particular case is a question for the decision of the Judge who hears the appeal."

I have examined the case of *Buultjens v. Uparis*. In this case the Counsel for the respondent took the preliminary objection that the appeal was not in order as the 13th defendant was not joined as a party. He was a person most concerned in the decision because if the decree be set aside he would be materially affected. Wood-Renton J. posed the question " Have we the power to add parties in an appeal ? " The answer given by Counsel was, "No" and that the appellant's only remedy was to obtain leave to appeal notwithstanding lapse of time. Wood-Renton, J. held that as the 13th defendant will be prejudiced by the failure of the appeal to make him a respondent to the appeal. He nevertheless said :

> " I would dismiss the present appeal with costs, but would at the same time reserve the right of the appellant, if he is so advised, to apply for leave to appeal notwithstanding lapse of time."

A perusal of the report shows that Section 770 of the Civil Procedure Code was not cited during the argument and has not been referred to in the judgment. Therefore, it becomes clear as to why it was necessary to refer the matter to the full bench decision in *Dias v. Arnolis*. The case of *Dias v. Arnolis* had not laid down the principle which formed the decision in *Ibrahim v. Beebee*, namely, that the power of dismissal should be exercised unless the defect is not one of an obvious character which could not have been reasonably foreseen and avoided. On the

[1] *(1913) 17 N. L. R. 200.* [2] *(1910) 2 Cur. L. R. 195.*

other hand, the question whether or not the respondent ought to be added in a particular case is a question for decision of the judge who hears the appeal was laid down in the full bench case. Much the same flexible language was used by Shaw, J. in *Ibrahim v. Beebee* when he stated as the second reason for the exercise of the discretion, namely, unless some good cause is given for non-joinder.

With all respects to the decisions which followed *Ibrahim v. Beebee* and while we are conscious of the commendation attached to it that it had been consistently followed, I would rather on the facts and circumstances in this case prefer to follow the principles laid down in the full bench case of *Dias v. Arnolis* and also the second reason given by Shaw, J. in *Ibrahim v.Beebee* by stating that the exercise of the discretion is a matter for the decision of the judge who hears the appeal in the particular case and also that it should be exercised when some good reason or cause is given for the non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously.

I was also very much impressed by the test suggested by Mr. Jayewardene who appeared for the appellants who submitted that this Court should adopt a principle analogous to that which was adopted by the Privy Council in *Bilindi v. Attadassi Thera* [1] where a practical approach was adopted, namely, whether the discretion should be exercised if the defect can be easily remedied without injustice to anyone.

In this case objection was taken to the petition of appeal after judgment was given to the plaintiff. All the defendants including the defendant who was added as a necessary party in the course of the action filed the same petition of appeal and one notice of appeal was given on their behalf by the Proctor who was acting for them all. The objection which the Supreme Court upheld was that there was only one petition of appeal before the Court whereas it was said that there were in truth two appellants and as the petition bore a stamp sufficient to cover only one it was not properly stamped and the Court was bound not to proceed upon it, but to dismiss the appeal. Lord Goddard observing that the objection was based on a fallacy said :

> " That is a fallacy ; as soon as he gave his proxy to the proctor who was acting for the others and threw in his lot with them by adopting their defence he became a joint defendant with them for all purposes. As this is enough to dispose of this appeal their Lordships do not propose to express any opinion as to whether it is open to the Supreme Court, once the petition has been accepted by the Court of first instance, to take or give effect to an objection as to the sufficiency of the stamp, nor as to whether by the combined effect of Sections 756 and 839 it may not be possible for a *bona fide* mistake as to the stamp required to be remedied and thus perhaps avoid a miscarriage of justice. They say no more than that both points appear susceptible of considerable

[1] *(1945) 47 N. L. R. 7 at 9.*

argument and that it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to anyone. "

I am of opinion that no injustice will be done at this stage by permitting the 1st, 2nd, 3rd, 6th, 7th and 8th defendants to be added as parties, for the obvious reason, if the appeal is ultimately allowed, then it is because the Court exercised the discretion under Section 770 in their favour which enabled the appellants to win their rights. The defendants will also have had the satisfaction of having been given an opportunity of putting their arguments before Court. On the other hand, if the appeal is not allowed, then their rights are not prejudiced. One cannot also say that the reasons given by the Proctor in the petition of appeal for his views for the non-joinder of these defendants was factually incorrect, namely, that the point of contest raised as to the corpus at the trial was one between the 4th and 5th defendants-appellants and the plaintiff-respondent. The reason given by the Proctor for the appellants for his omission has not been challenged on the ground that it lacked bona fides. Where a party to an action, as in this case, has seriously and diligently prosecuted his appeal and taken all other necessary steps up to the time that the matter comes up for hearing of the appeal, he should not be penalised because his Proctor who filed the petition of appeal made a bona fide error in not making certain parties as respondent who might be prejudicially affected if the appeal is ultimately allowed.

I agree with the submissions made by Mr. Jayewardene that where a matter could be easily remedied without injustice being done then the discretion under Section 770 can be exercised by this Court in appeal in an appropriate case. I, therefore, overrule the preliminary objection and direct that in terms of Section 770 of the Civil Procedure Code, the 1st, 2nd, 3rd, 6th, 7th and 8th defendants in these proceedings be made respondents and the requisite notices of appeal be served on them. The plaintiff-respondent will, however, be entitled to the costs of this argument which I fix at Rs. 105 payable by the 4th and 5th defendants-appellants.

RAJARATNAM, J.—

I agree. Section 770 of the Civil Procedure Code has survived intact all the authorities referred to above to give us still an unfettered discretion to adjourn the hearing of the appeal to a future date and to direct that the 1st to the 3rd and 6th to the 8th defendants be made Respondents and the requisite notices of appeal be issued to the Fiscal for service. We have done so in the interests of a just hearing of the appeal while being most respectfully mindful of the guiding principles laid down by this Court. The plain meaning of this Section, however, shines with a clear and constant simplicity in the midst of all the wise observations made round it during the last half of a century.

Preliminary objection overruled.