1952 *Present :* **Gunasekara J. and Swan J.**

D. A. SUWARISHAMY, Appellant, *and* G. D. THELENIS *et al.*, Respondents

S. C. 119—D. C. (Inty.) Kalutara, 26,351

Appeal—Necessary party omitted—Discretion of Court to rectify defect—Civil Procedure Code, s. 770.

Where, in an appeal, a necessary party has not been made a respondent, the appeal will be dismissed unless the defect is not one of an obvious character which could not reasonably have been foreseen and avoided.

APPEAL from an order of the District Court, Kalutara.

E. D. Cosme, with *O. M. da Silva*, for the intervenient, appellant.

C. R. Gunaratne, for the 1st plaintiff respondent.

October 13, 1952. GUNASEKARA J.—

Counsel for the respondent, who is the 1st plaintiff, takes the objection that the appeal is not properly constituted in that the 3rd plaintiff, who is a necessary party, has not been made a respondent. Counsel for the appellant agrees that she is a necessary party but asks that we should exercise the discretion vested in this court by section 770 of the Civil Procedure Code and direct that she should be made a respondent. 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* [1]. 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 the present case, which is an action for partition of land, the order that is appealed from was made upon an intervention by the appellants, who claimed to have succeeded to certain interests that at one time belonged to one Eliashamy. The learned District Judge after inquiry held that Eliashamy's interests have now devolved on the 1st plaintiff and the 3rd plaintiff. 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 defect was not one that could not reasonably have been foreseen and avoided.

It is urged by learned Counsel for the appellants that the order he asks for would cause no prejudice and substantial justice would be done if the appellants are put upon terms. 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 appeal is rejected with costs.

SWAN J.—I agree.

Appeal rejected.

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