

1937

Present : Moseley J. and Fernando A.J.

TAMBIAH *v.* SANGARAJAH.

163—D. C. Colombo, 4,171.

*Appeal—No notice to person who is party in original Court—How party is affected not apparent to appellant—Discretion of Supreme Court—Civil Procedure Code, s. 770.*

Where a person who was a party to an action in the lower Court is not made party to the appeal, the Supreme Court would in the exercise of its discretion under section 770 of the Civil Procedure Code order notice to be served on such party if the Court is satisfied that it was not quite clear to the appellant that the party in question would be affected by the appeal.

*Ibrahim v. Bezbee* (19 N. L. R. 289) followed.

**A** PPEAL from an order of the District Judge of Galle.

*N. Nadarajah*, for first defendant, appellant.

*N. E. Weerasooria* (with him *L. A. Rajapakse*), for plaintiff, respondent.

June 24, 1937. FERNANDO A.J.—

The appellant appeals from an order made by the learned District Judge on May 26, 1936, entering judgment for the plaintiff as prayed for against both defendants. The plaintiff instituted this action for the recovery from the defendants jointly and severally of the sum of Rs. 20,778.33, and further interest on Rs. 17,500 being the amount due on a mortgage bond signed by the first defendant and by Idroos Lebbe Marikar Hadjar Abdul Hamid now dead, and represented in this action by the second defendant.

When the appeal was called, objection was taken by Counsel for the plaintiff that the appellant had failed to make the second defendant, the representative of the estate of Abdul Hamid, a party to this appeal, and that the appeal was not properly constituted, inasmuch as the second

defendant was also a necessary party. It seems to me that this contention must prevail. The judgment of the learned District Judge is against the two defendants jointly and severally, and although execution may proceed against the property of one or the other, it is also possible for one of the judgment-debtors, if he is compelled to pay the entire debt to take an assignment of the decree from the plaintiff and then proceed to recover a portion of the debt from the other judgment-debtor. The first defendant in his appeal contends that judgment should not have been entered against him inasmuch as the first defendant was a minor at the date of the mortgage bond, and if he succeeds in his appeal the result of the judgment being reversed will be either immediately to relieve him of his liability or to enable the Court to free him from liability on the ground of his minority. Counsel for the first defendant strenuously argued that the only issue tried was the question whether the first defendant's claim to avoid liability was barred by prescription, and that the second defendant was not a necessary party for a decision of that question, but the result of the appeal will affect the second defendant, and he is therefore clearly interested in the result of this appeal.

Section 770 however, of the Civil Procedure Code, provides that if it appears to the Court at the hearing of the appeal that any person who is a party to the action in the Court below, and 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 date, and direct that such person be made a respondent. Of course it is a matter of discretion for this Court whether the power given by section 770 should be exercised or not, and it has been held by a Bench of four Judges of this Court that that power should not be exercised unless some good excuse was given for the non-joinder, or unless it was not very apparent that the party or parties not joined might be affected by the appeal. As Wood Renton C.J. said in that case, "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 instituted 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. (See *Ibrahim v. Beebee* <sup>1</sup>). It might adopt the words of Shaw J. in that case, it may not have been very apparent to the appellant that the second defendant might be affected by the appeal, inasmuch as the second defendant had made default in appearing in Court and had filed no answer, and the only contest at the trial was between the plaintiff and the first defendant who had pleaded minority.

I would accordingly order that the second defendant be made a respondent to this appeal, and that notice of appeal should issue to the Fiscal for service on him in terms of section 770 of the Civil Procedure Code. The costs of this argument will abide the result of the appeal.

MOSELEY J.—I agree.

*Varied.*

<sup>1</sup> 19 N. L. R. 289.