1938 *Present :* **Maartensz and Hearne JJ.**

SEELANANDA THERO *v.* RAJAPAKSE.

170—D. C. Kandy, 44,651.

Appeal—Failure to make a necessary party, respondent—Irregularity—Application for relief—Civil Procedure Code, s. 770.

Plaintiff, as controlling trustee of a vihare instituted this action to be restored to the possession of a land belonging to the vihare from which, he alleged, the defendant had ousted him. The plaintiff, stating that he had leased the land to others, filed an amended plaint and averred that the lessees were necessary parties. The lessees were added as party plaintiffs.

The defendant claimed that he was entitled to possess the land as the lessee of another priest, who was the real trustee.

In the course of the trial the defendant's lessor was, on the suggestion of the Judge, added as a defendant for the purpose of deciding who was the real trustee. The District Judge held that the plaintiff was the trustee and entered judgment for the plaintiffs.

***Held,* that the added plaintiffs were necessary parties to the appeal and that the failure to make them respondents to the appeal was a fatal irregularity.**

***Held further,* that relief could not be granted to the appellant under section 770 of the Civil Procedure Code.**

THE plaintiff as controlling trustee of Kotabogoda Vihare brought this action to be restored to possession of a land vested in the vihare. The defendant claimed to be in possession under a lease from another priest who he said was the real trustee. The plaintiff had his lessees of the land joined as plaintiffs. The trial which commenced on January 8, 1935, proceeded on for several days. On January 15, 1936. the learned District Judge intimated to the parties that the lessor of the defendant should be added as a party defendant and that the question of who is the "Adikari Bhikkhu" should be decided. The plaintiff and the added plaintiffs amended their plaint and the trial was resumed. The learned District Judge held that the plaintiff was the Adikari Bhikkhu and entered judgment for the plaintiffs as against the added defendant and defendant. From this order the defendant and the added defendant appealed.

H. V. Perera, K.C. (with him *N. E. Weerasooria*), for plaintiff, respondent.—There is a preliminary objection against this appeal. The added plaintiff has not been made a party to the appeal. The plaintiff claims to be the incumbent of a vihare. The added plaintiff is the lessee under a notarial deed of lease for five years of the lands in dispute The learned District Judge held that the plaintiffs were entitled to the land as against the defendants. If the appeal is allowed the added plaintiffs would be deprived of their benefits under the decree.

No appeal is properly constituted where the granting of the appeal would prejudice a party not before Court—*Ibrahim v. Beebee.*[1]

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

F. A. Hayley, K.C. (with him *C. V. Ranawake*), for defendant and added defendant, appellants.—This is a case in which relief should be granted under section 770 of the Civil Procedure Code, 1889. The principles under which the Court should exercise its descretion are laid down in *Ibrahim v. Beebee*[1].

This case commenced as a possessory action. The plaint was amended in August, 1934, when the plaintiff's two lessees were joined as added plaintiffs. During the course of the trial, the plaintiff was allowed to contest an entirely different action, namely, on an incumbency. The added plaintiffs were there nominally. They were not represented at this stage. A new set of issues were framed and the original issues were disregarded. The whole judgment deals with the incumbency and the learned trial Judge has answered the new issues only.

The decree has given certain rights to the added plaintiffs, but the appeal is from the judgment and not from the decree. The code allows a party to appeal from the "judgment, order or decree". The decree may be varied to bring it into line with the judgment—section 189 of the Civil Procedure Code, 1889. Section 5 defines a decree and it may be drawn up at any time though it is dated as from the judgment—section 188. A copy of the judgment was brought to Colombo for the purpose of drafting the petition of appeal. The question decided there was whether the plaintiff was the incumbent. (*Ramasamy Chettiar v. Mohamadu Lebbe Marikar*[2].)

N. E. Weerasooria, in reply.—It is impossible to distinguish this case from those dismissed for not joining the necessary parties. This practice has existed for a long time. The necessary parties must be found out according to the decree. The added plaintiffs are vitally interested. They have substantial rights. It is quite possible that the petition of appeal may have been drafted without the decree, but that is a negligence of the proctor for which the defendant must suffer.

The added plaintiffs would be prejudiced if the appeal is allowed. *Thegis et al. v. Don Emanis et al*[3].

Cur. adv. vult.

March 17, 1938. MAARTENSZ J.—

The plaintiff as controlling trustee of the Kotabogoda Vihare brought this action to be restored to possession of a parcel of land vested in the vihare from which he alleged the defendant ousted him. The defendant claimed to be entitled to possess the land under a lease from another priest who he asserted was the real trustee.

The plaintiff himself had leased the property to certain persons and he filed an amended plaint in which he averred that his lessees were necessary parties to the action and prayed that the defendant be ejected and he and the lessees restored to possession.

The lessees were added as party plaintiffs.

The trail commenced on January 8, 1935, when issues were framed as to the possession of the plaintiffs and added plaintiffs, whether the

[1] *(1916) 19 N. L. R. 289.*
[2] *(1933) 17 Cey. Law Rec. 78.*
[3] *(1937) 17 Cey. Law Rec. 14.*

defendant had taken wrongful possession from the plaintiffs and added plaintiffs, and what damages the plaintiffs and added plaintiffs were entitled to.

The trial proceeded on these issues for several days. On January 15, 1936, the District Judge intimated to the parties that the trial would be of no use to either party unless the defendant's lessor is added as a party and the question of who is the "Adikari Bhikkhu" decided.

The lessor was in Court and he was added as defendant.

On March 17, 1936, the plaintiff and added plaintiffs filed an amended plaint in which they, in addition, prayed that the plaintiff be declared the incumbent of the vihare.

When the trial was resumed on April 30, 1936, fresh issues arising from the prayer that the plaintiff be declared trustee were framed and issues were also framed as to the possession of the plaintiff and added plaintiffs and as to ouster and damages. They are numbered 5 to 14, but, as observed by the District Judge, they "take in the previous issues and are comprehensive".

The District Judge held that the plaintiff is the Adikari Bhikkhu and that the lease P 16 which was the lease executed by the plaintiff in favour of the added plaintiffs prevailed over the lease D 1 relied on by the defendant, and entered judgment for the plaintiffs as against the added defendant and defendant.

The defendant and added defendant have appealed. They have not made the added plaintiffs respondents to the appeal, and a preliminary objection was taken to the hearing of the appeal on the ground that the appeal was not properly constituted.

The added plaintiffs are necessary parties as they are interested in the result of the appeal. It is now settled law that when a necessary party is not made a respondent the appeal should be rejected unless it is not clear from the proceedings that he was interested in the result of the appeal. The decree does not leave the matter in doubt. It further orders and decrees that "the defendant and added defendant be ejected from the land described in the annexed schedule and the plaintiff and the added plaintiffs be put, placed, and quieted in possession thereof".

The appellants' Counsel however pointed out that the appeal is from the judgment which does not refer to the added plaintiffs in the answers to the issues and only refers to them in the words by which judgment is entered for plaintiffs. It was suggested that the word "plaintiffs" was an error for "plaintiff" in the brief. I have referred to the original and I find that the word used is "plaintiff".

It was submitted that it was not clear from the judgment that the added plaintiffs were parties interested in the result of the appeal and that instead of dismissing the appeal we should make an order under section 770 of the Civil Procedure Code directing the added plaintiffs to be made respondents.

I regret I cannot accede to this submission. In my judgment it is perfectly clear from the steps taken to make the added plaintiffs parties to the action, the finding of the District Judge that their lease prevailed

over the lease of the defendant, and the use of the word "plaintiffs" in the group of words by which judgment was entered up, that the added plaintiffs were necessary parties to the appeal and that there could have been no doubt about it.

I accordingly uphold the preliminary objection and dismissed the appeal with costs.

HEARNE J.—I agree.

Appeal dismissed.