1955 *Present :* Gratiaen, J., and K. D. de Silva, J.

S. THAMBIPILLAI *et al.*, Appellants, *and* A. MUTHUCUMARASWAMY *et al.*, Respondents

S. C. Application 298—D. C. Jaffna, 5,752

Civil Procedure Code—Section 189—Amendment of judgments and decrees—"Accidental slip or omission".

Where, in an appeal preferred by the contesting defendants in an action, the plaintiff's claim was dismissed, but the Supreme Court inadvertently omitted to make a formal order that a decree granting the defendants' counterclaim for delivery of possession of the property in dispute should be entered in addition to the decree for the dismissal of the plaintiff's claim—

Held, that as the omission was an accidental one within the meaning of section 189 of the Civil Procedure Code the judgment and decree could be duly amended.

APPLICATION to amend a judgment and decree of the Supreme Court.

C. Thiagalingam, with *A. Nagendra*, for the 1st and 2nd defendant-appellants, petitioners.

H. W. Tambiah, with *C. Shanmuganayagam*, for the plaintiff-respondent.

S. Sharvananda, for the 5th defendant-respondent.

Cur. adv. vult.

October 14, 1955. GRATIAEN, J.—

This is an application for the amendment in certain respects of the judgment and decree of this Court dated 9th March, 1955.

A woman named Sellammah and her husband the 5th defendant had by a deed P2 dated 1st February, 1947, conveyed the land in dispute to the 1st and 2nd defendants. Sellammah died shortly thereafter leaving as her heirs the plaintiff and the 3rd, 4th, and 5th defendants. The deed provided *inter alia* (1) that the 1st and 2nd defendants must reconvey the property to Sellammah and the 5th defendant on payment of an agreed sum as consideration within a stipulated period and (2) that in the meantime the right of the 1st and 2nd defendants to obtain delivery of possession of the property should be postponed.

Notwithstanding the expiry of the stipulated period the plaintiff sued the 1st and 2nd defendants for a reconveyance. The 1st and 2nd defendants disputed their liability to part with their title at that stage and counterclaimed (1) a declaration that they were the owners of the property, (2) accrued damages and continuing damages until they were placed in vacant possession as purchasers under the deed P2.

The learned trial Judge held that the transaction was in reality a mortgage, so that the right to a reconveyance was not barred by lapse of time. Accordingly, he entered a decree in favour of the plaintiff (subject to certain conditions which are no longer material) and dismissed the claim in reconvention. On appeal, however, the Court took a different view of the transaction. In my judgment, with which Sansoni J. agreed, I held that P 2 operated as an absolute sale of the property subject only to the conditions previously mentioned. Accordingly, the judgment under appeal was set aside and the plaintiff's action was dismissed with costs in both Courts. A decree was passed in strict conformity with the terms of my judgment.

It has now been brought to our notice that through inadvertence, and for no other reason, my judgment, with which Sansoni J. expressed concurrence, had omitted to make any order in respect of the claim in reconvention of the 1st and 2nd defendants—that is to say, in respect of their prayer for a declaration of title and consequential relief on the basis that, as alleged in paragraph 13 of the answer, " the plaintiff and the 3rd, 4th, and 5th defendants were in wrongful possession of the property ". It must also be observed that, although the prayer to the answer did not expressly ask for a writ of ejectment, certain issues had by consent been raised at the trial inviting a decision whether, in the circumstances of the case, the 1st and 2nd defendants were entitled to this relief as well. This disposes of Dr. Thambiah's argument that this Court had in any event no power on appeal to grant the 1st and 2nd defendants anything more than a bare declaration of title and a decree for accrued and continuing damages.

My judgment dated 9th March, 1955, with which Sansoni J. agreed, expressly held that the 1st and 2nd defendants were the absolute owners of the property by right of purchase and also that their right to delivery of possession (which had been postponed by agreement for a period of 2½ years) had since accrued to them. Unfortunately, we " accidentally " omitted to make a formal order that a decree to this effect should be entered in addition to the decree for the dismissal of the plaintiff's claim. We certainly did not intend to reserve the important question of the 1st and 2nd defendants' rights for determination in any other proceedings. Sansoni J. has authorised me to confirm that, in his case too, the " omission " or " slip " was " accidental ".

Dr. Thambiah has submitted that this Court has no power under section 189 of the Civil Procedure Code to grant the relief asked for. He relied on *Dconis v. Samarasinghe* [1], but that judgment was pronounced at a time when the Court's powers under section 189 (in its original form) were strictly limited to the correction of variations between the judgment and the decree and clerical and arithmetical errors. Indeed, it was to meet such a situation as has now arisen that the language of the section was extended by Ordinance No. 26 of 1939 to cases where an error *in any judgment or order* had arisen " from any

[1] *(1911) 15 N. L. R. 39.*

accidental slip or omission". The powers now invoked by the 1st and 2nd defendants are co-extensive with those vested in the Courts in England by virtue of Order 28 Rule 11 of the Rules of the Supreme Court. As Lord Watson explained in *Hatton v. Harris* [1]:

> "When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which renders it inexpedient or inequitable to do so, to correct the record *in order to bring it into harmony with the order which the Judge obviously meant to pronounce.*"

With regard to the decisions explaining the scope of section 189 after it was amended in 1930, *Wanigasekara v. Kirihamy* [2] merely decided that the section cannot, after judgment, be invoked for the purpose of granting a party relief which through his own inadvertence he had omitted to claim at the trial. In such a case there was clearly no slip or omission on the part of the Court itself. *Mapalatham v. Elayavan* [3] is equally inapplicable, because there the Court had been misled into entering a judgment which it did intend to enter, but which was later discovered to be wrong in law. Section 189 does not empower a Court to correct mistakes of its own in law or otherwise, even though apparent on the face of the order. *Bright v. Sellar* [4]. The limited jurisdiction of a Judge to correct decisions which he subsequently discovers to be wrong was recently explained in *Harrison v. Harrison* [5]. Having pronounced judgment, he still retained control over the case until the order giving effect to his judgment is formally completed—i.e., until, in Ceylon, a decree or order has passed the seal of the Court. Roxburgh, J., accordingly was held to have the power to recall an order which, before it was formally drawn up, passed and entered, was discovered to be contrary to a decision pronounced during the interval by the House of Lords. But that jurisdiction is quite independent of section 189 or of Order 28 Rule 11.

Piyaratana Unnanse v. Wakaraka Unnanse [6] is not material to the present problem; in that case there was no variance in fact between the particular decree and the judgment on which it was based. The Judicial Committee was satisfied that the trial Judge had "deliberately refrained from deciding the title to a certain allotment of land".

In the present case we have the power, and we are clearly under a duty, to grant the first and second defendants relief against the error which has arisen from an accidental omission or slip for which I was primarily responsible. The judgment dated 9th March, 1955, must now be corrected so as to bring it into harmony with the order which Sansoni, J., and I obviously intended to pronounce on the earlier occasion. Accordingly, let the judgment be amended so as

(1) to declare the 1st and 2nd defendants entitled as against the plaintiff, and the 3rd, 4th, and 5th defendants to the land described in the Schedule to the plaint, and

[1] *(1892) A. C. 547, at 560.*
[2] *(1937) 7 C. L. W. 134.*
[3] *(1934) 41 N. L. R. 115.*
[4] *(1901) 1 K. B. 6.*
[5] *(1955) W. L. R. 256.*
[6] *(1950) 51 N. L. R. 313 (P. C.).*

(2) to order that the plaintiff and the 3rd, 4th, and 5th defendants be ejected forthwith from the said land, and that the 1st and 2nd defendants be placed in vacant possession thereafter.

Let the decree dated 9th March, 1955, also be brought into conformity with the judgment so amended. Mr. Thiagalingam states that the 1st and 2nd defendants do not press their counterclaim for damages provided that their application for a writ of ejectment is allowed. I would therefore make no order in respect of damages.

The plaintiff and the 3rd, 4th, and 5th defendants must pay to the 1st and 2nd defendants the costs of this application.

SWAN, J.—I agree.

Application allowed.