1964 *Present:* **Basnayake, C.J., Abeyesundere, J., and Sri Skanda Rajah, J.**

ODIRIS APPUHAMY, Appellant, *and* CAROLINE NONA, Respondent

S. C. 235/62—D. C. Kalutara, 323/P

Partition action—Absence of due registration of lis pendens*—Interlocutory decree—Incapacity of a new party to be added thereafter—Partition Act, ss. 3 (1), 6 (1) (a), 7, 8 (a), 11, 12 (1), 13 (1), 26, 48 (1) (2) (3), 70—Civil Procedure Code, ss. 84, 86, 87, 189, 207, 707, 839.*

Held (Sri Skanda Rajah, J., dissenting) : Once interlocutory decree has been passed in a partition action instituted under the Partition Act, a new party is not entitled, by invoking the provisions of section 48 (3) of the Act, to intervene and have the interlocutory decree set aside by the Court of first instance on the ground that the *lis pendens* has not been duly registered.

APPEAL from a judgment of the District Court, Kalutara.

D. R. P. Goonetilleke, with *S. S. Sahabandu*, for Plaintiff-Appellant.

M. Tiruchelvam, Q.C., with *K. Thevarajah* and *Nihal Jayawickreme*, for intervenient 16th Defendant-Respondent.

Cur. adv. vult.

July 8, 1964. Basnayake, C.J.—

This appeal first came up for hearing before my brethren Abeyesundere and Sri Skanda Rajah and because they were unable to agree on the decree that should be passed it now comes up for hearing before a Bench of three Judges. The questions that arise for decision are—

(*a*) whether, after the interlocutory decree has been passed in a partition action instituted under the Partition Act, a party can be added, and

(*b*) whether the Court that passed the interlocutory decree has power to set it aside.

Briefly the material facts are as follows :—The present action for partition was instituted on 28th May 1958. Thirteen persons were named as defendants in the plaint. Another person who claimed a part of the land as his exclusive property was added in the course of the proceedings and after investigating the title of the parties the learned District Judge passed an interlocutory decree on 23rd March 1960 and the steps for the partition of the land were under way when on 15th March 1961

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the 16th defendant (hereinafter referred to as the 'respondent') Lewuwanduwe Badalge Caroline Nona filed petition and affidavit and asked—

(*a*) that the Commission issued for the final partition of the land be recalled,

(*b*) that the interlocutory decree be set aside, and

(*c*) that she be given an opportunity of filing answer.

The petition was inquired into and on 17th April 1962 the learned District Judge made order setting aside the interlocutory decree and granting the petitioner an opportunity of proving her title to the land and recalling the Commission issued for partition of the land. The present appeal is from that order. The main points urged before us on behalf of the appellant are—

(*a*) that the Partition Act does not confer power to add a party after the interlocutory decree has been passed and that the learned District Judge did what he had no power to do, and

(*b*) that the Judge had no power to set aside the interlocutory decree which he had entered or to reverse any of the orders made by him subsequently.

The respondent sought to support the order of the District Judge mainly on the ground that *lis pendens* had not been duly registered and that therefore the interlocutory decree was null and void and that the District Judge had power to set it aside.

Express provision for the addition of parties is made in section 70 of the Partition Act which reads—

" (1) The court may at any time before interlocutory decree is entered in a partition action add as a party to the action on such terms as to payment or prepayment of costs as the court may order—

(*a*) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or

(*b*) any person who, claiming an interest in the land, applies to be added as a party to the action.

(2) Where a person is a party to a partition action and his right, title and interest to or in the land to which the partition action relates are sold, during the pendency of the partition action, in execution of, or under, any decree, order or process of any court, the purchaser of such right, title and interest at the sale shall be entitled to be substituted for that person as a party to the partition action, and such purchaser, when so substituted, shall be bound by the proceedings in the partition action up to the time of the substitution."

The above quoted provision leaves no room for doubt as to the stage of a partition action at which a party may be added. While a substitution under subsection (2) may be made at any time, an addition under

subsection (1) can be made only *before* interlocutory decree. In adding the respondent to this appeal as a party to the partition action, the learned District Judge did what he had no power to do.

Learned counsel for the respondent sought to support the judgment on the ground that section 48 (3) rendered the interlocutory decree ineffective as *lis pendens* had not been duly registered. Now subsection (3) reads—

> "The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by subsection (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a *lis pendens* affecting such land."

Section 48 (3) does not render an interlocutory decree null and void for the reason that *lis pendens* has not been registered. Subsections (1), (2) and (3) of section 48 indicate that under the Partition Act a decree is final as between the parties unless it is set aside in appeal. The material portion of subsection (1) reads—

> " Save as provided in subsection (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the Court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree."

Subsection (2) reads—

> " The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees."

The three subsections taken collectively indicate that notwithstanding—

(*a*) any omission or defect of procedure, or

(*b*) in the proof of title adduced before the court, or

(*c*) the fact that all persons concerned are not parties to the partition action—

the decrees are final and conclusive against all persons whomsoever except against a person who has not been a party to the partition action and claims a title to the land independently of the decree. Such a person must assert his claim in a separate action and can only succeed if—

(*a*) he proves that the decree had been entered by a court without competent jurisdiction, or

(*b*) that the partition action has not been duly registered as a *lis pendens*.

The present claim is one to be added as a party to the partition action and does not fall within the ambit of that provision. The District Judge has no power to set aside his own decree. All decrees passed by the Court are, subject to appeal, final between the parties (sec. 207 Civil Procedure Code) and may not be varied except in the circumstances set out in section 189 of the Code which empowers the Court to correct any clerical or arithmetical mistakes in any judgment or order or any error arising therein from any accidental slip or omission. The Court may also make any amendment which is necessary to bring a decree into conformity with the judgment. There is no inherent power in a Court of subordinate jurisdiction to set aside its own decree even though it be wrong. It would be proper to quote here the following observations of the Privy Council in *Piyaratana Unnanse v. Wahareke Sonuttara Unnanse* [1]—

" . . . . The general rule is clear that once an Order is passed and entered or otherwise perfected in accordance with the practice of the court, the court which passed the Order is *functus officio* and cannot set aside or alter the Order however wrong it may appear to be. That can only be done on appeal. "

Power to amend its own decree must be expressly conferred on a subordinate Court as has been done in sections 84, 86, 87 and 707 of the Code.

We therefore allow the appeal and set aside the order of the District Judge with costs here and below, and refuse the application of the respondent to be added as a party. It would be profitless to refer to cases decided under the repealed Partition Ordinance, as the present enactment expressly lays down the time before which a party may be added.

ABEYESUNDERE, J.—I agree.

SRI SKANDA RAJAH, J.—

If I begin by remarking that this appeal was argued by this Court, with occasional assistance from the learned Counsel who appeared for the parties, I will only be following, with respectful agreement, two learned and experienced Judges, eminent in their countries, though their observations are " not binding " on this Court.

[1] *(1950) 61 N. L. R. 313 at 316.*

In *Elliot v. Duchess Mill* [(1927) 1 K. B. 182], which came up before the Court of Appeal consisting of Lord Hanworth, M.R., Scrutton, L.J., and Romer, J., at 201, Scrutton, L.J., commenced his judgment, " The Court, with occasional assistance from counsel, took more than a day in discussing this case . . . . . "

In *The Federal Commissioner of Taxation v. Hoffnung & Co., Ltd.*, (1928) 4 C. L. R. 39, which came up before the Full Court consisting of Isaacs, Higgins and Starke, JJ., at 62, Starke, J., commenced his judgment, " This is an appeal from the Chief Justice, which was argued by this Court over nine days, with some occasional assistance from the learned and experienced Counsel who appeared for the parties. The evidence was taken and the matter argued before the Chief Justice in two days. This case involved two questions, of no transcendent importance, which are capable of brief statement, and could have been exhaustively argued by learned counsel in a few hours. "

This is a partition action filed on 21.5.1958, i.e., after the new Partition Act 16 of 1951 came into operation. Interlocutory decree was entered on 25.3.1960. On 15.3.1961 one Caroline Nona (Respondent to this appeal), who was not a party to this action, filed petition and affidavit alleging, inter alia, that this action had not been duly registered as a lis pendens, in that it was not registered in the correct folio, and prayed that the interlocutory decree be set aside. After inquiry the learned Additional District Judge made order on 17.4.1963 setting aside the interlocutory decree on the ground stated above. This appeal is from that order.

It seems appropriate to reproduce certain provisions of the Partition Act :

Section 3 (1)—Every partition action shall be instituted by presenting a written plaint to the court, . . .

Section 6 (1)—The plaintiff in a partition action shall file or cause to be filed in court with the plaint—

(*a*) . . . . an application (in duplicate vide sub-section(2)) for the registration of the action as a lis pendens addressed to the Registrar of Lands . . .

Section 7—Where the plaintiff in a partition action fails to comply with the requirements of . . . . section 6, the court may—

(*a*) return the plaint so that the plaintiff may, ... comply with those requirements, or

(*b*) reject the plaint . . .

Section 8—Where the plaint in a partition action is accepted, the court shall forthwith—

(*a*) cause to be inserted in each copy of the application for the registration of the action as a lis pendens a reference to the number assigned by the Court to the action, and transmit the application in duplicate to the Registrar of Lands of each land registry in which the action is to be registered as a lis pendens ;

Section 11—A Registrar of Lands to whom an application for the registration of a partition action as a lis pendens has been transmitted by a court under section 8 shall, upon registration of the action as a lis pendens, return to the court the duplicate of the application duly endorsed in the manner prescribed by the Registration of Documents Ordinance. . . .

Section 12 (1)—After a partition action is registered as a lis pendens . . . (proctor to file declaration).

Section 13 (1)—Where the court is satisfied that a partition action has been registered as a lis pendens . . . the court shall order that . . . summonses . . . . shall be issued . . . .

Section 26—(deals with the entering of interlocutory decree).

Section 48 (1)—Save as provided in subsection (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action ; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

(2) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.

(3) The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by subsection (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a lis pendens affecting such land.

Section 70 (1)—The court may at any time before interlocutory decree is entered in a partition action add as a party to the action, on such terms as to payment or prepayment of costs as the court may order—

(*a*) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or

(*b*) any person who, claiming an interest in the land applies to be added as a party to the action.

(2) Where a person is a party to a partition action and his right, title and interest to or in the land to which the partition action relates are sold, during the pendency of the partition action, in execution of, or under, any decree, order or process of any court, the purchaser of such right, title and interest at the sale shall be entitled to be substituted for that person as a party to the partition action, and such purchaser, when so substituted, shall be bound by the proceedings in the partition action up to the time of the substitution.

From the provisions reproduced above the following emerge :—

(1) Where a plaint in a partition action is filed it may be either accepted or rejected by the Court.

(2) If the Court accepts the plaint a number should be assigned to it. From that moment it would be pending.

(3) Thereafter steps should be taken to register the action as a lis pendens.

(4) Summons can issue only after the lis pendens is registered. To put it another way, registration of lis pendens is a condition precedent to the issue of summons.

(5) Before interlocutory decree the court may add parties.

(6) In section 48 (3) *want of due registration of the lis pendens is equated with such a fundamental matter as want of jurisdiction of the court in the sense of the power to act at all.*

It is elementary that every act of a court which lacks jurisdiction in the sense that it has no power to act at all is void and not merely voidable.

Anyone who has even a passing acquaintance with the procedure in the original courts would know that if, after the issue of summons, it is discovered that the lis pendens has not been duly registered, i.e., not registered in the correct folio, then the court orders that the lis pendens be duly registered, i.e., in the correct folio. After that order is carried out fresh summons is issued. This is done in the exercise of the Court's inherent powers, though there is no special provision in the Partition Act requiring this procedure to be adopted. In *Wijeyesinghe v. Uluwita*[1] Macdonell, C.J., said, " . . . . I cannot help thinking that a District Court has the power to recall process which it has issued improvidently, that is to say, on information which is or which is alleged to be insufficient and misleading. It seems clear from section 839 that a District Court

[1] *(1933) 34 N. L. R. 362 at 364.*

has inherent powers, and the various authorities cited to us in argument support this view. It would indeed be extraordinary if such court has not the power of vacating an order which had been obtained from it on insufficient or inaccurate information and there is abundant authority that it has that power."

The reason for doing so is that want of due registration of lis pendens has the same effect as failure to register the lis pendens at all and renders the issue of summons and all further proceedings null and void. Even an interlocutory decree entered under such circumstances would be null and void.

If all the proceedings from and after the registration of lis pendens are null and void, the resulting position would be that the action is still pending, and any person who has not been made a party will have the right to intervene and to be added as party.

In an unreported case, S.C. 74—D.C. (Inty.) Colombo 8115 P : S. C. Minutes of 3.2.1961, Sansoni, J., with whom Tambiah, J., agreed, said, " The learned District Judge has found that lis pendens was not duly registered. In view of that finding, it appears to us that summons should not have been ordered to issue on the defendants, since the correct registration of the lis pendens was a necessary step to have been taken by the plaintiff before such an order was made. We therefore set aside the interlocutory decree entered in this case and all proceedings taken at the trial. The case will go back in order that the plaintiff might register the lis pendens correctly. Thereafter, summons may be issued on the defendants, and the intervenient will also have an opportunity of putting forward his claim. A fresh commission to survey the land must also be issued. As all proceedings that have taken place since the filing of the plaint are bad, proceedings must commence *de novo*."

In *Noris v. Charles*[1] Sinnetamby, J., with whom H. N. G. Fernando, J., agreed, held that it is not open to a new party to intervene to have a decree set aside on the ground that lis pendens was not registered in the correct folio. The learned Judge took the view that to permit this would be to unduly prolong partition actions and thereby defeat the purpose of the new Partition Act.

Section 48 (3) restricts the grounds depriving an interlocutory decree of its "final and conclusive" character to : (1) want of jurisdiction in the court ; and (2) want of due registration of lis pendens. The determination of one or the other or both these will not take an unduly long time. There was no such restriction under the old Partition Ordinance. Therefore, it was that repeated interventions were possible and partition actions took many years. But, once these matters are decided, there can be no further interventions.

It behoves the court which enters a " final and conclusive " decree, to satisfy itself that it had jurisdiction and/or the lis pendens was

[1] *(1961) 63 N. L. R. 501.*

duly registered when such a matter is brought to its notice, regardless of the source of information being an outsider and the stage at which it is made aware. This power is inherent.

In considering the effect of section 48 (3), Sinnetamby, J., said at 503, " In the case of persons who are not parties to the action, however, sub-section 3 provides, inter alia, that the fact that the lis pendens had not been properly registered would deprive the decree of its final and conclusive effect." With respect I would agree. But with respect I am unable to agree with the learned judge's further statement, " This does not mean that he is entitled to intervene and have the interlocutory decree set aside." Why should a person wait till action is taken on the decree which in reality is no decree at all ? Why cannot he go to the court and intimate to it one or both these grounds ? In order to do so and to prove his allegation he will have to be permitted to intervene.

Section 48 (3) is concerned with a person who was not a party to the partition action. It only places the burden on a person who was not a party to the partition action to prove want of jurisdiction in the court or want of due registration of the lis pendens, as the case may be. It does not lay down the procedure he should adopt for doing so. It does not say that he should wait till " steps are taken against him under the partition decree " ; nor does it say that he should wait till " his proprietory rights are in any way challenged in other roceedings ", as stated by Sinnetamby, J., at 504 in *Noris v. Charles* (supra).

The observation of the learned judge that the question whether the lis pendens was duly registered will arise only if steps are taken against him under the partition decree carries with it the implication that, if steps are taken under the partition decree, e.g., to be placed in possession, he will be entitled to show in the partition action itself, that there was want of due registration. If he can do so at that stage, why should he not be permitted to do so without waiting till then ?

Section 70 is a permissive or enabling provision regarding addition of parties before interlocutory decree is entered. It is not exhaustive. It should not be construed as prohibiting the addition of parties altogether after interlocutory decree regardless of its validity. In the absence of express provision prohibiting the addition of parties after interlocutory decree the Court will have to act on the principle that the non-observance of an essential step such as due registration of lis pendens renders the proceedings void and puts back the partition action to the stage of the acceptance of the plaint by the court.

Due registration of lis pendens, like due service of summons on a party, is an essential step. Failure to comply with either would not come within the term " omission or defect of procedure " in section 48 (1). These words should be confined to omissions or defects of much more venial character as pointed out by Sansoni, J., in *Siriwardene v. Jayasumana* [1].

[1] *(1958) 59 N. L. R. 400.*

This view derives support from the judgment of T. S. Fernando, J., with whom Abeyesundere, J., agreed in *Victor Perera v. Don Jinadasa* [1], which I discovered after judgment was reserved and to which I have drawn the attention of My Lord the Chief Justice and brother Abeyesundere. The caption reads thus :—

> In partition suit No. 7059 R, who was added as a party, did not take any action herself in respect of the suit and did not participate at the trial. After interlocutory decree was entered she attempted to intervene in the suit in order to obtain either a dismissal of the suit or an exclusion of lots 1 and 2 in the corpus. Her attempt proved unsuccessful. Thereafter she transferred her rights in lots 1 and 2 to V.P. Relying upon this deed of transfer, V.P. instituted the present action No. 8576 claiming a declaration of title to lots 1 and 2, citing as defendants all the persons who had been allotted shares in the interlocutory decree which dealt with lots 1, 2 and 3 as one corpus. He claimed that, inasmuch as the partition action had not been duly registered as a lis pendens, his right to a declaration of his title was unaffected by the interlocutory decree.
>
> Held, that under section 48 (3) of the Partition Act the trial judge was obliged to address his mind to the question of due registration of the partition action as a lis pendens.

R. was already a party to the partition action 7059 when interlocutory decree was entered. Therefore, if that was a valid decree or the court had jurisdiction to enter it, not only R. but also her successor in title V.P. would be bound by it and by the final decree. I have examined the record in 8576, the issues, the learned District Judge's answers to them and the petition of appeal and find that, inter alia, the following points were before this Court for decision in appeal :

If lis pendens was not duly registered :—

(*a*) V.P., the appellant who derived title from R., would not be bound by the interlocutory decree in 7059 in spite of section 48.

(*b*) The interlocutory decree could not operate as res judicata because the court had no jurisdiction to enter it.

The question of due registration of lis pendens, to which this Court directed the District Judge to address his mind, would arise only if R. and, therefore, her successor in title V.P. were not bound by the interlocutory decree. This judgment can be explained only on the footing that if the lis pendens is not duly registered both the interlocutory and final decrees do not have the " final and conclusive " effect sought to be conferred on them by section 48 (1) and (2) *even as regards parties to the partition action.* That would seem to be because due registration is an essential step and not an " omission or defect of procedure ".

The learned Additional District Judge was right in permitting the respondent to intervene. All proceedings since the acceptance of the plaint are bad. Therefore, proceedings should commence *de novo.* I would dismiss the appeal with costs.

Appeal allowed.

[1] *(1962) 65 N. L. R. 451.*