1968 *Present :* **H. N. G. Fernando, C.J., Tambiah, J., and Siva Supramaniam, J.**

Mrs. M. NAVARATNAM, Appellant, *and* S. H. SOMAWATHIE SIRIWARDENA and 2 others, Respondents

S. C. 170/64—D. C. Anuradhapura, 6070/MB

Partition action—Erroneous interlocutory and final decrees—Power of Court to amend them subsequently—Finding in judgment that a share is subject to a mortgage—Omission to reserve in the interlocutory and final decrees the rights of the mortgagee—Sale of the share prior to amendment of the decrees—Effect—Scope of final and conclusive effect of interlocutory and final decrees—Civil Procedure Code, ss. 5, 187, 188, 189—Partition Act (Cap. 69), ss. 6 to 9, 26, 36, 48 (1), 48 (3), 51, 79.

Held by TAMBIAH, J., and SIVA SUPRAMANIAM, J. (H. N. G. FERNANDO, C.J., dissenting) :—Where, in an action governed by the Partition Act, the decree which the Court purports to enter under s. 26 of the Act is not in accordance with the findings in the judgment, such decree is not an interlocutory decree which has a final and conclusive effect under s. 48 (1). If the interlocutory decree is not such a decree as the Judge is empowered to sign under s. 26, the final decree for partition entered in pursuance of that decree is also not a valid "final decree under s. 36" having the final and conclusive effect under s. 48. In such a case the Court has the power, by virtue of the provisions of s. 189 of the Civil Procedure Code read with s. 79 of the Partition Act, to amend on a subsequent date the erroneous interlocutory and final decrees so as to bring them into conformity with the findings in the judgment, even though a divided share as described erroneously in the unamended decrees has already been sold and the purchaser's rights under the sale would be adversely affected by the subsequent amendment of the decrees.

In partition action No. 4417 the trial Judge found in his judgment that an undivided one-half share of the corpus was subject to a mortgage bond executed on 30th November 1954. Nevertheless the rights of the mortgagee, who was a party to the action, were not reserved either in the interlocutory decree or in the final decree entered on 11th October 1956 and 11th September 1958 respectively. Both decrees were registered. Thereafter, the person who was allotted the mortgaged share sold it "free from any encumbrance" on 24th June 1960. On 14th October 1960, upon the joint consent motion of the parties' Proctors seeking amendment of the decrees, the Court brought the decrees into conformity with the finding in the judgment by declaring that the divided share that had been allotted in lieu of the mortgaged undivided half-share was subject to the mortgage. The present action was subsequently brought by the mortgagee to enforce her rights on the mortgage.

Held (H. N. G. FERNANDO, C.J., dissenting), that the interlocutory decree and the final decree that were originally entered on 11th October 1956 and 11th September 1958 respectively did not have the final and conclusive effect contemplated in s. 48 of the Partition Act, and the Court had the power, under s. 189 of the Civil Procedure Code, to effect the amendments made subsequently on 14th October 1960. Accordingly, the divided share which had been sold on 24th June 1960 "free from any encumbrance" was subject to the mortgage executed in favour of the present plaintiff on 30th November 1954. The plaintiff was, therefore, entitled to a hypothecary decree.

1*——H 13548—2,130 (5/68)

APPEAL from a judgment of the District Court, Anuradhapura. This case was referred to a Bench of three Judges in terms of section 38 of the Courts Ordinance, owing to a difference of opinion between the two Judges before whom it was previously argued.

C. Thiagalingam, Q.C., with *T. Parathalingam*, for the 3rd Defendant-Appellant.

H. W. Jayewardene, Q.C., with *E. S. Amerasinghe* and *C. A. Amerasinghe*, for the Plaintiff-Respondent.

Cur. adv. vult.

February 18, 1968. H. N. G. FERNANDO, C.J.—

I regret that I am unable to agree with the conclusion of law which my brothers have reached in this appeal. That conclusion, it seems to me, is based on a literal construction of s. 189 of the Code, and fails to take account of the intention of the Legislature expressed in that section and in the relevant provisions of the Partition Act.

Section 189 empowers a Court—

(*a*) to correct any clerical or arithmetical mistake in a judgment ;

(*b*) to correct any error arising from an accidental slip or omission in a judgment ;

(*c*) to make any amendment necessary to bring a decree into conformity with a judgment.

In each of these cases, there will have been a fault on the part of the Court resulting in prejudice to a party, and justice demands that the Court corrects its wrongful act. Nevertheless I cannot agree that s. 189 casts on the Court a peremptory duty to make the correction. Such a peremptory duty would arise only if the section provided that the Court *shall* make the correction or amendment. Instead the section has only the word " may " which (save in exceptional cases) is merely empowering and not compelling. The fact that the Court is not bound to exercise the power to correct or amend its own errors is brought out in the dictum of Lord Watson on which my brother Tambiah relies :— " 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 ". The words which I have italicized constitute in my opinion a just and necessary limitation of the power of correction.

It is not difficult to envisage cases in which it would be inexpedient or inequitable for a Court to amend a decree. Let me mention some examples :

(*a*) The judgment in a divorce action brought by a wife provides for a divorce and for alimony of Rs. 200 per month. But by a typing error the decree orders the payment of Rs. 400 per month. The parties do not notice the error, and the amount of Rs. 400 per month is regularly paid for 2 years and received in good faith by the wife, and she spends the full amount for her maintenance. After two years, the former husband applies to the Court for amendment of the decree. If the usual amendment is made, that is, to take effect from the date of the original decree, the consequence will be that the former wife must either repay the Rs. 4,800 which was over-paid, or else set off the alimony for the next two years against the amount due from her. Re-payment is not possible, because the wife has no other property or income ; and if there is to be a set-off, then the wife will have nothing with which to maintain herself for the next two years. Surely, in such circumstances, it would be neither expedient nor equitable to amend the decree, except perhaps prospectively.

(*b*) A guardian files action for personal injuries, such as the loss of a limb, sustained by a minor. The judgment awards Rs. 3,000 as damages, but by error the decree orders payment of Rs. 5,000 as damages. Rs. 5,000 is paid by the defendant, and is received in good faith by the guardian, who expends it for the medical treatment and education of the minor. The error is noticed after three years when the minor has still not attained majority. Will it be expedient or equitable for the Court now to amend the decree, with the consequence that the minor will become a debtor in a sum of Rs. 2,000 ?

(*c*) In a partition action, to which only two co-owners having equal shares are parties, the judgment allots Lot A to the Plaintiff and Lot B to the Defendant. But by error, the decree allots Lot B to the Plaintiff, and *vice versa*. Lot B, which has on it a house which is subject to Rent Control, is advertised To Let, and a prospective tenant is advised by his lawyer, on the faith of the decree as registered, to take Lot B on rent. If the error in the decree is noticed two years later, is the Court to make an amendment of the decree, with the consequence that the tenant becomes a trespasser on Lot B ? (I must add that there has been at least one error of the exact nature mentioned in the first part of this paragraph. It was corrected in Revision in an Application which I myself decided, but unfortunately I am not able to cite the reference to the Application.)

(*d*) A claims a right of cart-way by necessity over B's land on a route marked X–X^1 shown in a Plan P1 filed with the plaint. B answers that a different route, marked Y–Y^1 on a fresh plan, is more convenient and less injurious to his land. The judgment upholds B's contention, but the decree by error declares A entitled to a cart-way " over the route X–X^1 as shown in the Plaintiff's Plan P1 ". The decree is duly registered, and A commences to use the route X–X^1. Soon thereafter, B sells his land to C, who erects a building on the land,

part of which building covers the route Y–Y[1]. If A subsequently discovers the error in the decree, is the Court bound at A's instance to amend the decree and thus compel C to demolish his building ?

Having regard to general considerations of equity and expediency, I am satisfied that the power conferred by s. 189 of the Code is purely discretionary, and that a Court is not bound to correct every error which might occur in its decrees. I must note also that in the present case we are concerned only with the third limb of s. 189, namely, the correction of a decree in order to bring it into conformity with the judgment. Consideration of relevant provisions of the Partition Act leads me to the conclusion that, in the case of Partition Decrees, the discretion to amend must be exercised with special caution.

Sections 6 to 8 of the Act impose on the Court the duty to cause the *lis pendens* of a partition action to be registered, and s. 9 requires a declaration from a proctor certifying to his inspection of the appropriate registers and containing a statement of the names of all persons found on such inspection to have interests or claims affecting the land. It is only after these requirements are observed that the Court can order the issue of summons. In this way the Legislature has done all that is possible to ensure that a partition action will not proceed to trial unless all persons having interests in the land have notice of it through the Court.

At this stage s. 67 comes into operation. By virtue of that section, the registration of the *lis pendens* becomes a warning to third parties that the law prohibits any dealings in the land prior to the final determination of the Partition action. Even dealings in the interests to be ultimately allotted in the Partition decree take effect only when the decree is entered (*Karunaratne v. Perera* [1]). But once the decree is entered, all these restrictions cease to operate, and it is significant that they so cease in consequence of an act of the Court. For again, s. 51 requires the Court to transmit a copy of the decree for registration. Where, as in the present case, the final decree is thus registered *at the instance of the Court*, the public has notice through the register of the termination of the action and of the interests allotted in a decree having the final and conclusive effect specified in s. 48.

The only qualifications of this final and conclusive effect of the decree are those specified in sub-section (3) of s. 48, namely that the Court had no jurisdiction and that the action had not been duly registered as a *lis pendens*. Hence a notary who examines title flowing from a partition decree will have a duty to investigate these two matters, both of which should involve only a consideration of matters recorded in the registers. But I do not agree that a notary (except *ex abundanti cautela*) need inspect the record of a partition action to search for defects in procedure, if any; for s. 48 does not provide that any such defects can qualify the final and conclusive effect conferred on a decree.

[1] *(1965) 67 N. L. R. 529.*

It cannot be denied that the power conferred by s. 189 of the Code to amend a decree conflicts with the provision in s. 48 of the Partition Act which renders a partition decree final and conclusive. Where such a conflict exists and it cannot be resolved otherwise, then the principle that the later statute prevails over the earlier must apply. But it is not necessary to go so far as to hold that s. 189 will not apply in the case of partition decrees. The language of Lord Watson, which I have already cited, propounds a test which will enable a Court to have regard to s. 48 in deciding whether or not to exercise its powers under s. 189 in the case of a partition decree. By causing a partition decree to be registered, a Court in my opinion "holds out" to the public that the decree has been entered and that it has the final and conclusive effect provided in s. 48. And if, on the faith of the registration of such a decree, a third party acquires an interest in a land or share allotted by the decree, then it will not be expedient or equitable to amend the decree in such manner as will deprive the third party of that interest.

In my opinion, therefore, the powers conferred by s. 189 cannot be exercised to amend a partition decree unless the Court first ascertains whether or not interests allotted by the decree have been acquired by third parties under duly registered instruments. If interests have been so acquired, the question whether an amendment of the decree is expedient and equitable will obviously arise for consideration by the Court, and it seems to me that ordinarily a Court will not in such a case allow an amendment which will defeat such interests.

The learned District Judge who tried the present case reached a finding of fact that the 3rd defendant purchased the land which is the subject of this case with knowledge that there had been a prior mortgage to the present plaintiff, and that the mortgage was not specified in the earlier partition decree through an omission on the part of the judge who entered that decree. It is not now necessary for me to state any agreement or disagreement with this finding, because in my opinion such a finding was not relevant to the decision of the present case. If the matter of the knowledge, or else of the ignorance, of the 3rd defendant concerning the error or omission in the partition decree was relevant at all, it was a matter which should have been decided by the Judge who entertained the application to amend the partition decree. The illegality which I hold took place, namely, that that Judge amended the decree without taking proper and simple steps to ascertain whether the amendment would be expedient and equitable, cannot in my opinion be cured by a finding as to knowledge reached many years later by a different Judge in a different action.

My brother Tambiah's observations in this case include the following statement concerning the provisions of ss. 26 and 48 of the Partition Act :—

> " It is only a decree which is contemplated by s. 26 of the Partition Act which is given the final and conclusive effect under s. 48 of the Act. It is not any type of decree which does not reflect the findings of the

Judge which is given the final and conclusive effect. When a peremptory duty is cast on the Court, to enter a decree which is in accordance with the findings of the Judge, it will be a monstrous proposition to state that when a Judge does not follow the peremptory provisions of the law and enters any type of decree, final and conclusive effect is given to such a decree."

With much respect, my own opinion does not substantially differ from that expressed by my brother. I seek only to qualify his statement by introducing the two words " without exception " after the word " given " in the last line of that statement. Section 189 of the Code provides for what I trust is the exceptional situation in which a Judge signs a decree which is not in accordance with the findings in his judgment. And I do agree that if such an exceptional situation does arise in a partition action, s. 189 *can* be utilised by the Court to correct its own error. At the same time, although I have just referred to the Court's " own error ", the parties to an action must take the blame at least equally with the Court for such errors, and particularly for that which occurred in this case, namely, that the decree did not specify the mortgage in favour of the present plaintiff. I must decline to be blind to the inveterate practice of our Courts, whereby in fact decrees are prepared by parties, and not by the Court. Having regard to that practice, the present plaintiff's proctor was very much to blame for his neglect to ensure that the decree which was submitted for signature in the Partition action did not specify her mortgage, and for the consequence that a defective decree was subsequently registered at the instance of the Court. That neglect on the proctor's part was in the circumstances the prime cause of the Court's error, and we unfortunately are not unfamiliar with situations in which clients have to suffer for the neglect on the part of their proctors. If in such circumstances, the Court signs an erroneous decree and causes it to be registered, and if a third party acquires rights on the faith of the decree as registered, it is not in my opinion " monstrous " for the Court to decline to exercise its powers under s. 189 of the Code. On the contrary, it seems to me quite clearly " monstrous " that a Court should be bound by s. 189 (which I repeat is an empowering and not a compelling provision) to amend errors in decrees which have misled third parties into transactions such as those I have envisaged in the examples lettered (*c*) and (*d*) in an earlier part of this judgment. In the case of a partition decree, there is the additional consideration that third parties may act on the faith of a decree required by law to be registered at the instance of the Court.

I must lastly express my fear that the majority decision in this appeal might be relied on in future even in situations different from that which arise in the present case. The decision, it seems to me, has been much influenced by the opinion that the third defendant's proctor should have looked into the record of the earlier partition action, and that such a search by him would have revealed the error in the decree. But the question whether a decree is in conformity with a judgment of a Judge

may not always be readily capable of solution ; a notary applying reasonable skill and judgment may advise his client that a proper decree has been entered, and the client may yet have to suffer if another Judge is satisfied, after having the advantage of learned debate, that there has been some lack of conformity between the judgment and the decree. Furthermore, a decision that there is a duty to compare a partition decree with the judgment can well be relied on for the contention that there is a duty also to examine various other matters, including the correctness of the record of the action. I myself doubt very much whether the Legislature contemplated that such considerations can afford grounds for denying to partition decrees the final and conclusive effect so clearly conferred on such decrees by s. 48 of the Partition Act.

For these reasons I would hold that the partition decree was not lawfully amended and that the amendment was null and void. In the result I would allow this appeal and dismiss, with costs in both Courts, the plaintiff's action for a hypothecary decree in respect of the land of the third defendant.

TAMBIAH, J.—

I agree with the reasons set out by my brother Siva Supramaniam, J. It is common ground that the unamended decree did not preserve the mortgage and is not in accordance with the judgment of the learned District Judge who decided the case. Counsel for the appellant contended that once the interlocutory decree is entered, although it may not be in accordance with the findings of the Judge, when it is followed up by the final decree, both the decrees are final and conclusive in view of the provisions of section 48 of the Partition Act. He further urged that although a Judge is given the power to amend an interlocutory decree, once the final decree is entered and the decree is sent up for registration by the Judge under the provisions of the Partition Act (Cap. 69) and is registered, he has no more power to amend the decrees however erroneous they may be. There is nothing in the Partition Act (Cap. 69) to support the propositions advanced by the learned Counsel for the appellant. No where in this Act is it stated that once the decree is registered the Court has no power to amend a decree which is not in conformity with the judgment.

Section 189 of the Civil Procedure Code (Cap. 101), in its unamended form, empowers a judge to correct clerical or arithmetical errors in entering up a decree. But later by Ordinance 36 of 1936, the Court was also empowered to correct any accidental slip or omission in the decree so as to bring it into conformity with the judgment. The powers conferred on a court by section 189 of the Civil Procedure Code to bring the decree into conformity with the judgment are co-extensive with the powers vested in the English Courts by virtue of Order 28 Rule 11 of the Rules of the Supreme Court to correct decrees. Commenting on the English

provisions Lord Watson said : (vide *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." Under our procedure, the court could correct any decree to bring it into conformity with the judgment at any time, subject to the limitations set out in the dictum of Lord Watson (vide *Thambipillai v. Muttukumaraswamy* [2]).

The Partition Act (Cap. 69) has a specific provision governing interlocutory decrees. It enacts : " At the conclusion of the trial of a partition action, or on such later date as the court may fix, the court *shall pronounce the judgment* in open court and the judgment shall be dated and signed by the Judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the court shall enter an interlocutory decree *in accordance with the findings in the judgment*, and such decree shall be signed by the Judge." (vide section 26 (1) of Cap. 69) A peremptory duty is cast on the Court to enter only a decree which is *in accordance with the findings in the judgment.* It will be illegal for a Judge to enter any other type of decree. It is only a decree which is contemplated by section 26 of the Partition Act which is given the final and conclusive effect under section 48 of the Act. It is not any type of decree which does not reflect the findings of the Judge which is given the final and conclusive effect. When a peremptory duty is cast on the Court, to enter a decree which is in accordance with the findings of the Judge, it will be a monstrous proposition to state that when a Judge does not follow the peremptory provisions of the law and enters any type of decree, final and conclusive effect is given to such a decree.

In this case the learned District Judge made order in his judgment stating that the decree will be entered accordingly. By that he meant, in accordance with the evidence which showed that the mortgage is preserved. It will be a travesty of justice if the plaintiff is denied the right to bring this action on the mortgage bond because the Judge, on whom the duty is cast by law, has failed to follow the provisions of section 26 of the Partition Act. In view of the far-reaching effect of section 48 of the Partition Act which gives finality to a decree entered under section 26, it became necessary for the Legislature to limit the finality and conclusive effect only to decrees which are entered in accordance with the findings of the judgment as set out in section 26 of the Act.

Mr. Thiagalingam urged that once a court sends a decree for registration, even though the decree may not be in accordance with the judgment, title to property will be affected if we adopt any other construction, since a bona fide purchaser may buy on the strength of the decree which is registered. It is not possible for any injustice to be done to a bona fide purchaser who is diligent. A proctor or notary employed by him should

[1] *(1892) A. C. 547 at 560.*

[2] *(1955) 57 N. L. R 97*

not only see that the decree is registered but also that the decree is in accordance with the findings of the Judge. If a decree is not in accordance with the findings of a Judge, he cannot pass title. Therefore no bona fide purchaser would in any way be affected. But if he buys without diligence a property on an erroneous decree, then the rule *caveat emptor* applies.

In view of section 79 of the Partition Act (Cap. 69), the provisions of section 189 of the Civil Procedure Code would apply empowering a court to amend a decree in order to bring it into conformity with the judgment.

After careful consideration of the evidence led in this case, I find no reason to interfere with the findings of facts in this case. The learned District Judge has held that no consideration has been paid on deed P3 by which the property was transferred to the second defendant. Sitting in appeal it is not possible for me to differ from this judgment. Therefore in this case, the second defendant is not a bona fide purchaser.

Finally, Mr. Thiagalingam submitted that a decree which is not in accordance with a judgment, yet is final and conclusive in view of the provisions of section 48 of the Partition Act which confers finality on such decrees despite errors or defects in procedure. He urged that entering of a decree which is not in accordance with the judgment is an error in procedure and therefore despite such errors finality is given to the decree by section 48 of the Act. But as stated earlier, it is only a decree which is contemplated by section 26 of the Act which is given finality by section 48 despite omissions and errors in procedure or defect in proof of title. Such finality does not apply to decrees which are entered by Judges, not in accordance with the peremptory mandatory provisions of section 26 of the Act which enjoins the Judge only to enter a decree in accordance with the judgment.

For these reasons I affirm the judgment of the learned District Judge and dismiss the appeal with costs.

SIVA SUPRAMANIAM, J.—

This appeal raises an important question in regard to the effect of an erroneous decree entered under s. 26 of the Partition Act, No. 16 of 1951, (Cap. 69) (hereinafter referred to as the Act) and the powers of a Court to amend such a decree.

The plaintiff instituted this action to enforce her rights on a mortgage bond No. 1372 dated 30th November (P1) granted by one Lewishamy Weeramantri in her favour. One of the properties mortgaged was an undivided one-half share of a land called Haggemuwakele, described as item 2 in the 1st schedule to the plaint. The mortgagor is now dead and the 1st defendant is the legal representative of his estate. After executing the mortgage bond P1 Lewishamy Weeramantri, by deed

No. 1374 dated the same day (P3), transferred his half share of the said land subject to the said mortgage to Dissanayake, the 2nd defendant. In April 1955 one Podinona who was entitled to the remaining half share instituted a Partition action (No. 4417 D. C. Anuradhapura) to partition the said land. Dissanayake and the plaintiff (the mortgagee of Dissanayake's share) were made parties-defendants. The action was not contested by the defendants. Podinona gave evidence setting out the title of herself and Dissanayake to the land and concluded her evidence as follows :—

> " The parties are each entitled to the land in the following shares :— Plaintiff to an undivided half share, the 1st defendant to an undivided half share. I have made the 2nd defendant a party inasmuch as she is the mortgagee under deed No. 1372 of 30.11.54 attested by C. B. Kumarakulasinghe and I produce it marked P20. The 1st defendant's interests are also subject to an agreement to transfer his ½ share to the 2nd defendant as allotted after the final decree of this partition action. I produce deed No. 133 of 30.11.54 attested by C. B. Kumarakulasinghe marked P21 ..... I pray that the land described in the schedule be partitioned in terms of the provisions of the Partition Act, No. 16 of 1951, that I be declared entitled to a divided specific lot in lieu of my undivided ½ share in the said land and that the 1st defendant be declared entitled similarly to a specified divided lot subject to the mortgage and agreement mentioned above in P20 and P21 respectively, that I be placed in possession of the divided lot awarded to me and for costs pro rata."

At the conclusion of the aforesaid evidence, the trial Judge made order as follows :—

> " Enter interlocutory decree for partition accordingly."

He did not write a judgment setting out, *inter alia,* the points for determination and the decision thereon as required by s. 187 of the Civil Procedure Code.

It was common ground, however, between the parties at the hearing of this appeal that the aforesaid Order made by the trial Judge should be interpreted to mean that he accepted the testimony of the witness Podinona, that his findings were in accordance with that testimony and that his judgment was that interlocutory decree for partition should be entered in accordance with those findings. The findings therefore included that the share of the 1st defendant was subject to a mortgage in favour of the 2nd defendant (the plaintiff in the instant case) under bond No. 1332 of 30.11.54 (P1).

Interlocutory decree for partition (3D5) was entered on 11th October 1956. Final decree for partition (3D6) was entered on 11th September 1958 in terms of which the divided allotments described in the schedule to the plaint in the instant case were allotted to Dissanayake in lieu of

his undivided interests in the said land. There was, however, no reservation of the rights of the 2nd defendant (the plaintiff in the instant case) on mortgage bond P1 in either the interlocutory decree or the final decree. Both decrees were sent to the Registrar of Lands for registration in terms of s. 51 of the Act and were duly registered in January 1957 and February 1959 respectively. On 24 th June 1960 by deed No. 1867 (3D11) Dissanayake transferred to the 3rd defendant the divided allotments to which he had become entitled upon the final decree 3D6. The transfer was declared by the vendor to be free from any encumbrance.

Thereafter, on 10.10.1960 the Proctor for the plaintiff in the partition action, with the consent of the Proctor for the defendants, moved the Court to amend the interlocutory and final decrees that had been entered to bring them into conformity with the judgment of the Court by setting out that the 1st defendant's share of the land was subject to a mortgage in favour of the 2nd defendant and also to an agreement to sell the divided share to the 2nd defendant. The motion was allowed by the District Judge. In accordance with the said Order an amended interlocutory decree (P6) was entered on 14.10.1960, in terms of which the undivided share of Dissanayake was declared to be subject, *inter alia*, to the mortgage in favour of the present plaintiff on bond P1. An amended final decree (P7) was also entered on the same date in terms of which the divided blocks allotted to Dissanayake in lieu of his undivided share were declared to be subject to the same mortgage.

The principal question that arises for determination in this case is whether the divided allotments transferred to the 3rd defendant by the 2nd defendant under deed 3D11 on 24.6.1960 are subject to the rights of the plaintiff under mortgage bond P1. The answer to this question depends on whether the interlocutory decree 3D5 and the final decree 3D6 that were originally entered had the final and conclusive effect under s. 48 (1) of the Act and, if so, whether the Court had the power to effect the amendments made subsequently.

S. 48 of the Act (omitting parts not relevant for the point under consideration) provides as follows :—

> " (1) ..... the interlocutory decree entered under s. 26 and the final decree of partition entered under s. 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) ..... "

It was argued that since s. 48 (1) does not limit the final and conclusive effect to interlocutory decrees " duly " entered under s. 26, even an erroneous interlocutory decree that had been signed by the Judge is a " decree entered under s. 26 " and should be final and conclusive under s. 48. The argument of counsel was somewhat as follows :—A court has jurisdiction to sign a right decree or a wrong decree. A wrong decree is nevertheless a decree. The provisions of s. 26 of the Act are similar to those contained in s. 188 of the Civil Procedure Code but in less stringent terms, since the latter requires that the decree should specify " in precise words the order which is made by the judgment ". But s. 189 recognises what is signed by the Judge under s. 188 as " a decree " even if it does not correctly specify the order made by the judgment, since it provides that a Judge " may make any amendment which is necessary to bring a *decree* into conformity with the judgment ". Similarly, a decree entered in pursuance of the provisions of s. 26 of the Act, whether it is in accordance with the findings in the judgment or not, is nevertheless " a decree entered under s. 26 of the Act " and should, therefore, have the final and conclusive effect under s. 48 (1).

The whole argument, in my view, is based on a fallacy that a court is entitled to enter a wrong decree. It is undoubtedly correct that in matters where a court has to make a decision, it may decide wrong as well as right and until and unless the decision is reversed by a superior court it is valid and binding, however wrong it may be. This principle, however, does not mean that a Judge has jurisdiction to act in contravention of the express terms of a statute. In regard to decrees, both s. 188 of the Civil Procedure Code and s. 26 of the Act give a mandatory direction to a Judge to sign a decree which is in accordance with the judgment. I am unable to agree that a Judge has jurisdiction to sign a decree in contravention of that direction or that a " decree " so signed is an effective decree. The fact that an erroneous decree signed by the Judge under s. 188 is referred to as " a decree " in s. 189 does not mean that it is enforceable as a valid decree until it is brought into conformity with the judgment.

Counsel also sought to derive support for his argument from the judgment of this court in *Rasah v. Thambipillai*[1] in which it was held that where an interlocutory decree had been entered in terms of s. 26 of the Act, a person is not entitled to avail himself of the provisions of s. 48 (3) in order to intervene subsequently and have the decree set aside on the ground of failure to register the action duly as a *lis pendens* under the Registration of Documents Ordinance. Special emphasis was laid by him on the following passage in the judgment of Sansoni C.J. at page 147 :—

> " Finally, Mr. Ranganathan who laid stress on the word " under " argued that an interlocutory decree entered under s. 26 and a final decree entered under s. 36 can only mean decrees which are regular in the sense that they have been entered after all the requirements of the Act have been obeyed, and that they are valid not merely in form but in substance. This argument cannot be sustained in view of the very terms of s. 48 (1) which contemplate decrees entered despite omissions or defects of procedure or inadequate proof of title, or non-joinder of parties who had an interest in the land. For the same reason I would hold that registration of an action as a lis pendens *under* the Registration of Documents Ordinance (as required by S. 13 (1)) does not mean registration in accordance with all the provisions of the Ordinance, since due registration is not required by section 13 (1)."

An examination of the above passage makes it clear that the point that arose for decision in that case is widely different from the one under consideration in this case. A defect in the registration of the action as a *lis pendens* will fall within the category of " an omission or defect of procedure " which, subject to the provisions of s. 48 (3), does not affect the final and conclusive nature of the decree. The case where a decree is not in conformity with the judgment is, however, not included in the section among the circumstances notwithstanding which the decree will be final and conclusive. A defect so fundamental cannot be regarded as falling within the description of " any omission or defect of procedure ".

S. 26 which relates to the entering of an interlocutory decree provides as follows :—

> " At the conclusion of the trial of a partition action, or on such later date as the court may fix, the court shall pronounce judgment in open court, and the judgment shall be dated and signed by the Judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the court shall enter an interlocutory decree *in accordance with the findings in the judgment*, and *such decree shall be signed by the Judge*."

[1] *(1965) 68 N. L. R. 145.*

It will be seen that under this section the Court is directed to enter a decree which is in accordance with the findings in the judgment and it is only " such decree " that shall be signed by the Judge.

There can be no question but that it was the intention of the Legislature that an adjudication made by the court under the Act should, subject to any decision on appeal, be final and conclusive despite any defect in procedure. A decree is " the formal expression of an adjudication "—s. 5 of the Civil Procedure Code. Can it be said that it was the intention of the Legislature that " the formal expression of the adjudication " should be " final and conclusive for all purposes against all persons whomsoever " even though it erroneously sets out the terms of the adjudication ? The answer is to be found in s. 26 which, as stated earlier, directs that the decree which " shall be signed by the Judge " shall be " in accordance with the findings in the judgment ". A judge is not empowered to sign any other decree.

" *The interlocutory decree entered under s. 26* " referred to in s. 48 (1) should therefore be " such decree " as is required to be signed by the Judge under that section, namely, a decree which is in accordance with the findings in the judgment. I am of opinion, therefore, that a decree purported to be entered under s. 26 which is not in accordance with the findings in the judgment is not an interlocutory decree which has a final and conclusive effect under s. 48 (1).

If the interlocutory decree was not such a decree as the Judge was empowered to sign under s. 26, the final decree for partition entered in pursuance of that decree was also not a valid " final decree under s. 36 " which had the final and conclusive effect under s. 48.

It was, however, urged that the Legislature passed the Act in view of the fact that the indefeasibility of the title under a final decree entered under s. 9 of the Partition Ordinance, No. 10 of 1863, " had tended to be eaten away " by reason of the decisions of this Court that the final decree was final and conclusive only when the decree was entered in proceedings which strictly complied with the essential and imperative provisions of that Ordinance and consequently the whole scheme of the new Act was designed to ensure finality to a decree entered thereunder. It was also urged that when a Court caused the interlocutory and final decrees to be registered in terms of s. 51 of the Act as instruments affecting the land, the Court itself held out to the world that the title under the decrees was good and indefeasible and that any interpretation of s. 48 which would affect the conclusiveness of the title would seriously jeopardise land tenure in this country and would cause undue hardship to innocent third parties who may purchase a land relying on the validity of the title as set out in the registered decrees.

I do not consider the above arguments to be sound. The final and conclusive effect given to a decree under s. 48 (1) is not absolute ; it is subject to the provisions contained in sub-section (1). Under this sub-section, decrees entered by a court without competent jurisdiction

or in an action which had not been duly registered as a *lis pendens* do not have a final and conclusive effect under s. 48 (1) as against a person who claims on an independent title and who had not been made a party to the action. An innocent purchaser cannot therefore blindly rely on the validity of the title under a registered decree. Although it is unnecessary that he should satisfy himself that all the provisions of the statute had been complied with as in the case of a decree entered under Ordinance No. 10 of 1863, he has still to satisfy himself that the title is not liable to attack by a person to whom s. 48 (3) applies. It cannot, therefore, be a hardship if he has also to satisfy himself that the registered decree is in conformity with the judgment before he can rely on the validity of the title.

In any event, if it was the intention of the Legislature that even erroneous decrees entered under s. 26 of the Act should be final and conclusive for the benefit of innocent purchasers, it should have made express provision to that effect.

The next question that arises for consideration is whether the Court had the power to amend an erroneous decree entered under s. 26 so as to attract the conclusive effect under s. 48. Although there is no specific provision in the Act corresponding to s. 189 of the Civil Procedure Code, it was conceded in the course of the argument that in view of the provisions of s. 79 of the Act, s. 189 of the Civil Procedure Code will be applicable to proceedings under the Act, provided the application of that section will not be inconsistent with the provisions of the Act. In view of the conclusion I have reached that an interlocutory decree which is not in accordance with the findings in the judgment is not an effective decree under s. 26 which has the final and conclusive character under s. 48, I am of opinion that it is not inconsistent with the provisions of the Act for the Court, acting under s. 189 of the Civil Procedure Code, to amend the interlocutory decree to bring it into conformity with the judgment. Since such an amendment will relate back to the date of the judgment, the Court has the power to make the corresponding amendment in the final decree under s. 36 as well. In the instant case, therefore, the amended decrees P6 and P7 are respectively the decrees under s. 26 and s. 36 which are final and conclusive under s. 48.

For the aforesaid reasons I am of opinion that the lands purchased by the 3rd defendant on deed No. 1867 dated 24th June 1960 (3D11) were subject to the mortgage in favour of the plaintiff on bond No. 1372 of 30.11.1954 (P1) and the plaintiff is entitled to a hypothecary decree in this case.

In view of the above conclusion, it is irrelevant to consider whether the 3rd defendant paid the full purchase price mentioned on deed 3D11 to the 2nd defendant or whether she was aware of the mortgage in favour

of the plaintiff at the time of her purchase. I would state, however, that the evidence on record is quite insufficient to support the finding of the trial Judge that the transaction embodied in the deed of purchase 3D11 was fraudulent and collusive.

I dismiss the appeal with costs.

Appeal dismissed.