IN THE COURT OF APPEAL
OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1.W. Jane Nona Kumbuka, Gonapola
2.W. Wijerathna, Maha Uduwa
3.K. Kusumawathie, Horana
4.W.Dayawansa, Maha Uduwa

14th, 15th, 17th and 24th
Defendant-Appellants

C.A. NO.499/98(F) &499 A /98 (F)

Vs.

D.C.HORANA CASE NO.231/P

H. D. Chalo Singho, Maha Uduwa

Substituted-Plaintiff-Respondent

D. Surabiel, Maha Uduwa
and others

Defendant- Respondents

BEFORE : **K. T. CHITRASIRI, J**

COUNSEL : Dr.Jayantha Pathirana with D.D.P.Dassanayake for the 15th and 24th Defendant-Appellants

J.A.J.Udawatta with Sanjaya Kannangara, for the Substituted Plaintiff-Respondent

WRITTEN SUBMISSIONS FILED ON : 28th May 2013 by the Substituted-Plaintiff-Respondent

: 03rd June 20113 by the 15th & 24th Defendant-Appellant

DECIDED ON : **25. 07. 2013**

CHITRASIRI, J.

These two appeals have been preferred consequent upon the delivery of judgment in the action bearing No.231/P filed in the District Court of Horana. It is an action filed to have the land called Delgahawatta which is morefully described in the schedule to the plaint, partitioned. Learned District Judge, after a protracted trial made order to partition the said land having allocated shares to the parties, as specified in his judgment.

When the appeal was taken up for hearing in this Court, learned Counsel for the appellants made an application to have this case remitted back to the District Court for re-trial submitting that it is not correct to permit the impugned judgment to stand since it had been delivered without substituting the heirs in place of the 8th, 10th, 16th, 19th and 20th defendants who had died whilst the case was pending in the lower Court. He substantiated this application citing a Supreme Court decision made in the case of **Gamarallage Karunawathie V. Godayalage Piyasena**. [S.C.Appeal No.09A/2010 decided on 05.12.2011 /Bar Association Law Journal 2012 pg.81] This decision has been followed in the case of **V.P.William Singho Vs I.V.Japin Perera and others** as well. [SC. HC. CA. LA. No.145/2011 decided on 08.06.2012]

However, learned Counsel for the plaintiff-respondent submitted that the Court of Appeal is not bound to follow these two decisions since those have been given *per incuriam* as the Supreme Court had failed to consider Section 81(9) of the Partition law No.21 of 1979 as amended by Act No. 17 of 1997 on the question of substitution of heirs in place of the deceased parties to the action.

In the said judgment in Karunawathie Vs. Piyasena, (supra) it was held that:

> *"When a party to a case had died during the pendency of that case, it would not be possible for the Court to proceed with that matter without bringing in the legal representatives of the deceased in his place".*
> [2012 B L R at pg.81]

The Supreme Court, on this question of non-substitution and its effects on a judgment, has further stated [at pg. 84] that;

> *"In the present appeal, as clearly stated earlier, prior to the judgment of the District Court dated 20.05.2005, the 15th respondent who was the 16A Respondent as well had died on 30.05.2004. No steps were taken for substitution of parties.*
>
> *Thereafter, an appeal was taken before the High Court and its judgment was delivered on 13.10.2009. However, the 2nd Respondent had died prior to that on 06.09.2007.*
>
> *Accordingly, it is evident that both of those judgments are ineffective and therefore each judgment would be rejected as a nullity".*

Admittedly, no substitution had been effected by the trial judge to substitute the heirs in the room of the deceased 8th, 10th, 16th, 19th and 20th defendants though they have died while the case was pending before him or in other words before the impugned judgment was pronounced. In the circumstances, it is necessary to examine the principle governing the decisions given *per incuriam* and its application to the doctrine of *stare decisis*.

Halsbury's Laws of England describes the rule of *per incuriam* as follows:

> *"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords Decision, in which case it must follow that decision; or* ***when the decision is given in ignorance of the terms of a statute or rule having statutory force."***

[Halsbury's Laws of England, 4th Edition Volume 26 Para 578 at pages 297 and 298]

Professor Rupert Cross in his Book "Precedent in English Law" [3rd Edition – 1977] explains the rule at pages 143 &144 as follows:

> *"The principle appears to be that a decision can only be said to have been given per incuriam if it is possible to point to a step in the reasoning and show that it was faulty because of* ***a failure to***

***mention a statute**, a rule having statutory effect or an authoritative case which might have made the decision different from what it was."*

In the case of **Young v Briston Aeroplane Company Ltd** reported in (1944) 2 All E.R. 293, Lord Green M.R. at page 300 held thus:

"But where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this Court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.

Furthermore, in the Indian case of **Government of A.P. and Another V. B. Sathyanarayan Rao (dead) by L.R.S.amd others reported in** [2000 (4) S.C.C.262, it was held as follows:

*"The rule of per incuriam can be applied where the court omits to consider a binding precedent of the same court or a Superior Court rendered on the same issue or **where the court omits to consider any statute** while deciding the same issue."*

Basnayake J (as he then was) in the case of **Alasupillai v. Yavetpillai** [1949 (39) C L W 107 and 108] gave the following definition:

> *"A decision per incuriam is one given when a case or statute has not been brought to the attention of the Court and* ***it has given the decision in ignorance or forgetfulness of the existence of that case or that statute****".*

Having set out the manner in which the rule *per incuriam* is defined, I shall now proceed to discuss the question of the application of a decision given *per incuriam* on the doctrine of *stare dicisis.* This doctrine of *stare decisis* is considered as an indispensable foundation upon which the law and its application to individual cases are determined. The effect of a decision given *per incuriam* on the said important doctrine is discussed in Halsbury's Laws of England in the following manner.

> *"578.The decisions of the Court of Appeal .....are binding. There are, however, three, and only three, exception to this rule;*
> *(1).....*
> *(2).....*
> *(3)* ***the Court of Appeal is not bound to follow a decision of its own if given per incuriam.*** *[Industrial Properties Ltd. Associated Electrical Industries Ltd. 1977 Q B 580] Unlike the House of Lords, the Court of Appeal does not have liberty to review its own earlier decisions."*

(Halsbury's Laws of England, 4th Edition Volume 26 Para 578 at pages 297 and 298)

In Professor Rupert Cross' Book titled "Precedent in English Law" [3rd Edition - 1977], at page 150, it is further explained in its concluding paragraph and it reads thus:

7. CONCLUSION

Summary of exceptions to stare decisis in appellate courts:

It will be convenient to conclude this chapter with a summary of all the exceptions to stare decisis in appellate courts. Even if such a court would be bound by a particular decision of its own in the ordinary way, that decision need not be followed

i. ...

ii. ...

iii. ...

iv. *If it was reached per incuriam by the same court*

v. ...

vi. ...

vii. ...

viii. *(perhaps) if it conflicts with a previous decision of a higher court ...*

In **Ramanathan Chettiar Vs. Wickramarachchi and others,** [reported in 1978 – 1979 (2) SRI L.R.395, at pages 410 and 411] **Soza J with Tambiah J agreeing,** sitting in the Court of Appeal observed thus:

"The doctrine of stare decisis is no doubt an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Certainty in the law is no doubt very desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into.

Further there is also the especial need for certainty as to the criminal law. While the greatest weight must be given to these considerations, certainty must not be achieved by perpetuating error or by insulating the law against the currents of social change. ..... However ....., a decision given per incuriam by the former Supreme Court is, if I may say so respectfully, not absolutely binding on the present Court of Appeal."

By the decision referred to above, the Court of Appeal had declined to follow the decisions made by the Supreme Court in the cases of Kurunegala Estae Limited Vs. The District Land Officer [BR/3528/ML 47-S.C.4 of 1976 decided on 01.04.1977] **and** Pathiwille Vs. The Acquiring Officer. [BR/3325/CL/834 – S.C. 1/75 decided on 11.05.1977] It was so decided on the basis that those decisions had been given *per incuriam.*

Accordingly, I will now turn to consider whether or not, the decision in Kusumawathie Vs. Piyasena (supra) would amount to a decision given *per incuriam* and if so, the effect it has on the doctrine of *stare decisis.* Learned Counsel for the respondent brought to the notice of this Court that the Supreme Court has not examined the provisions contained in the Partition Law No.21 of 1977 as amended by Act No.17 of 1997.

I have perused the judgment in Kusumawathie Vs. Piyasena carefully and could not find any reference therein to the provisions of Section 81 of the Partition Law No.21 of 1971 as amended by the Act No.17 of 1997. In that decision the provisions in the Civil Procedure Code as well as the Supreme Court Rules had been much elaborated with reference to Indian authorities.

I will now look at the provisions in Partition law on the issue of non-substitution of legal representatives in place of the deceased parties. At the outset, it is important to refer to Section 48(1) of the Partition Law No.21 of 1977 in which final and conclusive nature of Interlocutory and Final Decrees is set out. In that Section, failure to substitute the legal representatives in place of the deceased parties has been made ~~equatorial to~~ equated with an omission or defect in procedure. Section 48(1) in the Partition Law reads thus:

48. (1) Save as provided in subsection (5) 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, and in the case of an interlocutory decree subject also to the provisions of subjection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share of 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 decree relates 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.

It is to be noted that omission or defect of procedure includes a failure to substitute heirs or legal representative of a party who dies pending the determination of the action or to appoint a person to represent the estate of the deceased party. Furthermore, sub section (6) of section 48 stipulates that a right, share or interest awarded in a partition decree will deemed to be a decree in favour of the representatives of a party who is dead by the time the decree is entered even without a substitution being effected in place of a deceased party.

Therefore, it is clear that Section 48 of the Partition Law No.21 of 1977 as amended by the Act No.17 of 1997 is drafted to ensure the final and conclusive nature of a decree in a partition action even if no substitution has been effected to represent a deceased party in such an action.

It must also be mentioned that by the Partition (Amendment) Act No. 17 of 1997, a new Section was substituted in place of Section 81 of the Partition Law No.21 of 1977 whereby a new process had been introduced for the appointment of legal representatives to represent the parties in a partition action upon their death. Under Section 81(1) to Section 81(8) of the said Act, it has been made mandatory to file a memorandum by every party to a partition action or any other person, nominating at least one person [but not exceeding 3] to be his legal representative in the event of his death pending the determination of the partition action. The manner in which the parties are added as a party in such an instance is described in Section 69 of the Partition Law as amended by the Act No.17 of 1997

More importantly, it is Section 81(9) which is directly relevant on the question of failure to substitute a legal representative in place of a deceased party. It is significant that Section 81(9) starts with the failure to file a memorandum to nominate a person in terms of Section 81and it specifically deals with the question of failure to appoint a legal representative. It reads thus:

> "81(9)*Notwithstanding that a party or person has failed to file a memorandum under the provisions of this" section, and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made, partition or sale effected or thing done in the action shall be deemed to be valid and effective and in conformity with the provisions of the Law and shall bind the legal heirs and representatives of such deceased party or person. Such failure to file a memorandum shall also not be a ground for invalidating the proceedings in such action".*

Therefore, with the introduction of new Section 81 by the Partition (Amendment) Act No.17 of 1977, it is crystal clear that a judgment shall be deemed to be valid and effective and in conformity with the provisions of the Law and shall bind the legal heirs and representatives of such deceased party or person, despite the non appointment of a legal representative in place of a deceased party.

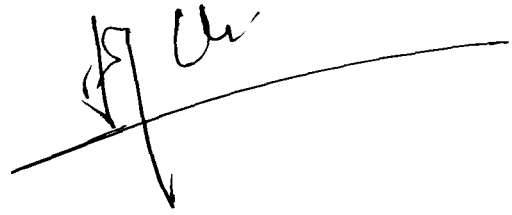
In the circumstances, this Court is entitled in law to consider the said decision in Karunawathie Vs. Piyasena (supra) was given in *per incuriam* and accordingly to consider it as an exception to the application of the doctrine of *stare decisis.* This is absolutely because the case law

cannot overrule statutory provisions laid down by an enactment of the Legislature.

In the circumstances, If I may say so respectfully, that the decision in Kusumawathie Vs. Piyasena is not absolutely binding the Court of Appeal since there had been failure to consider specific provisions in the partition law in respect of non-substitution, in the room of deceased parties in partition actions.

In the light of the above material, I am of the view that failure to effect substitution in the room of the deceased 8th, 10th, 16th, 19th and 20th defendants by the learned District Judge in this instance would not make the judgment invalid.

For the aforesaid reasons, I disallow the application to have this case remitted back to the District Court for re-trial.



JUDGE OF THE COURT OF APPEAL