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

In the matter of an Application for Writs of Certiorari and/or Prohibition under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Cargills Agrifoods Ltd.
(formerly known as "CPC Agrifoods Limited")
No. 40, York Street, Colombo 01

PETITIONER

C.A. (Writ) Application No. 198/2012

-Vs.-

1. Mrs. Kalyani Dahanayake,
   Commissioner-General of Inland Revenue,
   Sir Chittampalam A. Gardiner Mawatha,
   Colombo 02.

2. G.A.O. Dayawansa,
   Senior Assessor, Unit 10,
   Department of Inland Revenue,
   Colombo 02.

3. Ms. S.A.P.D. Dissabandara,
   Assessor, Unit 10,
   Department of Inland Revenue,
   Colombo 02.

4. M.D.J.M. Devappriya,
   Deputy Commissioner, Unit 10,
   Department of Inland Revenue,
   Colombo 02.

5. Ms. Samankala Thilakaratne,
   Assessor, Unit 10,
   Department of Inland Revenue,
   Colombo 02.

6. A.L.D. Sanjeewa,
   Assessor, Unit 10,
   Department of Inland Revenue,
   Colombo 02.

7. The Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

BEFORE : **K.T. CHITRASIRI, J. &**
L.T.B. DEHIDENIYA, J.

COUNSEL : Romesh De Silva P.C. with N.R.Sivendran and D.Jayasuriya for the Petitioner
Milinda Gunatilleka D.S.G. for the Respondents

WRITTEN SUBMISSIONS FILED ON : 04.08.2015 by the Petitioner
25.08.2015 by the Respondents

DECIDED ON : **10TH SEPTEMBER 2015**

ORDER

Petitioner Company filed this Application seeking to have three Interim Orders and two Final Orders. Those 3 Interim Orders are found in Prayer "B" whilst the Final Orders are found in Prayers 'C' and 'D' to the Petition. When the matter was supported initially on the 27th July 2012, Court granted the Interim Orders as prayed for in Prayer "B" to the Petition. Thereafter on several occasions the validity of the Interim Orders had been extended by this Court.

Having received notices, the Respondents were represented in this Court by a Counsel from the State and had moved time to file objections to the main application filed by the Petitioner. Said application by the Respondents to file objections was made for the first time on the 5th of September 2012. Thereafter, on several occasions they have moved further time to file objections. Finally, by the Motion dated 14th July 2014, the objections of the Respondents were filed and it had been tendered to Court on the 15th of July 2014. On that same day, i e on the day that the objections of the Respondents were filed, learned D.S.G. objected to the extension of the Stay Order that had been in force for a long period of two years prior to 14.07.2014.

Upon the said objection being raised, both parties were heard on the 7th of August 2014 in respect of the issue as to the extension of the Stay Order. Thereafter, parties were given time to file their written submissions as well. Upon filing the written submissions, the matter was adjourned for the delivery of the order on the question of extending the Stay Order.

Thereafter, it was mentioned on the 18th November 2014 and then the Court on that date made order to mention the case on 5th of December 2014 for the delivery of the order on the question of extending the stay order. Journal Entry made on the aforesaid date namely on the 5th of December 2014 reads thus:

"Order delivered in open Court ...

Application is dismissed with costs."

The journal entry above shows that the Court had delivered the judgment in this case on the 5th of December 2014 though it was the date fixed for the delivery of the order, in respect of the extension of the stay order issued by Court. Indeed, the parties, on that date were expecting an order in respect of the extension of the Interim Order.

Consequently, a motion had been filed on the 12th of December 2014 on behalf of the Petitioner moving to have the said judgment dated 5th December 2014 vacated, on the ground that it had been made *per incuriam.* It is trite law that a decision made *per incuriam* is applied when a Court makes an order ignoring or without reference to a contradictory statute or binding authority.

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****".*

However, the circumstances of this case do not show that there had been such an ignorance of the law by the Court in this instance. Nevertheless, the authorities cited by both the Counsel show that our Courts have extended the aforesaid rule *per incuriam* even to remedy an injury caused to a party when there had been a mistake on the part of the Court. In **Sivapathalingam vs. Sivasubramanium** [1990 (1) S L R 378], it was held that:

> *"suspension of an injunction without notice to the Petitioner causes an injury to that Petitioner ... becomes invalid as it was made without proper notice been given to the Petitioner, and the said Order was vacated having applied the Rule per incuriam."*

In the case of **Gunasena vs. Bandaratilleke** [2000 (1) S.L.R. 292] it was held that:

> *"the Court of Appeal mistakenly thought that the learned District Judge had entered judgment for the Plaintiff and that the appeal was by the Defendant. Consequently, the Court dismissed the appeal with costs and entered decree. Thereafter, the record was returned to the District Court with the judgment and the Decree. Then the same Court of Appeal recalled the case record and set aside its judgment on the ground that it had been delivered per incuriam and re-fixed the matter for argument."*

In **Kariyawasam vs. Priyadarshini** [2004 (1) S L R 189] Court of Appeal vacated its judgment and held that the *per incuriam* findings in the judgment of the Court of Appeal has been as a result of Courts attention not been drawn to the second page of the Final Decree where "G" has been allotted shares.

Decisions referred to above had been made exercising the inherent power of Courts in order to repair an injury caused to a party by a mistake of the Court and not due to any fault on the part of the parties to the action. Therefore, to apply the law pronounced in those authorities, this Court is to consider whether the circumstances of this case would have led to cause an injury to the Petitioner due to the delivery of the judgment by this Court on 5th December 2014.

Learned DSG in his submissions has made an attempt to distinguish the matters referred to in the cases referred to above with that of the facts of this case. In doing so, he has argued that even an appeal should have been allowed in Gunasena vs. Bandaratilleke (Supra), if not for the mistake

of the Court since there had been a clear injury to that party in that case. In the other two cases too, he has stated that if not for the decision of those two cases, the affected party would have been seriously affected.

In the circumstances, it is necessary to consider whether the Petitioner's rights would be affected or whether there had been an injury caused to the Petitioner as a result of the judgment been pronounced by this Court on the day that the Order in respect of the extension of the Interim Order was to be delivered.

Admittedly, the said judgment dated 05.12.2014 was delivered on a day that the matter was fixed for the delivery of the Order in respect of the extension of the Interim Order. As mentioned hereinbefore, both parties were expecting to have an order on the 5th of December 2014 on the question of extending the Interim Order. They, in their written submissions filed in connection with the extension of the interim order too, have mentioned its topic as the "Written Submissions ... as to the extension of the Interim Order". Those submissions had been made restricting it to the question of extending the Interim Order. Moreover, in those written submissions, they have not referred to any matter concerning the final reliefs either. The final reliefs sought by the Petitioner are quite different to the interim reliefs referred to in the Petition.

Therefore, it is clear that the Petitioner was expecting to have a hearing proper, in respect of the final reliefs and to make submissions on a

day fixed for the hearing of the main matter. It is crystal clear that no party was heard at all in connection with the final reliefs sought by the Petitioner. Therefore, it is seen that the Petitioner was not afforded by this Court, an opportunity to present his case as far as the final reliefs are concerned.

Learned DSG has also contended that it is futile to proceed with the matter since the appeals filed by the Petitioner in the Tax Appeals Commission has already been delivered its decision after this action was filed. However, the fact remains that the Petitioner was not given an opportunity to make submissions on the main issue brought before the Court. Indeed, in the submissions filed by the Petitioner in respect of the extension of the Interim Order, they have clearly stated that the aforesaid decision made by the Tax Appeals Commission is not a matter that can be decided in the application as to the extension of the Interim Order. In those submissions they have stated thus:

> *"6.6 In the circumstances, it is submitted that whether a finality has been reached in the appeal process has nothing to do with the interim order application that has been prayed for in Your Lordship's Court in this matter."*

The petitioner also in a sub topic in those written submissions has stated that the main relief in Prayer "C" of the Petition is a live issue.

I have also carefully examined the judgment of this Court made on the 5th December 2014 as well. In that judgment, appeals procedure

referred to in Section 7(1) of the Tax Appeals Commission Act has been extensively discussed but I do not see therein any consideration by His Lordship on the matters concerning the final reliefs sought in the petition filed by the petitioner. However, by stating so, I do not mean that the matters referred to in that judgment are incorrect. I do not wish to make any comment on that judgment either.

As discussed hereinbefore, it is clearly seen that the Petitioner was prevented from presenting his case in respect of the final reliefs prayed for in the petition filed by him. It is thereby seen that a serious injury had been caused to the Petitioner. Such a position has come into place purely due to a mistake on the part of the Court. Therefore, this Court has the inherent power to remedy such an injury caused to the petitioner in view of the judicial pronouncements referred to hereinbefore. For the reasons setout above, I vacate the judgment dated 5th December 2014 of this Court.

In the circumstances, this matter is to be mentioned on another date to fix it for argument.

JUDGE OF THE COURT OF APPEAL

L.T.B.DEHIDENIYA, J

I agree.

JUDGE OF THE COURT OF APPEAL