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

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Mohamed Nilaudeen of
Paragahadeniya, Hettiyawala, Weuda.

PLAINTIFF

-Vs-

C.A. No. 866/2000 (F)

D.C. Kurunegala Case No. 5030/L

1 Mohammed Sameen Mohamed Rasleem,
No.56, Paragahadeniya, Weuda.

2 Sadukeen Mohamed Mujeem,
No.56, Paragahadeniya, Weuda.

3 Samsudeen Zahira Banu,
Paragahadeniya, Weuda.

DEFENDANTS

AND

Mohamed Nilaudeen of
Paragahadeniya, Hettiyawala, Weuda. *(deceased)*

PLAINTIFF-APPELLANT

1A. Mohammadu Zaheer,

No.135 A, Hettiyawela, Paragahadeniya, Weuda.

SUBSTITUTED 1A PLAINTIFF-APPELLANT

-Vs-

1 Mohammed Sameen Mohammed Rasleem,
No.56, Paragahadeniya, Weuda.

2 Sadukeen Mohammed Mujeem,
No.56, Paragahadeniya, Weuda.

3 Samsudeen Zahira Banu,
Paragahadeniya, Weuda.
1ST , 2ND , AND 3RD DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Mohammed Sameen Mohammed Rasleem,

No.56, Paragahadeniya, Weuda.

2. Sadukeen Mohammed Mujeem,
No.56, Paragahadeniya, Weuda

3. Samsudeen Zahira Banu,
Paragahadeniya, Weuda.
1ST , 2ND , AND 3RD DEFENDANT-RESPONDENTS-PETITIONERS

Vs

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1A. Mohamed Zaheer,

135A, Paragahadeniya, Weuda

SUBSTITUTED-1A PLAINTIFF-APPELLANT -RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Champaka Ladduwahetty with Kirthi Gunawardena for the Defendants-Respondent Petitioners

Harith de Mel with Piyumi Kumari for the Substituted 1A Plaintiff-Appellant-Respondent

Decided on : 28.11.2019

Reasons : 06.12.2019

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By a petition dated 4th September 2019, the 1st, 2nd and 3rd Defendants-Respondents-Petitioners (hereinafter sometimes referred to as "the Defendants") have sought the rectification of the judgement delivered by this Court in this case on 04.09.2018, by seeking to have a part of the said judgement set aside. The material part of the judgement which contains the impugned portion sought to be rectified reads as follows:

> "*Accordingly, I take the view that the Plaintiff is entitled to a declaration that P2 the deed of cancellation is null and void* ***and in the circumstances P3, the deed of transfer and P4 the deed of gift donating a portion of the subject matter on the strength of the title purportedly acquired by the 1st Defendant by way of P2 should also be declared null and void.*** " -see the Judgment dated 04.09.2018 in CA 866/2000 (F)-DC Kurunegala 5030/L.

There is no complaint of a *per incuriam* order that is made against the 1st sentence of the above paragraph (unhighlighted portion) and it is only in regard to the highlighted part of the judgment the Defendants seek to attach the taint of a "*per incuriam* decision or determination" and though the Defendants did not prefer an appeal to the Supreme Court canvassing the propriety of the judgment, the jurisdiction of this Court is invoked to correct or rectify the decision in the highlighted portion on the premise that it is *per incuriam* and that this Court can rectify it on the basis of its inherent jurisdiction.

If one summarizes the effect of the above ratio in the paragraph, it would mean that this Court in its judgment dated 04.09.2018 had declared null and void a unilateral cancellation of a deed of gift (**P2**). In addition this Court made further declarations that two other deeds **P3** and **P4** which were executed and derived their purported validity subsequent to **P2** were also null and void. The argument is that this Court lacked jurisdiction to make these two further declarations. These are declarations made *per incuriam* and should therefore be rectified in the inherent jurisdiction of this Court. This was the argument that was advanced by the Petitioners and according to Mr. Champaka Ladduwahetty the learned Counsel for the Petitioners this argument springs from Section 839 of the Civil Procedure Code (CPC) which reads as follows:

> "*Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*"

The petition before this Court undoubtedly engages the question whether the main decision was reached *per incuriam* and I recall Lord Alfred Tennyson's memorable lines in *Aylmer's Field:*

> "*Mastering the lawless science of our law,*
> *That codeless myriad of precedent,*

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That wilderness of single instances,

Through which a few, by wit or fortune led,

May beat a pathway out to wealth and fame."

Per Incuriam orders rectifiable in inherent jurisdiction

From among the labyrinthine maze of precedents I do stumble upon authorities for the proposition that even *per incuriam* orders are capable of rectification in the exercise of inherent power. The rationale behind this approach is the all too familiar principle that no man shall be put in jeopardy by a mistake made by a Court. The Court should be amenable to the exercise of inherent powers to rectify errors made *per incuriam*-see ***Kariawasam v Priyadhrashani*** (2004) 1 Sri.LR 189. Where orders are demonstrably and manifestly wrong and where it is necessary in the interests of justice to correct such errors, even the Supreme Court has declared that it has inherent power to correct its errors. Decisions made *per incuriam* can thus be corrected. The Supreme Court has proceeded on the basis that inherent powers are adjuncts to existing jurisdiction to remedy injustice. They are certainly not the source of new jurisdictions to revise a judgment rendered by that Court-see ***All Ceylon Commercial & Industrial Workers Union v Ceylon Petroleum Corporation and Another*** (1995) 2 Sri.LR 295 at 297. In ***Ganeshananthan v Vivienne Gunawardene and Three Others*** (1984) 1 Sri.LR 319, the Court held:

> *"As a Superior Court of record there is no doubt that it has inherent powers to make corrections to meet the ends of justice".*

In ***Jeyaraj Fernandopillai v De Silva and Others*** (1996) 1 Sri.LR 70, a five judge decision of the Supreme Court, which remains a *locus classicus* on inherent jurisdiction, Amerasinghe J held that where the judges are available, a review of the *per incuriam* decision should be referred to the Court composed of the judges who heard the case. Amerasinghe J alluded to ***Wickremasinghe and Others v Cornel Perera and Others*** S.C. Minutes of 21.03.1996, S.C.L.A No 49/96 and

stated that the Court has *advanced beyond graceful politeness and considerateness in intercourse as a justification of the practice.*

In order to ascertain whether the further declarations of invalidity made in this case attract the *per incuriam* rule, the factual template of the case has to be laid bare before one proceeds to dispose of this argument and in a nutshell, the facts engulfed in the case go as follows:

The Plaintiff-Appellant-Respondent (hereinafter sometimes referred to as the Plaintiff) had instituted this action in the District Court of *Kurunegala* seeking among other reliefs that the deed of cancellation or revocation **(P2)** effected by his mother be set aside. She had gifted the subject-matter of the action by a deed of gift **(P1)** in his favour on 16.09.1986 but four years later her maternal instincts veered towards her younger son and so she unilaterally proceeded to revoke the deed of gift by a deed of revocation or cancellation on 27.03.1983 **(P2)**.

In the wake of this revocation she transferred the land to the younger son -the 1st Defendant on 27.04.1983 **(P3)**. Subsequent to this acquisition the 1st Defendant (the younger son) donated the land to his son-in-law -the 2nd Defendant by **P4**. The Plaintiff sought a declaration that he remained the legal owner of the property despite the unilateral revocation of the deed of gift on the part of his mother. The Plaintiff averred that that since **P1** (the deed of gift) remained valid and effectual, the subsequent deeds **P2 (deed of revocation of the deed of gift), P3 (the deed of transfer) and P4 (the deed of gift)** all became null and void.

When the matter was taken up for trial on 07.03.2000, the Plaintiff raised the following issues:

1) Is the deed of gift (**P1**) irrevocable ?
2) Are the executions of **P2**, **P3** and **P4** illegal and null and void since **P1** (the deed of gift) remained irrevocable?

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The Defendants raised issues No 4, 5, 6 and 7 and the material issues were to this effect:

3) Is the deed of gift in favour of the Plaintiff invalid according to Muslim Law?
4) Did the initial donor-the mother-re-acquire her title to the property after she had revoked the deed of gift (P1) on the basis that it was invalid according to Muslim Law?
5) Did the Defendants acquire title on P3 and P4?

The learned District Judge of *Kurunegala* treated the above issues as issues of law and afforded an opportunity to the parties to tender written submissions.

By a judgment dated 19th September 2000, the learned District Judge held with the Defendants declaring the deed of gift in favour of the Plaintiff (**P1**) invalid according to Muslim Law and dismissed the case of the Plaintiff. It was against this judgment that the Plaintiff-Appellant-Respondent had preferred an appeal to this Court and this Court, after having heard both counsel for the parties, reversed the judgment of the District Court on 04.09.2018 and after having made the above observation which I have quoted in the anterior part of this judgment, I proceeded to hold that the Plaintiff is entitled to the relief prayed for in his amended plaint and allowed the appeal.

In fact the amended plaint dated 10th February 1999, sought *inter alia* the following relief:

(a) The Plaintiff should be declared the absolute owner of the property by virtue of **P1**-the deed of gift executed by the mother.

(b) A declaration that **P2** (the deed of revocation of the deed of gift), **P3** (the deed of transfer in favour of the 1st Defendant) and **P4** (the deed of gift in favour of the 2nd Defendant) are all invalid and that the 1st and 2nd Defendants do not derive any interest or title to the land.

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These two remedies constituted the fulcrum of the legal issues tried by the learned District Judge and this Court allowed these remedies as prayed for in the amended plaint after an exhaustive analysis of the facts and the law.

The gist of the *ratio* of the judgment dated 04.09.2018 would be distilled as follows: Sections 3 and 4 of the Muslim Intestate Succession Ordinance make two things as plain as a pikestaff. As Muslim Law stipulates delivery and possession of the gift as prerequisites to the constitution of a valid gift, Section 3 would govern such a gift. By virtue of section 4 a Muslim donor can make a gift under the common law and in this latter case which would be governed by Roman Dutch Law, the donor could reserve or impose a condition such as a usufruct or life interest -see ***Haseena Umma v Jemaldeen*** 68 N.L.R 300; ***Aliya Marikar Abuthahir v Aliyar Marikar Mohammed Sally*** 43 N.L.R. 193 ; ***Weerasekera v Pieris*** 34 N.L.R 281 (PC). In fact ***Aliya Marikar's*** case which had the composition of 5 judges of the Supreme Court overruled the previous decision of ***Sultan v Peris*** 35 N.L.R 57 and followed the PC decision of ***Weerasekera*** (supra).

In the case before this Court the donor had gifted the corpus to the Plaintiff by **P1** subject to her life interest and irrevocable. As such this Court held that Roman Dutch Law would govern the revocation of the deed of gift namely **P1** and necessarily the donor should have sought the assistance of Court to have this deed of gift revoked; instead she chose to cancel the deed by **P2** of her own accord and such a unilateral revocation is impermissible in Roman Dutch Law-for a survey of the law pertaining to revocation of deeds of gift - see ***Franklin Fernando v Anacletus Fernando and Others*** (2015) 1 Sri.LR 1 (CA).

Since **P2** was not valid and effectual so as to revoke **P1**, this court made the further declarations that the subsequent deeds after **P2**, namely **P3** (the deed of transfer in favour of the younger son) and **P4** (the deed of donation by the younger son) were both invalid and infructuous. This is the conclusion that

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naturally follows as axiomatic or as the crow flies upon this Court's finding that **P1** was never revoked and **P3** and **P4** which followed the inoperative deed of revocation **(P2)** have to be necessarily null and void and inoperative *per se.*

The invalidity of **P3** and **P4** is a corollary which is irresistible upon the supposition that **P2** (the deed of revocation) is a nullity as no Court authorized the revocation. One cannot put something on nothing as Lord Denning so famously echoed the catchy expression in the Privy Council in ***McFoy v United Africa Company*** **(1961) 3 AER 1169 at 1172.**

As I said before, the Plaintiff had inter alia prayed for in his plaint:

(a) A Declaration of title in respect of the land described in the schedule to plaint based on the deed of gift **(P1)**

(b) A Declaration that deeds **P2, P3** and **P4** are null and void and no title to the land passed to the 1st and 2nd Defendants:

The trial judge himself found the issues raised on the pleadings as legal issues and ordered that written submissions be tendered. It was based on the written submissions that he had delivered his judgment dismissing the plaint of the Plaintiff.

This Court having found P2 (deed of revocation) null and void proceeded to make the declarations that **P3** and **P4** too were invalid. **This entailed the effect of granting the reliefs prayed for by the Plaintiff** and it is worth recalling that there was no appeal that was preferred to the Supreme Court against the judgment of this Court dated 04.09.2018. But one year later on 4th September 2019, this petition has been preferred by the Defendants-Respondents-Petitioners on the basis that that the declaration that the subsequent deeds **P3** (the deed of transfer in favour of the 1st Defendant) and **P4** (the deed of gift in favour of the 2nd Defendant) could be made only after adduction of evidence in

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the District Court and therefore the case should have been sent back for further trial.

As the Latin tag quite aptly describes it, it is *reductio ad absurdum* or carrying an argument to an inconsistent absurdity to insist on a trial to ascertain the validity or otherwise of **P3** and **P4.** Since **P2**-the antecedent deed of revocation that is alleged to have breathed life into **P3** and **P4** is itself infructuous and invalid, it is patently obvious that **P3** and **P4** do not exist in law and no title to the land in question could have inured to the benefit of the 1st and 2nd Defendants. Whether **P3** and **P4** are valid and effectual in view of the fact that **P2** has been found to be invalid and ineffectual is a question that does not need the motions of a trial to resolve. It is for this reason that pure questions of law under section 147 of the Civil Procedure Code have been delineated as issues which would dispose of a case without the necessity to adduce any evidence-see ***Muthukrishna v Gomes*** (1994) (3) Sri.LR 01.

The issues that were tried by the learned District Judge, albeit by way of written submissions, were indisputably pure questions of law that are capable of disposing of the case without adducting of any evidence and that decision to assign issues as pure questions of law was rightly made. This Court only reversed the answers to the issues given by the learned District Judge and it is my view that no *per incuriam* taint impugns the answers given by this Court.

No per incuriam order

So I hold the view that this Court did not make a *per incuriam* order inasmuch as **P2** was null and void and *ipso facto* **P3** and **P4** became inoperative or lifeless, figuratively speaking. The judgment of this court dated 04.09.2018 in the case falls far outside the pale of *per incuriam* decisions.

In Halsbury, Laws of England , and under the title Civil Procedure (Volume 11 (2015), paras 1-503: Volume 12 (2015), paras 504-1218); Volume 12A (2015), paras 1219-1775), 1. Civil Procedure Law: Sources and Framework (5) Judicial Decisions as Authorities, paragraph 30 expatiates on *per incuriam* decisions 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- *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA; *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1951] 1 KB 711, [1951] 1 All ER 268, or when it has acted in ignorance of a Supreme Court 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 See *Lancaster Motor Co (London) Ltd v Bremith Ltd* [1941] 1 KB 675, [1941] 2 All ER 11, CA; *A and J Mucklow Ltd v IRC* [1954] Ch 615, [1954] 2 All ER 508, CA; *Willis v Association of Universities of the British Commonwealth (No 2)* [1965] 2 All ER 393, [1965] 1 WLR 836, CA; *Farrell v Alexander* [1976] QB 345, [1976] 1 All ER 129 (affd [1978] AC 59, [1976] 2 All ER 721, HL). For a Divisional Court decision disregarded by that court as being *per incuriam* see *Nicholas v Penny* [1950] 2 KB 466, sub nom *Penny v Nicholas* [1950] 2 All ER 89, DC.
>
> or when, in rare and exceptional cases, it is satisfied that the earlier decision involved a manifest slip or error *Williams v Fawcett* [1986] QB 604, [1985] 1 All ER 787, CA; *Rickards v Rickards* [1990] Fam 194 [1989] 3 All ER 193, CA and there is no real prospect of a further appeal to the Supreme Court *Rakhit v Carty* [1990] 2 QB 315, [1990] 2 All ER 202, CA; *Rickards v Rickards* [1990] Fam 194, [1989] 3 All ER 193, CA.

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A decision should not be treated as given ***per incuriam***, however, simply because of a deficiency of parties *Morelle Ltd v **Wakeling*** [1955] 2 QB 379, [1955] 1 All ER 708, CA

or because the court had not the benefit of the best argument *Bryers v Canadian Pacific Steamships Ltd* [1957] 1 QB 134, [1956] 3 All ER 560, CA, per Singleton LJ (affd sub nom *Canadian Pacific Steamships Ltd v Bryers* [1958] AC 485, [1957] 3 All ER 572, HL); *Critchell v Lambeth Borough Council* [1957] 2 QB 535, [1957] 2 All ER 108, CA.

As a general **rule**, the only cases in which decisions should be held to be given ***per incuriam*** are those given in ignorance of some inconsistent statute or binding authority- *A and J Mucklow Ltd v IRC* [1954] Ch 615, [1954] 2 All ER 508, CA; *Morelle Ltd v Wakeling* [1955] 2 QB 379, [1955] 1 All ER 708, CA See also *Bonsor v Musicians' Union* [1954] Ch 479, [1954] 1 All ER 822, CA, where the ***per incuriam*** contention was rejected and, on appeal to the House of Lords (now the Supreme Court), although the House overruled the case which bound the Court of Appeal, the House agreed that that court had been bound by it: see [1956] AC 104, [1955] 3 All ER 518, HL.

Even if a decision of the Court of Appeal has misinterpreted a previous decision of the Supreme Court, the Court of Appeal must follow its previous decision and leave the Supreme Court to rectify the mistake- *Williams v Glasbrook Bros Ltd* [1947] 2 All ER 884, CA.

In ***Morelle Ltd v Wakeling*** (*supra*) (1955) 1 All ER 708 Sir Raymond Evershed MR states the following at p 718:

As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily

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exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene MR of the rarest occurrence. In the present case, it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case.

Rupert Cross and Harris in their seminal work on *Precedent in English Law* (4th Edition, 1990, p149) acknowledge the above passage as probably the leading statement of the principle of *per incuriam.*

So in the petition before me which has raised the *per incuriam* contention, no statutory rule has been cited to have been overlooked nor did counsel point out that this Court has turned a Nelsonian eye to a precedent which is binding on this Court. Neither does the complaint of the Defendants fall within the cocktail of grounds that Halsbury enumerates as set out above.

The further declarations that this Court made in the case namely **P3** and **P4** could not have validly operated to confer title on the 1st and 2nd Defendants- came about as answers to the legal issues in the case and those declarations were made after a full consideration of the facts and the law immanent in the case.

Thus I would dispose of the argument by holding that the conclusions reached in the judgment as to the invalidity of **P3** and **P4** are not *per incuriam* and I would now turn to the 2nd argument on behalf of the Defendants that the judgment has to be varied in view of section 189 of the Civil Procedure Code.

Section 189 argument

I reiterate that the declarations made in this case were decisions deliberately reached after a careful consideration and Section 189 of the Civil Procedure Code that has been invoked additionally does not embrace within it a decision which

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was made rightly or wrongly after a full consideration of the facts in the case. As section 189 of the CPC clearly shows, it is a clerical or arithmetical mistake in judgments, decrees or orders or errors arising therein from any accidental slip or omission that may at any time be corrected by the court either of its own motion or on the application of any of the parties.

Section 189 of the Civil Procedure Code reads:

(1)The Court may at any time, either on its own motion or on that of any party, correct any clerical or arithmetical mistake in any judgment or order, or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment.

(2) Reasonable notice of any proposed amendment under this section shall in all cases be given to parties or their registered attorneys.

There cannot be an accidental slip or omission when a judgment is deliberately reached after a full consideration of the facts and the law. In such a situation it is the Supreme Court which has to review and appraise the judgment in its appellate jurisdiction. No accidental slip or omission through inadvertence has crept into the judgment.

Sinno Appu vs. Andris et al 13 N.L.R 297 the Supreme Court held that if a court is satisfied that there is a clerical error in its decree, it is bound to correct it, and the fact that there is the same clerical error in the judgment upon which the decree is founded cannot make any difference even though the result is that the decree as amended is at variance with the judgment. If the judgment contains a mistake in addition, which mistake is repeated in the decree, or if it contains a clerical error which is repeated in the decree, the decree ought to be amended

A careful reading of section 189 makes it crystal clear that there is a clear distinction between an erroneous decision and an error apparent on the face of

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the record. The first can be corrected by the higher forum, the latter can only be corrected by exercise of an inherent jurisdiction. Thus a review petition invoking the inherent jurisdiction of this Court and Section 189 power, as it is before me, has a limited purpose and cannot be allowed to be 'an appeal in disguise'.

So both arguments namely *per incuriam* rule and section 189 of the Civil Procedure Code fail and in the circumstances I would disallow the petition and dismiss it.

JUDGE OF THE COURT OF APPEAL

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