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

In the matter of an application for Mandates in the nature of Writs of Prohibition & Certiorari under and in terms of Article 140 of the Constitution of the Republic.

CA/WRIT/45/2022

Nagananda Kodithuwakku
Maha Lekam,
Vinivida Padanama,
99, Subadrarama Road,
Nugegoda.

Petitioner

Vs.

1. Dinesh Gunawardena
   Minister of Education,
   Ministry of Education
   Isurupaya,
   Battaramulla.

2. Kapila Perera
   Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

3. Sunil J. Nawaratna
   Director General,
   National Institute of Education,
   P.O Box 21,
   Highlevel Road, Maharagama.

4. L.M.D. Dharmasena
   Commissioner General Examination,
   Examinations Department,
   Pelawatta, Battaramulla.

Respondents

And now between

Nagananda Kodithuwakku
Maha Lekam,
Vinivida Padanama,
99, Subadrarama Road,
Nugegoda.

Petitioner – Petitioner

Vs.

1. Dinesh Gunawardena
   Minister of Education,
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   Isurupaya,
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1. Kapila Perera
   Secretary,
   Ministry of Education,
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   Director General,
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   P.O Box 21,
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3. L.M.D. Dharmasena
   Commissioner General Examination,
   Examinations Department,
   Pelawatta, Battaramulla.

Respondents – Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Petitioner appears in person.

Hashini Opatha SC for the Respondents.

Supported on : 23.05.2022

Decided on : 20.06.2022

Sobhitha Rajakaruna J.

The Petitioner has filled the original Petition marked 'X3' in the application bearing the same number as above on 28.01.2022 seeking a mandate in the nature of a writ of Mandamus against the 1st and 2nd Respondents and also a Writ of Certiorari against the 4th Respondent's decision to hold the General Certificate of Education (Advanced Level) Examination on 07.02.2022.

The said main application was supported on 03.02.2022 before this Court by the Petitioner. The Court heard the Petitioner as well as the learned Counsel who appeared for two students who were to sit at the said Advanced Level Examination. Those two students sought to intervene in to the said application on the basis that their rights would be directly affected due to the said application. This Court dismissed the said application of the Petitioner refusing to issue notice on the Respondents based on the reasons given in the order dated 03.02.2022 ('relevant order'). Accordingly, I have not made an order on the application for intervention of those two students.

The Petitioner thereafter filed a purported 'Revision Petition', under the same case number, on 09.02.2022 seeking inter alia;

a) An order to set aside the order dated 03.02.2022 refusing to issue notice on the Respondents and grant interim relief prayed for in the Petition,

b) A mandate in the nature of a writ of Mandamus against the 1st and 2nd Respondents compelling them to grant an additional attempt for University Admission to the students who sat for General Certificate of Education (Advanced Level) Examination -2021/2022.

The Petitioner by way of filing a motion dated 14.03.2022 has moved that a special bench comprising of three judges be nominated to hear and determine the said application (purported 'Revision Petition'). His Lordship the President of the Court of Appeal has decided that there is no good reason to nominate a divisional bench as the relevant application has been made on the basis of per incuriam. It is important to note that in the said motion, the Petitioner has categorically mentioned that he is making the purported application for revision on the basis of the principles of per incuriam.

In the case of ***Billimoria vs. Minister of Lands and Land Development & Mahaweli Development and two others (1978-79-80) 1 Sri. L.R. 10***, it was held that; " ... While it was competent for one Bench to set aside an order made per incuriam by another bench of the same court, it has been the practice of parties or their Counsel to bring the error to the notice of the Judge or Judges who made the order so that he or they can correct the error**...**". In the judgement of ***Jeyaraj Fernandopulle vs. Premachandra De Silva and Others 1996 1 Sri. L.R. 70 (at p.71),*** it was held that when there is a re-examination of an order/judgement, the same Judges who participated in the formal hearing should constitute the new Bench or should also be included, as far as possible in the new Bench. Further, in the same judgement it was held that the matter should be addressed as well as referred to the same bench of judges who have made the purported error in order to prevent the Court's final position being in jeopardy.

Therefore, the application of the Petitioner dated 09.02.2022 was referred to this division of the Court of Appeal by which the relevant order dated 03.02.2022 was issued.

It is important to note that as per section 49(2) of the Judicature Act No. 02 of 1978 (as amended), no Judge shall hear an appeal from or review any judgement, sentence or order passed by himself. Anyhow, it is trite law that an application cannot be made to the Court of Appeal on revision against an order made by the same Court. Further, Supreme Court Rules provide for appeals made against any order, judgement, decree or sentence of the

Court of Appeal. Therefore, primarily, no revision application can be dealt with by the same panel of judges who delivered the impugned order or the judgement.

In addition to the contents of the motion dated 14.03.2022, the Petitioner even on 05.04.2022 and 23.05.2022, has clearly submitted in open Court (as entered in the respective journal entries) that his application is based on per incuriam. Therefore, it is important to observe whether the said impugned order dated 03.02.2022 would fall within the purview of the principle of per incuriam.

In light of the above, the question to be examined in reference to the purported 'Revision Petition' is whether the relevant order made on 03.02.2022 is per incuriam.

In order to examine the said question, it is necessary to consider the definition of the said term 'per incuriam' and also the decided judgements on the law relating to the principle of per incuriam. According to the definition provided by the "Oxford Reference" (*www.oxfordreference.com*) a decision of a Court is made per incuriam if it fails to apply a relevant statutory provision or ignores a binding precedent. The literal meaning of the word 'incuria' is 'carelessness'[1] and this rule is applicable to the ratio decidendi and not to obita dicta[2]. The significance of the doctrine of per incuriam is that, a decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute, or of a rule having the force of a statute.[3]

Therefore, an order/a judgement can be considered per incuriam based on two grounds/elements. Firstly, as held in the judgement of ***Alasupillai vs. Yavetpillai [1949] 39 CLW 107, 108***, if any provision in a statute, rule or regulation was not brought to the notice of the court and it has given the decision in ignorance or forgetfulness of the existence of that case or that statute, a decision or a judgement would be considered per incuriam.

The other ground for per incuriam was enumerated in the case ***of Sundeep Kumar Bafna vs. State of Maharashtra, Criminal Appeal No. 689 of 2014***, where it was decided that if it is not possible to reconcile the ratio of the judgement with that of a previously pronounced judgement of a coequal or larger bench, the order can be considered per

[1] State of U.P. vs. Synthetics & Chemicals Ltd., (1991) 4 SCC 139
[2] Sundeep Kumar Bafna vs. State of Maharashtra, Criminal Appeal No. 689 of 2014, Supreme Court of India
[3] Municipal Corporation of Delhi vs. Gurnam Kaur, AIR 1989 SC 38; Union of India vs. Manik Lal Banerjee, (2006) 9 SCC 643

incuriam. Moreover, as stipulated in the judgement of ***Gupta Sugar Works vs. State of U.P., AIR 1987 SC 2351***, it is important to note that the non-reference of earlier decisions in the judgement does not indicate non-consideration of those cases in the judgement.

Therefore, it is necessary to examine whether the order made by this Court on 03.02.2022 was made carelessly by not taking any terms of a statute into consideration or whether the said order does not reconcile with a previously pronounced judgement or any other relevant law/rule.

The Petitioner states in his purported 'Revision Petition' that the "prerogative writs issued in terms of Article 140 by the Court of Appeal are rights exclusively affecting a person or a class of people who seeks relief under the said Article and therefore, the law does not allow intervention in any manner by a third party in writ application and as a result the order made by this Court is void per incuriam *in limine*". As I have mentioned before, no order has been made by this Court allowing any intervention other than allowing the learned Counsel for the parties who sought to be intervened to make submissions.

Furthermore, the Petitioner states that this Court has made a flawed reference about the Petitioner's appearance in the relevant order referring to the Supreme Court Rule 70. It should be noted that this Court has not made any order referring to the Petitioner's appearance other than mentioning in the relevant order, a portion of the submissions made by the learned Counsel (for the parties sought to be intervened) against the Petitioner based on Rule No.70 of the Supreme Court Rules.

The articulation on per incuriam developed in ***Young vs. Bristol Aeroplane Co. (1944) 2 AH E. R. 293.***, in my view, is of much relevance to the instant application. The dicta in the said case has been followed even by Lord Evershed M. R. in ***Morelle, Ltd. vs. Wakeling (1955) 1 A ll E.R. 708, 718***, where he states as follow;

> *"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 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, M. R., of the rarest occurrence".

Having regard to the above established law on the per incuriam, I take the view that the facts and circumstances of the instant case do not warrant the exercise of inherent powers of this Court to make any changes to the relevant order dated 03.02.2022. I hold that no mistake has been made in the relevant order to rectify any error and also that no injustice has been caused to the Petitioner by putting him in jeopardy by any kind of mistake made by this Court.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal