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

Case No: CA/214/1994/F
D.C. (Kurunegala) No. 2836/L

In the matter of an application for the review and/or reconsideration of the Judgement of the Court of Appeal dated 23rd October 2012 delivered in Case No. 214/1994/F under and in terms of the Inherent Powers of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka and/or under the provisions of Section 839 of the Civil Procedure Code.

T. M. Madduma Banda Tennakoon
"Shanthi" Nakkawatta.

PLAINTIFF

-Vs-

1. T. M. Tillekeratne Banda Tennakoon
   Meegolla, Hindagoda.

2. W. M. Podimenike
3. R. M. Dharmasena Ratnayake

   Both of No. 724, Sundarapola Road,
   Yanthampalawa,
   Kurunegala.

DEFENDANTS

AND BETWEEN

T. M. Tillekeratne Banda Tennakoon
of Meegolla, Hindagoda.

1st DEFENDANT APPELLANT

-Vs-

T. M. Madduma Banda Tennakoon
of "Shanthi" Nakkawatta.
(Deceased)

PLAINTIFF

1A. A.T.M. Vajira Kumari Tennakoon
1B. T.M.B.K.Tennakoon
1C. T.M.L.K. Tennakoon
1D. T.M.S.K.B. Tennakoon

All of Shanthi Nekkawatte

SUBSTITUTED-PLAINTIFF-RESPONDENTS

2. W.M. Podimenike
3. R.M. Dharmasena Ratnayake

Both of No. 724, Sundarapola Road,
Yanthampalawa, Kurunegala.

2nd & 3rd DEFENDANT-RESPONDENTS

AND NOW BETWEEN

2. W.M. Podimenike
3. R.M. Dharmasena Ratnayake
(deceased)
3A. R. M. Upali Ratnayake

Both of No. 724, Sundarapola Road,
Yanthampalawa, Kurunegala.

Now at
No 94C, Regland Watta Junction,
Colombo Road, Waduragala,
Kurunegala

2ND & 3ARD DEFENDANT-RESPONDENTS-PETITIONERS

-Vs-

T.M.Madduma Banda Tennakoon of
"Shanthi" Nakkawatta.
(Deseased)

PLAINTIFF RESPONDENT

1A. A.T.M. Vajira Kumari Tennakoon
1B. T.M.B.K.Tennakoon
1C. T.M.L.K. Tennakoon
1D. T.M.S.K.B. Tennakoon

All of Shanthi Nekkawatte

SUBSTITUTED - PLAINTIFF - RESPONDENTS

T.M.Tillekeratne Banda Tennakoon
of Meegolla, Hindagoda.

1ST DEFENDANT - APPELLANT - RESPONDENT

Before: C.P. Kirtisinghe - J.
R. Gurusinghe - J.

Counsel: Lakshman Perera PC with Thishya Weeragoda and L. Fernando for the 2nd and 3A Defendants Respondents Petitioners.
P.K. Prince Perera for the substituted Plaintiff Respondents.

Argued on:20.06.2023

Decided On: 25.07.2023

C. P. Kirtisinghe - J.

The 2 and 3A Defendants-Respondents-Petitioners (hereinafter referred to as the Petitioners) are making this application under section 839 of the Civil Procedure Code invoking the inherent powers of this court for the review or reconsideration of the judgement of this court dated 23.10.2012. By the aforesaid judgement this court had affirmed the judgement of the learned District Judge confining the reliefs to paragraphs අ, ආ and ඇ of the prayer to the plaint. Subject to the aforesaid variations the appeal had been dismissed with costs.

The Petitioners in their petition and affidavit state that they are the owners of the corpus in dispute which is the subject matter of this case. The original Plaintiff had instituted this action in the District Court of Kurunegala seeking for a declaration to the effect that the deed No. 2643 (P4) is null and void or in the alternative to cancel the aforesaid deed, for a judgement to the effect that the Plaintiff was entitled and is obliged to sell the land in dispute to the 2nd and 3rd Defendants and for a declaration that the 2nd and 3rd Defendants are the owners of the land in suit. The Plaintiff's case was that the Plaintiff was intoxicated at the time of the execution of the deed marked P4 which was in favour of the 1st Defendant and the Plaintiff had signed the deed under duress. It was also the case of Plaintiff that the Plaintiff had sold the property to the Petitioners and the Petitioners are the owners of the land in suit. The 1st Defendant by his answer had only sought for a dismissal of the Plaintiff's case. The 2nd and 3rd Defendants (the Petitioners) in their answer had prayed for a declaration to the effect that they are the owners of the land. They had also prayed for the ejectment of the 1st Defendant from the land and to put them in possession. The Petitioners state that the Plaintiff admitted the fact that he executed the deed No. 36 (marked P5) in favour of the 2nd and 3rd Defendants (the Petitioners) and that deed was never challenged at the trial. Neither the 1st Defendant nor any other party had sought to invalidate that deed which is in favour of the Petitioners. The validity of the deed No. 36 (P5) was never an issue before the District Court and neither party had raised any issue disputing the validity of that deed. The dispute was whether the deed marked P4 was duly executed. This court had upheld the findings of the learned District Judge on the issue of intoxication and undue influence and granted the reliefs prayed for in paragraphs a, b and c of the prayer to the plaint. Further, this court has held that the transfers effected by the deeds marked P4 and P5 are null and void as they had been executed without the prior permission of the government agent. The

Petitioners state that this court had proceeded to determine a matter on a ground which was never pleaded or raised by way of an issue at the trial namely, whether the deed No. 36 is validly executed. The Petitioners state that this court has granted a relief which was not prayed for by any party and erroneously determined the law applicable to the grant marked P1. The Petitioners state that a grave and irreparable injustice and harm is occasioned to the Petitioners by the aforesaid judgement and the substituted Plaintiffs are now seeking a writ of possession in their favour.

When one examines the pleadings and the proceedings in the District Court it is apparent that none of the parties had disputed the validity of the deed No. 36 marked P5 and that was never an issue at the trial. Neither the Plaintiff nor the 1st Defendant had sought a declaration to the effect that P5 is null and void and they had not prayed court to set aside that deed. However, in the judgement this court had decided that the deed No. 36 marked P5 is null and void. Thereby, the court had granted the substituted Plaintiffs a relief which they have never sought and based on that finding the substituted Plaintiffs are now attempting to get a writ of possession in their favour to eject the Defendants from the land. In the case of **Wijesuriya Vs Senaratne (1997) 2 SLR 323** F.N.D. Jayasuriya J. held that the learned District Judge did not have jurisdiction to grant the Plaintiff in that action reliefs which were not prayed for in the prayer to the plaint. In the case of **Surangi Vs Rodrigo (2003) 3 SLR 35** Gamini Amaratunga J. held that no court is entitled to or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer to the plaint.

Validity of the Deed No. 36 marked P5 and the question whether the finding of this court is *per incuriam*

The grant marked X10 (marked P1 at the trial) had been issued to the original Plaintiff in respect of this land on 30.12.1982. The original Plaintiff had transferred his rights to the 2nd and 3rd Defendants (Petitioners) by deed No. 36 marked P5 on 29.05.1986. When one examines P5 there is no averment in it to the effect that the prior written permission of the Government Agent had been obtained for the transfer and there is no document annexed to the deed which demonstrates that prior approval of the Government Agent had been obtained. Prior to the amendments introduced by Act No. 16 of 1969 section 42 of the Land Development Ordinance which governed the subject of disposition of land alienated by grant reads as follows;

“No disposition of a protected holding shall be effected except with the prior written consent of the Government Agent.”

According to the interpretation section of the principal enactment “protected holding” means a holding alienated by grant in which is inserted a condition prohibiting the disposition of the holding except with the prior permission in writing of the Government Agent.

After the amendments introduced by the Amendment Act No. 16 of 1969, section 42, as it stands today reads as follows;

“The owner of a holding may dispose of such holding to any other person except where the disposition is prohibited under this ordinance, and accordingly a disposition executed or effected in contravention of the provisions of this ordinance shall be null and void.”

Section 159 B (C) introduced and inserted to the principal enactment by the Amendment Act No. 27 of 1981 reads as follows;

“The grant shall have effect as if it were an absolute grant of land under section 2 of the Crown Lands Ordinance and the provisions of that Ordinance shall apply to the right, title and interest of the alienee of the land under such grant.”

The deed marked P5 was executed after the amendment brought in by Act No. 16 of 1969 which replaced the existing section 42 of the Land Development Ordinance and after the introduction of section 159 B (C) by the Amendment Act No. 27 of 1981.

Section 42 as it stands today does not require a grantee to obtain the prior written approval of the Government Agent to transfer a land alienated to him by a grant issued under the Land Development Ordinance and there is nothing to show that this disposition is prohibited under any other section of this Ordinance. Further the new section 159 B (C) provides that the grant shall have the effect as if it were an absolute grant of land under section 2 of the Crown Lands Ordinance and the provisions of that Ordinance shall apply to the right, title and interest of the alienee of the land under the grant.

Therefore, the deed of transfer No. 36 marked P5 is a valid deed which is not in contravention of the provisions of the land Development Ordinance and the fact that the transferor of that deed, the Plaintiff had not obtained the prior written consent of the Government Agent does not affect the validity of that deed. This court has come to an erroneous conclusion without taking into consideration

the relevant amendments introduced to the land Development Ordinance, obviously due to an oversight or mistake. Then the question arises whether the findings of this court is *per incuriam*.

Classen's Dictionary of Legal Words and Phrases (1976 Edition) defines "*per incuriam*" as "by mistake or carelessness, therefore not purposely or intentionally". The phrase *per incuriam* has been defined in Whertons' Law Lalexicon (3rd Edition) as "thorough want of care". In the case of **Jeyaraj Fernandopulle Vs Premachandra De Silva and others (1996) 1 SLR 70** Dr. A.R.B. Amarasinghe J. had observed as follows,

"Earl Jowitt in his Dictionary of English Law, (2nd Ed. 1977, Vol. 2 p. 1347) translates the phrase to mean "through want of care". He goes on to explain that "A decision or dictum of a judge which clearly is the result of some oversight is said to have been given *per incuriam*." In *Farrell v Alexander*, Lord Justice Scarman in the Court of Appeal translated *per incuriam* as "Homer nodded". Others, however, have given the phrase a more restricted meaning. Lord Chief Justice Goddard in *Huddersfield Police Authority v Watson*, said:

"What is meant by giving a decision *per incuriam* is giving a decision when a case or statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute."

Lord Goddard's definition was adopted by Basnayake J. in **Alasuppillai Vs Yavetpillai (1948) 39 CLW 107,** by Kulathunge J. in **All Ceylon Commercial and Industrial Workers Union Vs The Ceylon Petroleum Corporation and Others (1995) 2 SLR 295** and by Fernando J. in **Hettiarachchi Vs Seneviratne and others (1994) 3 SLR 293.** In **Alasuppillai's case** Basnayake J. observed as follows, "a decision *per incuriam* is one given when a case or a 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". in the case of **Hettiarachchi Vs Seneviratne and others** Fernando J. observed as follows,

"A decision will be regarded as given per incuriam if it was in ignorance of some inconsistent statute or binding decision; but not simply because the Court had not the benefit of the best argument: (see Halsbury, Laws of England 4th edition, Vol. 26, para 578 citing *Brvers v. Canadian Pacific Steamships Ltd.*"

In the case of **Subasinghe Mudiyanselage Rosalin Bertha Vs Maththumagala Kankanamlage Juwan Appu and others SC/APPEAL/160/2016,**

SC/SPL/LA/454/2013, NWP/HCCA/KUR/161/2003, DC KULIYAPITIYA NO: 5879/P decided on 02.12.2022, Mahinda Samayawardena J. has observed as follows,

“Hence, a decision *per incuriam* is one given in ignorance or forgetfulness of the law by way of statute or binding precedent, which, had it been considered, would have led to a different decision. It must be reiterated that a decision will not be regarded as *per incuriam* merely on the ground that another Court thinks that it was wrongly decided; the fault must derive from ignorance of statutory law or binding authority. Also, the authority must be a binding rule of law and not merely an authority that is distinguishable”

The definition of the phrase *per incuriam* in Lord Goddard’s terms has been regarded as being too restrictive and there are several instances of the court acknowledging that it had acted *per incuriam* in circumstances which might not have been accommodated within Lord Goddard’s definition. In the case of **Morelle Ltd. V Wakeling (1955) 1 All ER 708**, at page 718 Sir. Raymond Evershed MR states that,

“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 exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgement, 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".

There are many instances where the court has held that it has stated *per incuriam* in situations which do not come within Lord Goddard’s definition and in situations which come within the broader parameters of the concept of *per incuriam*.

In the case of **Gunasena Vs Bandarathilake (2000) 1 SLR 292** the Plaintiff had instituted action in the District Court for arrears of rent and ejectment of the

Defendant from the premises in suit. The District Judge by his judgement dismissed the Plaintiff's action. The Plaintiff preferred an appeal from that judgement to the Court of Appeal. The reasoning in the judgement of the Court of Appeal shows that the Court was of the view that the Defendant should have failed in the original court. However, the Court of Appeal mistakenly thought that the District Judge had entered judgement for the Plaintiff and that the appeal was by the Defendant. On that basis the court dismissed the appeal. The Plaintiff did not appeal to the Supreme Court from the judgement of the Court of Appeal but instead brought it to the notice of the Court of Appeal that there was an error in the judgement. Whereupon after giving due notice to the parties and counsel the court set aside its judgement on the ground that it had been delivered *per incuriam*.

In the case of **Kariyawasam Vs Priyadarshani (2004) 1 SLR 189,** in a partition action the District Court of Colombo held that one 'G' was not entitled to any rights in the corpus. The Plaintiff whose predecessor in title was 'G' appealed against the judgement. The Court of Appeal confirmed that 'G' was not entitled to any rights in the corpus and dismissed the appeal. 'G' was in fact allotted certain shares in an earlier partition case. The Plaintiff – Appellant sought to set aside the judgement of the Court of Appeal on the basis that 'G' was in fact allotted certain shares in the earlier partition action. The Appellant contended that the findings of the Court of Appeal had been made by an oversight/ inadvertence/ *Per incuriam*. The court was of the view that the *per incuriam* findings in the judgement of the Court of Appeal has been as a result of court's attention not being drawn to the second page of the final decree where 'G' had been allotted shares. The court held that having regard to the definition of the *per incuriam* order the facts and circumstances of that case warrant the exercise of inherent powers of the Court of Appeal to rectify the mistake made in the judgement to prevent injustice to be caused to the Plaintiff-Appellant. In that case as well as in the case of **Gunasena Vs Bandarathilaka** cited above, the judgements which were declared as *per incuriam* and ultimately set aside were based on mistaken factual situations and therefore fall within the broader parameters of the concept of *per incuriam* and do not fall within Lord Goddard's definition.

In the present case before us there is a mistaken factual situation as well as ignorance of the existence of a statute which has led to the findings of this court which are clearly *per incuriam*. The court has held that the deed of transfer No. 36 marked P5 is null and void as the prior approval of the Government Agent

had not been obtained before the execution of that deed. In coming to that decision the court had ignored the fact, no doubt by mistake that the Plaintiff or the 1st Defendant had never prayed for such a relief. Instead the Plaintiff had prayed for a declaration to the effect that the 2nd and 3rd Defendants are the owners of the corpus in dispute, a relief which had not been granted by the District Court. Now the substituted Plaintiffs are attempting to eject the 2nd and 3rd Defendants from the corpus on the basis of that finding of this court for which the original Plaintiff never prayed for in his plaint. This court had come to the aforesaid conclusion without paying due attention to the amendments introduced to the Land Development Ordinance. If the court was mindful of the amendments brought in to the section 42 of the Land Development Ordinance by the amending Act No. 16 of 1969 and the introduction of the new section 159B(c) by Land Development Amendment Act No. 27 of 1981 the court would not have arrived at that conclusion. By inadvertence or oversight the court has come to the aforesaid conclusion in ignorance of the existence of the aforesaid statutory provisions of the Land Development Ordinance. Therefore, this is a case which clearly comes within the definition of *per incuriam*.

Application of the principal of *actus neminem gravabit*

The meaning of *actus neminem gravabit* is that an act of court shall prejudices no person. In the case of **Rodger Vs Comptoir D'Escompte de Paris (1871) 3 PC 465** Lord Cairns had explained this principal in the following words,

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any inter- mediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is a duty of the aggregate of those tribunals, if I may use the expression to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

In the famous case of **Ittepana Vs Hemawathie (1981) 1 SLR 476** Sharvananda J. (as he then was) quoting the aforementioned dictum of Lord Cairns held that the court possesses inherent power to rectify such injustice caused to a litigant on the principal of *actus neminem gravabit.* Therefore, this court possesses inherent power to rectify the injustice caused to the 2nd and 3A Defendants-Respondents-Petitioners by the aforementioned findings of this court.

For the aforementioned reasons we expunge the words “& P5” in the following sentence in the fourth line from the top at page 17 of the judgement of this court dated 23.10.2012.

“Therefore the transfers effected in P4 & P5 are null and void.”

That sentence will now read as follows,

“Therefore the transfer effected in P4 is null and void.”

The application of the 2nd and 3A Defendants-Respondents-Petitioners is allowed without costs.

Judge of Court of Appeal

R. Gurusinghe - J.

I Agree

Judge of Court of Appeal