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

Kahandawa Arachchige
Kusumawathie
No.129,Weeragula, Yakkala

Substituted 1st Defendant-Appellant

C.A.791 /97 (F)
D.C.Gampaha No.25759/P **Vs.**

Arachchi Appuhamilage
Subatheris
of Weeragula South,
Yakkala.

Plaintiff-Respondent.

2. Emage Mainona.(Deceased)
K.A.Gamini Gunawardena
No.448, Kossinna.

Substituted 2nd Defendant-Respondent

3.A.P.Evgin Singo(Deceased)
Nimal Ranjith,
Nimal Ranjith No.126
Weeragula Yakkala

Substituted 3rd
Defendant-Respondent

4. K.A.Gunasekera (Deceased)
Chandana ranatunga
Weeragula, Yakkala

Substituted 4th
Defendant-Respondent

5.Emage Madiranona.

6.A.A.Appu Singo

7.K.A.Siman Singo

and 03 others.

All of Weeragula Yakkala.

Defendant-Respondents.

BEFORE	:	M.M.A. Gaffoor J., and S.Devika de L. Tennekoon,J.
COUNSEL	:	Dr.Jayatissa de Costta P.C. with R.Y.D.Jayasakera for the 1st Defendant-Appellant. Sudharshani Cooray for the Plaintiff-Respondents.
ARGUED ON	:	25/10/2016
DECIDED ON	:	28/02/2017

M.M.A. Gaffoor J.

This is an appeal from the District Court of Gampaha.

The plaintiff –respondent instituted an action in the District Court of Gampaha to partitioned the land called Kappuwawatta alias Mahawatta as per the pedigree in the plaint. After filing the statements of claim by the parties, the case was taken up for trial on 21.01.1988 without a contest and the judgment pronounced on 25.02.1988 declaring the shares of the parties. Thereafter the interlocutory decree was entered and the commission for partition was also issued to the Court Commissioner to partition the land as per the interlocutory decree.

In the mean time an application has been made by K.A.Sumanawathie to intervene into the action. After an inquiry, the learned District Judge on 25.01.1991 allowed the application and added her as the 10th defendant. Thereafter she was allowed to file a statement of claim but before filing the state of claim, she moved for a fresh commission to survey the land.

After filing the statements of claim the case was fixed for trial again. On the trial date, the plaintiff- respondent raised an objection that since the judgment has been entered on 25th February 1988 by the learned District Judge after taking evidence and the interlocutory decree has been entered, the order of the Court dated 25.01.1991 allowing the 10th defendant to intervene and file a state of claim is not legal. The Court inquired into the matter and decided that the order dated 25.01.1991 is per incuriam and was made without jurisdiction. The learned District Judge decided to proceed with the interlocutory decree already entered. Being aggrieved by the said order, the 1st defendant appealed to this Court.

Section 48 of the Partition Law brings a finality to the interlocutory decree, Subsection 1 of Section 48 reads:

(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 there from, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good an sufficient evidence of the title of any person as to any right, share or 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, where or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

The only instance that a party can intervene after the interlocutory decree is defined in subsection 4 which reads;

(4)

(a) *Whenever a party to a partition action ;*

(i) has not been serve with summons or

(ii) being a minor or a person of unsound mind, has not been duly represented by a guardian ad item, or

Paragraph (iii) repeated by (Section 21,17 and 1997)

(iv) being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial.

And in consequence thereof the right title or interest of such party to or in the land which forms the subject matter of the interlocutory decree entered in such party has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party or where such party is a minor or a person of unsound mind, a person appointed as guardian and litem of such party may nor or before the date fixed for the consideration of the scheme of partition under section 35 or at any time not later than thirty days after the return of the person responsibility for the sale under section 42 is received by court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered.

The learned District Judge without considering the finality of the interlocutory decree, allowed the application of the 10th defendant to intervene on the basis that the plaintiff was unaware of the co owners of the land and by that there was an injustice done to the 10th defendant. This is not a recognized

reason under section 48 (4) to intervene after entering the interlocutory decree.

The learned District Judge considered the objection raised by the plaintiff and came to the conclusion that the order dated 25.01.1991 where the 10th defendant was allowed to intervene, was made per incuiram,

Samarakoon C.J. explaining the per incuriam rule held in the case of *Billimoria Vs. Minister of Lands and Land Development & Mahaweli Development and others (1979) 1 Sri L.R.10 at 13 and 14 that;*

The Attorney- General contended that the stay order was one made per incuriam. He cited the case of *Alosupillai Vs. Yavetipillai* and another (2) in which Basnayake, J. following the case of Huddersfield Police Authority Vs. Watson (3) stated " A decision per incuriam is one given when a case or a statute has not been brought to the attention for the Court and it has given the decision in ignorance or forgetfulness of the existence of that case or statute". This statement is by no means exhaustive. *In Morrelle Ltd. Vs Wakeling (4) at 686* the Court observed as follows:

" As a general rule the only cases in which decision should be held to have been given per incuriam are those of decisions

given in ignorance or forgetfulness of some inconsistent statutory provisions 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 and essential feature of our law, be in the language of Lord Greene M.R. of the rarest occurrence".

In *Young Vs. Bristol Aeroplane Co. Ltd. (5) at 300*, Greene, Mr. pointed particularly to two classes of decision per incuriam :-

> (ii) a decision in ignorance of a previous decision of its own Court or of a Court of co-ordinate jurisdiction covering the case, and
>
> (ii) a decision in ignorance of a decision of a higher Court covering the case which binds the Lower Court.
>
> Lord Denning M. R. was inclined to add another category of decisions – one where a long standing rule of the common law has been disregarded because the

Court did not have the benefit of a full argument before it rejected the common law.

In the instant case the order dated 25.01.1991 where the learned District Judge allowed the application to intervene after the interlocutory decree has been made without considering statutory provisions i.e. section 48 of the Partition Law. Therefore it can be considered as a " A decision given when the statue has not been brought to the attention for the Court and it has given the decision in ignorance or forgetfulness of the existence of that statute. " Such a decision is a decision made in per incuriam.

In the case of Gunasena Vs. Bandaratilleke (2000) 1 Sri L.R. 292 , Wijetunga, J. held that :

The authorities clearly indicate that a court has inherent power to repair an injury caused to a party by its own mistake. One it is recognized that a court would not allow a party to suffer by reason of its own mistake, it must follow that corrective action should be taken as expeditiously as possible, within the framework of the law, to remedy the inquiry caused thereby. The

modalities are best left to such Court, and would depend on the nature of the error"

Under these circumstances, the finding of the learned District Judge date 1997.09.02 is correct in law. We see no reason to interfere with he learned District Judge's findings.

The appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

S.Devika de L.Tennekoon,J.

I agree.

JUDGE OF THE COURT OF APPEAL