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

In the matter of an appeal under Article 138 of the Constitution and of Section 09 of Act No. 19 of 1990 of the High Court of the Provinces (Special Provisions) Act against the Final Order dated 15.01.2013 by the Provincial High Court of Negombo in Case No. HC Revision Application No. 407/09

Rose Mary Bernadus,

No. 79/8 Matagoda Road,

Hendala, Wattala.

Case No. CA (PHC) 09/2013

H.C. Negombo Case No. HCRA 407/09

M.C. Wattala Case No. 48459/09

Aggrieved Party Petitioner-Appellant

Vs.

1. O.M.D.S. Peter Perera,

2. O.M.D. Ranjan Benedict,

3. O.M.D.N. Patricia Perera,

4. O.M.N. Jasintha Perera,

All of No. 79/7, Matagoda Road,

Hendala, Wattala.

Accused-Petitioners-Respondents-Respondents

Officer-in-Charge,

Police Station,

Wattala.

Complainant-Respondent-Respondent-Respondent

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent-Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Dinesh Alwis with Upendra Kalahewatta for Aggrieved Party Petitioner-Appellant

Dr. Sunil Cooray with Amila Kiripitige for Accused-Petitioners-Respondents-Respondents

Manohara Jayasinghe State Counsel for Respondent-Respondent-Respondent

Written Submissions tendered on:

Aggrieved Party Petitioner-Appellant on 02.04.2018

Accused-Petitioners-Respondents-Respondents on 14.05.2018

Argued on: 19.02.2018

Decided on: 28.09.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Western Province holden in Negombo dated 15.01.2013.

Wattala Police instituted proceedings under section 66 of the Primary Courts Procedure Act in M.C. Wattala case no. 28909/07. The 1st Accused-Petitioner-Respondent-Respondent (1st Respondent) was made the Party of the 2nd Part while the 2nd, 3rd and 4th Accused-Petitioners-Respondents-Respondents (2nd, 3rd and 4th Respondents) later intervened as Party of the 2nd Part Intervening Party Respondents. Malcom Samuel Bernadus, the brother of the Aggrieved Party

Petitioner-Appellant (Appellant), was made the Party of the First Part Respondent while Eustus Bernadus and the Appellant later intervened as Party of the 1st Part Intervening Party Respondents. The dispute was over the obstruction of the right of way of the Party of the 1st Part by the Party of the 2nd Part by closing the gate of the Party of the First Part by constructing a wall.

The learned Magistrate after an inspection gave order dated 01.08.2007 directing the wall built across the gate of the premises where the Appellant lived should be demolished. This order of the Magistrates Court was executed by demolishing the wall on or about 17.08.2007.

The 1st to 4th Respondents then filed a revision application in H.C. Negombo case no. 354/2007 and claimed that the access road to their house was damaged during the execution of the order of the Magistrates Court.

After inquiry, the learned High Court Judge made order on 06.11.2008 allowing the 1st to 4th Respondents to restore the accessway that was damaged during the execution of the writ in M.C. Wattala case no. 28909/2007 to the state it was prior to the execution of the writ. The Appellant then filed papers in the same case against the alleged wrongful execution of the order of High Court of Negombo case no. HCRA 354/2007 and claimed that under the guise of enforcing the said order of the High Court, the 1st to 4th Respondents had once again constructed a wall across the gate of the Appellant.

The Appellant prayed inter alia to be restored to the position prior to the execution of the order in the said case by demolishing the wall constructed across the gate of the Appellant. However, the Appellant states that due to a clerical error the said application made in HCRA 354/2007 had been given another number HCRA 29/2009. The learned High Court Judge in the said case by order dated 29.07.2009 dismissed the application on the basis that the Provincial High Court of Negombo did not have jurisdiction to inquire into the said application.

However, the learned High Court Judge stated that if a party had acted contrary to the order in H.C. Negombo case no. 354/2007 there were provisions in section 73 of the Primary Courts Procedure Act on the next steps that can be taken. Accordingly, proceedings were instituted against the 1st to 4th Respondents in M.C. Wattala Case No. 48459/2009 where they were charged for an offence punishable under section 73 of the Primary Courts Procedure Act. The charge was

that they had constructed a wall obstructing the gate through which one could access the house of the Appellant.

On 12.11.2009 the 1st to 4th Respondents raised a preliminary objection that the order of M.C. Wattala case no. 28909/2007 had been revised in its entirety by the order dated 06.11.2008 made in H.C. Negombo case no. 354/2007 and that therefore the Court did not have jurisdiction to hear and determine a case of contempt under section 73 of the Primary Courts Procedure Act. The learned Magistrate overruled the preliminary objection by order made on the same day.

The Appellant states that the 1st to 4th Respondents had thereafter without notice to her instituted another revision application in H.C. Negombo case no. HCRA 407/09 wherein the learned High Court Judge by order dated 22.11.2009 set aside the order dated 12.11.2009 of the learned Magistrate made in M.C. Wattala Case No. 48459/2009 and issued a permanent injunction stopping the said case from proceeding.

The contention of the Appellant is that order dated 22.11.2010 made in H.C. Negombo case no. HCRA 407/09 is *per incuriam* as the learned High Court Judge was not made aware of the previous order dated 29.07.2009 made in H.C. Negombo case no. HCRA 29/2009. However, the learned High Court Judge by order dated 15.01.2013 dismissed the said application. It is this order that is the subject matter of this appeal.

Per Incuriam

The term *per incuriam* is generally used in the context of the *Stare Decisis* principle. In this context, it has received a restricted meaning.

The leading authority on the *per incuriam* principle is *Young v. British Aeroplane Co. Ltd.* [(1944) K.B. 718] where Lord Greene M.R. (at pages 725-6) held that *per incuriam* decisions are 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 although he stressed that they do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* although such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.

Later cases have sought to clarify the scope and meaning of the term *per incuriam*. In *Police Authority for Huddersfield v. Watson* [(1947) K.B. 842 at 847] Lord Goddard, Lord Chief Justice held that what is meant by giving a decision *per incuriam* is giving a decision when a case or a statute has not been brought to the attention of the court and it has given its decision in ignorance or forgetfulness of the existence of that case or that statute.

However, Courts were reluctant to lay any rigid rule in identifying decisions made *per incuriam*. As Sir Raymond Evershed MR stated in *Morelle v Wakeling* [(1955) 2 Q.B. 379 at p 406]:

> "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 forgetful lness 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, 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. As we have already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the Judgments were based and to say of it: *"Here was a manifest slip or error"*." (Emphasis added)

Although that decision was overruled in *Attorney General v. Parsons* [1956] AC 421, it was without criticism of that general proposition.

In *Rickards v. Rickards* [(1989) 3 W.L.R. 748] the Court of Appeal sought to provide some general considerations on the exceptional categories as follows:

> "First, the preferred course must always be to follow the previous decision, but to give leave to appeal in order that the House of Lords may remedy the error. This was attempted in Bokhari v. Mahmood, but failed because of the understandable reluctance of the defendant to prosecute the appeal. Second, certainty in relation to substantive law is usually to be preferred to correctness, since this at least enables the public to order their affairs with confidence. Erroneous decisions as to procedural rules affect only the parties engaged in relevant litigation. This is a much-less extensive group and accordingly a departure from established practice is to that extent less undesirable. Third, an erroneous decision which involves the jurisdiction of the court is particularly objectionable, either because it will involve an abuse of power if the true view is that the court has no jurisdiction or a breach of the court's statutory duty if the true view is that the court is wrongly declining jurisdiction. Such a decision, of which this case provides an example, is thus in a special category. Nevertheless, this court must have very strong reasons if any departure from its own previous decisions is to be justifiable."

In *Peter Limb v. Union Jack Removals Ltd. & Anor* [(1998) 1 W.L.R. 1354] in delivering the judgment of Court Brooke LJ summarized the present position as follows:

> "(3) The doctrine of per incuriam applies only where another division of the court has reached a decision in ignorance or forgetfulness of a decision binding upon it or of an inconsistent statutory provision, and in either case it must be shown that if the court had had this material in mind it ***must*** have reached a contrary decision. (4) The doctrine does not extend to a case where, if different arguments had been placed before the court or if different material had been placed before it, it ***might*** have reached a different conclusion. (5) Any departure from a previous decision of the court is in principle undesirable and should only be considered if the previous decision is manifestly wrong. Even then it will be necessary to take account of whether the decision purports to be one

of general application and whether there is any other way of remedying the error, for example by encouraging an appeal to the House of Lords."

Other decisions shed some light on the possible delineations of the term *"per incuriam"*. An unwarranted assumption about the meaning of a Regulation is not *per incuriam* [*Kadhim v. The Housing Benefit Board, London Borough of Brent* (2001) Q.B. 955]. The Court of Appeal misunderstanding a decision of the House of Lords is *per incuriam* [*Rickards v. Rickards* [(1989) 3 W.L.R. 748; *Holden & Co. v. Crown Prosecution Service* (1990) 2 QB 261].

Sri Lankan courts have followed the English precedent in the use of the term *per incuriam* in the context of the Stare Decisis principle.

In *Billimoria v. Minister of Lands and Land Development & Mahaweli Development* [(1978-79-80) 1 Sri.L.R. 10] the Supreme Court in considering whether the Court of Appeal had the power to vary an earlier order made by it in the same case held that the earlier order was not made *per incuriam* by applying the ratio in *Young v. British Aeroplane Co. Ltd.* (supra), *Police Authority for Huddersfield v. Watson* (supra) and *Morelle Ltd. v. Wakeling* (supra). Hence, our courts have earlier used the restricted meaning of the term *"per incuriam"* as used in the Stare Decisis context in deciding whether a court can vary an order or judgment made by it in the same case.

However, in *Gunasena v. Bandaratilleke* [(2000) 1 Sri.L.R. 292] the Supreme Court held that the Court of Appeal had the inherent power to set aside the judgment dated 25.05.1998 and to repair the injury caused to the plaintiff by its own mistake, notwithstanding the fact that the said judgment had passed the decree of court. The Supreme Court held that this could not have been done otherwise than by writing a fresh judgment. Wijetunge J. took the view that this course was possible by regarding the facts and circumstances of that case as coming within the broader parameters of the concept of *per incuriam* or alternatively, as the earlier judgment contained a manifest error, the Court of Appeal had inherent power to correct the same, in order that a party did not suffer by reason of a lapse on the part of the Court.

The parameters of the broader concept of *per incuriam* according to Wijetunga J. is broader than the definition given to it by Lord Goddard in *Police Authority for Huddersfield v. Watson* (supra). Wijetunge J. made particular reference to the phrase *per incuriam* as defined in Wharton's Law Lexicon, 13th Edition at page 645 as "through want of care. An order of the Court obviously made through some mistake or under some misapprehension is said to be made per incuriam", Classen's Dictionary of Legal Words and Phrases, 1976 Edition defines per incuriam at page 137 as "by mistake or carelessness, therefore not purposely or intentionally" and Scarman J. in *Farrell v. Alexander* [(1976) 1 All.E.R. 129 at 145].

This broader concept of *per incuriam* was used in *Kariyawasam v. Priyadharshani* [(2004) 1 Sri. L. R. 189] where two judges of the Court of Appeal had confirmed that one 'G' was not entitled to any shares in a partition action and dismissed the appeal. Decree of court was entered and the record sent back to the District Court. However, after a period of 1 year and 8 months the plaintiff appellant sought to set aside the said judgment on the basis that "G" was in fact allotted certain shares. The appellant contended that the findings of the Court of Appeal has been made by an oversight/inadvertence/per incuriam. The defendant-respondent, objected to the application on the ground that there is no provision in law which enables the plaintiff-appellant to make the said application.

However, the Court of Appeal resorted to the broader concept of the *per incuriam* principle referred to in *Gunasena v. Bandaratilleke* (supra) and held that the *per incuriam* findings in the judgment 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' has been allotted shares. The Court of Appeal having regard to the definition of a *per incuriam* order and the facts and circumstances of that case concluded that it warrants the exercise of inherent powers of Court to rectify the mistake made in the judgment to prevent injustice to be caused to the plaintiff-appellant. It was further stressed that no man shall be put in jeopardy by a mistake made by a court.

Thus, it is seen that the broader meaning of *per incuriam* has been used by our Courts when considering whether a Court can revisit an order or judgment made by it in the same case.

However, Sri Lankan courts have laid down certain principles which regulate as to when a court can rehear, review, alter or vary any judgment or order made by it after it has been entered. As a general rule, no Court has power to rehear, review, alter or vary any judgment or order made by it after it has been entered. However, all courts have inherent power in certain circumstances to revise an order made by them. One such instance is where Court has inherent power to correct decisions made *per incuriam* [*Fernandopulle v. De Silva and others* (1996) 1 Sri.L.R. 70]. This power can be exercised by the judge who made the *per incuriam* order as well as by his successor [*Moosajees v. Fernando* (68 N.L.R. 414 at 419)] although it is an inveterate practice of Court which in my view has hardened into a rule that the same judge who made the impugned order or judgment should as far as possible given the opportunity to consider whether it is one made *per incuriam*.

Is Order dated 22.11.2010 made per incuriam?

The *per incuriam* application was supported on 01.02.2011 before the same High Court Judge who made the order dated 22.11.2010 and it is pertinent that he made order issuing notice after stating that he was satisfied with the oral submissions of the Attorney-at-Law for the Appellant. This indicates that the learned High Court Judge was of the view that there was a matter to be considered in view of the order dated 29.07.2009 made in H.C. Negombo case no. HCRA 29/2009. It is also pertinent that the order rejecting the *per incuriam* application was made by another judge as the learned High Court Judge who made the orders dated 22.11.2010 and 01.02.2011 had gone on transfer.

The record in H.C. Negombo case no. HCRA 407/09 does not show that the order dated 29.07.2009 made in H.C. Negombo case no. HCRA 29/2009 was brought to the attention of the learned High Court Judge even though the 1st to 4th Respondents were represented on 29.07.2009 in H.C. Negombo case no. HCRA 29/2009 by the same Attorney-at-Law who had instituted the revision application in H.C. Negombo case no. HCRA 407/09.

The question is whether this renders the order made on 22.11.2010 in H.C. Negombo case no. HCRA 407/09 an order made *per incuriam*.

In this context it is important to subject the order dated 29.07.2009 made in H.C. Negombo case no. HCRA 29/2009 to closer scrutiny to ascertain its true import. The learned High Court Judge clearly states that if a party had acted contrary to the order in H.C. Negombo case No. 354/2009 there are provisions in section 73 of the Primary Courts Procedure Act on the next steps that can be taken. He states that the learned High Court Judge in H.C. Negombo case No. 354/2007 holds that the Petitioner in that case is entitled to restore the road to the condition it was prior to the execution of the writ. Nowhere does he appear to have read that order as allowing the reconstruction of the wall that was demolished in the execution of the writ in terms of the order made in M.C. Wattala case no. 28909/2007. It is in that context he refers to section 73 of the Primary Courts Procedure Act.

This is clearly the correct reading of the order made in H.C. Negombo case no. 354/2007 for there the 1st to 4th Respondents prayed for the following relief:

(අ).මෙම ඉල්ලීමේ දැන්වීම් වගඋත්තරකරුවන් වෙත නිකුත් කිරීමට නියෝගයක් සඳහාද

(ආ)එකී ගරු වත්තල ප්‍රාථමික අධිකරණයේ අංක 28909 දරණ නඩු පොත කැඳවා පරීක්ෂාවට ලක්කරන ලෙසටද

(ඇ)පෙත්සම්කරුවනට එකී ඔවුන්ගේ නිවාස සඳහා වාහනයකින් සහ පයින් යාම ඒම කිරීම සඳහා සුදුසු අයුරින් එකී පාර සකසා ගැනීමට අවසර දෙන අතුරු නියෝගයක් සඳහාද

(ඈ)එකී ගරු උගත් වත්තල ප්‍රාථමික විනිසුරුතුමාගේ 2007.08.01 දින දරණ නියෝගය ප්‍රතිශෝධනය කොට එකී පාර පෙර තිබූ අයුරින් සුදුසු පරිදි සකසා පාවිච්චි කිරීමට පෙත්සම්කරුවනට අවසර දෙන නියෝගයක් සඳහාඳ

(ඉ)අධිකරණයට සුදුසු හා යෝග්‍යයැයි හැගෙන වෙනත් හා අතිරේක සහන සඳහාඳ වේ.

However, the learned High Court Judge by her order dated 06.11.2008 allowed the 1st to 4th Respondents to restore the accessway that was damaged during the execution of the writ in M.C. Wattala case no. 28909/2007 to the state it was prior to the execution of the writ. The order in M.C. Wattala case no. 28909/2007 was not set aside. This is also the logical conclusion for it was the Appellant who complained of an obstruction of a right of way by the construction of a wall. The demolishing of it due to a court order cannot obstruct the right of way of the 1st to the 4th

Respondents except to the extent that during the said demolishing their accessway was damaged. That wrongful act can indeed and was allowed to be remedied by the order in the High Court of the Western Province holden in Negombo case No. 354/2009. The said order cannot be read as permitting the 1st to 4th Respondents to rebuild the wall that was demolished in terms of the order of the Magistrates Court of Wattala case no. 28909/2007.

In the above circumstances, I am of the view that the order dated 22.11.2010 in H.C. Negombo case no. HCRA 407/09 is *per incuriam* as the learned High Court Judge was not made aware of the previous order dated 29.07.2009 made in H.C. Negombo case no. HCRA 29/2009. Accordingly, the learned High Court Judge was in error in dismissing the application made on *per incuriam* basis by his order dated 15.01.2013.

For the foregoing reasons, I set aside the orders of the H.C. of Negombo in case No. HCRA 407/2009 dated 22.11.2010 and 15.01.2013. This course is possible by regarding the facts and circumstances of this case as coming within the broader parameters of the concept of *per incuriam* or alternatively, as the order of the High Court dated 22.11.2010 contained manifest errors, the High Court had inherent power to correct the same, in order that a party did not suffer by reason of a lapse on the part of the Court. The application made by the 1st to 4th Respondents in H.C. of Negombo in case no. HCRA 407/2009 is dismissed.

Appeal allowed with costs fixed at Rs. 25,000/= payable by the 1st to 4th Respondents to the Appellant.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal