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

In the matter of an application for Leave to Appeal under and in terms of section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 amended by the Act No. 54 of 2006.

SC HC CA LA No. 127/2014
NWP/HCCA/KURU/111/2005(F)
DC Kurunegala case No. 4897/P

N. Habeebu Mohamedge Masahima Umma
Alias Siththi Raheema (Deceased)
No. 145, Bulugohotenna Road
Akurana

Plaintiff-Respondent-Respondent

1. P.T.G. Mohamed Sifan Najimudeen
2. P.T.G. Fathima Shifani Najimudeen
3. F. Masani Janimudeen

All of No. 145, Bulughatenna,
Palleweliketiya, Akurana

Substituted –Plaintiff-Respondent-Respondent-Petitioners

Vs.

9. Mahagamage Chandrasena alias
Chandrasiri of
Bamunugedera, Kurunegala

Defendant-Respondent-Petitioner Respondent

1. Abdul Hasan Mohomed Iqbal
2. Abdul Hasan Mohomed Sarook
3. Abdul Hasan Mohomed Mursheed
4. Abdul Hasan Mohomed Muneer
5. Abdul Hasan Mohomed Jarjees

All of 188, Dodamgolla, Akurana

6. Habeebu Mohomed Fauziya Umma (Deaceased)

Of 99/1, Bulugohotenna, Akurana

6A. Enderu Tenne Gedera Seyed Mohomed Habeebu Mohomed of 99/1, Bulugohotenna, Akurana.

7. Abdul Kadar Fathima Mafas of No. 41, Bulugohotenna, Akurana
8. Nuwara Gedera Habeebu Mohomedge Sanufa Umma of No. 237, Bulugohotenna, Akurana
10. Nuware Gedera Habeebu Mohomed Misiriya Umma
11. Welimankada Gedera Mohomed Anwar Siththi Afeera
12. Welimankada Gedera Mohomed Anwar Siththi Fariha

All of No. 237, Bulugohotenna, Akurana

Defendants-Appellants-Respondents-Respondents

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

In the matter of an application for Leave to Appeal under and in terms of section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 amended by the Act No. 54 of 2006.

SC HC CA LA No. 128/2014
NWP/HCCA/KURU/111/2005(F)
DC Kurunegala case No. 4897/P

9. Mahagamage Chandrasena alias Chandrasiri of
Bamunugedera, Kurunegala

Defendant-Respondent-Petitioner-Petitioner

Vs.

1. Abdul Hasan Mohomed Iqbal
2. Abdul Hasan Mohomed Sarook
3. Abdul Hasan Mohomed Mursheed
4. Abdul Hasan Mohomed Muneer
5. Abdul Hasan Mohomed Jarjees

All of 188, Dodamgolla, Akurana

6. Habeebu Mohomed Fauziya Umma
(Deceased)
Of 99/1, Bulugohotenna, Akurana

6A. Enderu Tenne Gedera Seyed Mohomed Habeebu Mohomed of 99/1, Bulugohotenna, Akurana.

7. Abdul Kadar Fathima Mafas of
No. 41, Bulugohotenna, Akurana
8. Nuwara Gedera Habeebu
Mohomedge Sanufa Umma of
No. 237, Bulugohotenna, Akurana
10. Nuware Gedera Habeebu Mohomed
Misiriya Umma
11. Welimankada Gedera Mohomed
Anwar Siththi Afeera
12. Welimankada Gedera Mohomed
Anwar Siththi Fariha
All of No. 237, Bulugohotenna,
Akurana

Defendants-Respondents-
Respondents-Respondents

1. Fathima Shifani Najimudeen
2. Muhammad Sifan Najimudeen
3. Fathima. Masani Najimudeen

All of No. 145, Bulugohotenna
Palleweliketiya, Akurana

Respondents
(Heirs of the deceased Plaintiff-
Appellant sought to be substituted)

Before — Priyasath Dep, PC J
Upaly Abeyrathne, J
Anil Goonaratne, J

Counsel — Lakshman Perera, PC with Upendra Walgampaya and Anjalee Amarasinghe for 9th Defendant-Respondent-Petitioner-Petitioner.

Rohan Sahabandu, PC for 1st to 8th and 10th to 12th Defendant-Appellants-Respondents-Respondents.

A.1 Panditharathna for parties proposed to be substituted as Substituted Plaintiff-Respondents.

Argued on : 15.06.2016

Decided on : 17.02.2017

Priyasath Dep, PC. J

This refers to an application filed by the heirs of the deceased Plaintiff-Respondent in Case No.NWP/HCCA/KUR/110/2005(F) and also the heirs of the deceased Plaintiff-Appellant in NWP/HCCA/KUR/111/2005(F) to set aside the judgment of this Court dated 07-07-2015 as the said judgment was entered per incuriam. This Court heard the submissions of the parties and permitted them to file written submissions. Accordingly the parties filed their written submissions.

In this case the Plaintiff instituted action in the District Court of Kurunegala in case No. 4897/P to partition the land depicted in Plan No. 5052 dated 30.09.1998 made by H.M.S. Herath, Licensed Surveyor marked "X" and containing in extent 08.1 perches between the Plaintiff and 1st to 8th and 10th to 12th Defendants. It is the position of the Plaintiff that the 9th Defendant has no rights to the property which is referred to as Lot 1 in the said Plan marked "X". The 9th Respondent claimed lot 1 on the basis that he has prescribed to that lot. He moved that the action be dismissed .

At the trial parties raised 30 issues. However, the learned District Judge did not answer those issues and raised 4 issues on his own and on the basis of the answers given to those issues he dismissed the plaint. His contention is that predecessors in title to the land sought to be partitioned had transferred divided lots to the parties and that they possessed those lots as divided and defined lots. The learned District Judge held that the properties were not properties co-owned by the parties. As there was no common ownership the question of termination of common ownership does not arise.

Being aggrieved by the judgment of the District Court, 1st to 8th and 10th to 12th Defendants appealed against the judgement to the Provincial High Court of North Western Province holden in Kurunegala in case No. WP/HCCA/KUR/110/2005(F). The Plaintiff and the 9th Defendant were cited as Respondents. Similarly Plaintiff also appealed against the judgement to the Provincial High Court of North Western Province held in Kurunegala in case No. NWP/HCCA/KUR/111/2005(F). Both appeals were taken up together by the Provincial High Court of Kurunegala and two separate judgements were delivered setting aside the Judgement of the District Court. The learned High Court Judges answered the 30 issues raised by the parties and ordered the partitioning of the land and allotted shares to the Plaintiff and to the 1st to 8th and to 10th to 12th Defendants. The 9th Defendant's claim based on prescription was rejected and no shares were allotted to him.

Being aggrieved by the judgement of the High Court, the 9th Defendant - Respondent-Petitioner filed two Leave to Appeal applications to the Supreme Court dated 10th March 2014 numbered HC CA LA No. 127/2014 and SC HC CA LA No. 128/2014.

On 08.05.2014 when the matter was listed for support it was brought to the notice of the Court that the Plaintiff had passed away and steps to be taken for substitution. Then the case was again mentioned on 20.05.2015 and 04.07.2014. On 04.07.2014 and the Court made order to the effect that if the substitution papers are in order to take steps to support for substitution. On 01.12.2014, 1st Defendant filed a motion and moved to dismiss the application as the 9th Defendant –Respondent-Petitioner had failed to exercise due diligence in prosecuting the Application. Thereafter the Attorney-At-law for the 9th Defendant –Respondent filed a motion dated 20.03.2015 along with the substitution papers and moved to list the case for support for substitution and accordingly case was listed for support for substitution on 07.07.2015.

When the case was taken up on 07.07.2015, the learned President Counsel for the 9th Defendant-Petitioner submitted that the Plaintiff had passed away when the appeal was pending in the High Court and therefore, judgement of the High Court is a nullity. He cited several authorities of the Supreme Court and moved to declare that the judgement is a nullity. The learned Senior Counsel for the 1st to 8th and 10th to 12th Defendant was not present in Court as he was held up in the other division of this Court and the junior Counsel did not raise any objections to this application. Accordingly this Court set aside the judgement of the Provincial High Court of North Western Province on the basis that the judgement is a nullity On 24.07.2015 Attorney-at-Law for the 1st to 8th and 10th to 12th Defendants filed a motion and moved that the application be re-listed for support. The Attorney-at-law for the 9th Defendant -Respondent Petitioner filed a statement of objections dated 08.12.2015 and objected to the re-listing of this application. The heirs of the Plaintiff who were substituted in the High Court after the delivery of the judgement as substituted Plaintiff-Respondents in . NWP/HCCA/KUR/110/2005(F) and as substituted Plaintiff-Appellants in . NWP/HCCA/KUR/111/2005(F) filed a petition dated 29th March 2016 and moved to set aside the order dated 07.07 2015 on the basis that it was entered per incuriam. This matter came up before the same bench on 03.02.2016 . The learned Counsel for the heirs of the Plaintiff proposed to be substituted as substituted Plaintiff in this Court and also learned President Counsel for the 1st to 8th and 10th to 12th Defendant-Respondent-Respondent submitted that the order made by the Supreme Court declaring that the judgement in the High Court is nullity is an order made per incuriam and moved to file papers to set aside the order. The Court permitted parties to file papers before 31.03.2016 and made order

that the case record to be submitted to His Lordship the Chief Justice for an order. His Lordship the Chief Justice directed that applications to be supported before the same bench which delivered the order dated 07.07. 2015. Accordingly the applications were supported on 15.06.2016 and after hearing all the parties, Court made order directing the parties to file written submissions before 18.07.2016 and the order was reserved. Thereafter the parties filed comprehensive written submissions.

The learned President's Counsel for the 9th Defendant-Respondent - Petitioner objected to the relisting application and argued that Supreme Court has no power to re-hear, revise, review or vary its orders. He cited the case of Jeyaraj Fernandopulle v De Silva and others (1996) 1 SLR 70 where at page 96, Amerasinghe J. stated that

> " The court has no statutory jurisdiction to rehear, reconsider, revise, review, vary or set aside its own orders. Consequently, the Chief Justice cannot refer a matter to a Bench of five or more judges for the purpose of revising, reviewing, varying or setting aside a decision of the Court. The fact that in the opinion of the Chief Justice the question involved is a matter of general or public importance makes no difference."

I agree with the submissions of the learned President's Counsel for the 9th Defendant Respondent -Petitioner that this Court has no power to review, revise, vary or set aside its orders.

The main question that has to be decided in this case is whether the order dated 07.07. 2015 is an order made per incuriam or not. If it is an order made per incuriam could the Court use its inherent powers to set aside the order.

The learned Counsel appearing for respective parties cited several authorities regarding the question as to whether the order made on 07.07 2015 is an order made per incuriam or not. I will refer to some of the authorities cited by the parties which are relevant to this Application.

In Halsbury, Laws of England 4th edition, Vol 26 para 578 it was stated that;

-

> "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."

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".

The learned Counsel for the heirs of the Plaintiff made submissions based on two grounds:

1. It was not brought to the notice of the Supreme Court the section 81 (9) of the Partition Law No. 21 of 1977 as amended by Act No 29 of 1997.
2. No notices have been served on substituted Plaintiff-Petitioners by the 9th Defendant –Respondent-Petitioner and due to that fact there was no representation on behalf of them when the Supreme Court made the order dated 07.07.2015.

This Court will deal with the second ground submitted by the heirs of the Plaintiff .It was established that there was no substitution effected in place of the deceased Plaintiff when the court made the order on 07.07.2015.The

present application by the heirs of the Plaintiff is to set aside the order dated 07.07.2015 on the basis that the order was made per incuriam. This court has to examine whether or not the order made by this court is an order made per incuriam. Though orders made per incuriam is subjected to narrow definition it includes orders made due to inadvertence, mistake or oversight..

It is to be observed that though the application was filed in 2013 it was never supported for granting of leave. Since the Plaintiff had passed away, the 9th Defendant-Respondent- Petitioner was given time to take steps for substitution . However, substitution was not effected and the 9th Defendant –Respondent-Petitioner is a defaulting party. In fact a motion was filed on behalf of the 1st Defendant to dismiss the application for not exercising due diligence in prosecuting the application. According to the proceedings of this case the date given which is 07.07.2015 is for the purpose of effecting substitution. Heirs of the Plaintiff- Respondents submit that they have no notice of this application and for that reason there was no representation. The Learned President Counsel who appeared for the 1stto 8th and 10th to 12th was held up in another division of this court and a Junior counsel appeared for them. In this background the learned President Counsel for the 9th Defendant –Respondent -Petitioner made submissions to the effect that the judgement of the Provincial High Court of North Western Province held in Kurunegala was a nullity due to the fact that the Plaintiff-Appellant had passed away prior to the delivery of the judgement. The learned counsel who appeared for the 1st to 8th and 10th to 12th Defendant –Appellant-Respondents did not object to the submissions made by the President's Counsel and it appears that there was an acquiescence on the part of the Counsel. On the strength of the submissions and the authorities cited by the learned President's Counsel this court made order setting aside the judgement of the Provincial High Court.

The gravamen of the complaint made by the heirs of the deceased Plaintiff is that they had no notice of this application and had no representation and thereby they were deprived of a right of hearing which they are entitled to in law. It is to be observed that the judgment in the Provincial High Court of Kurunegala was given in favour of the deceased Plaintiff as well as in favour of the 1st to 8th and 10th to 12th Defendants. The judgement of the Supreme Court prejudicially affected the rights of the heirs of the Plaintiff-Appellant and they were deprived of their rights without a hearing. On the other hand 9th Defendant –Respondent –Petitioner obtained the relief

without taking the procedural steps and noticing the heirs of the Plaintiff who are necessary parties to the action. Therefore this court has to consider whether there is a serious flaw in the procedure and violation of the principles of natural justice. This court has to consider whether the order made on 07.07.2015 order made per incuriam or not .

The Court made order on 07.07. 2015 on the basis of submissions made by the learned President's Counsel for the 9th Defendant-Respondent-Petitioner to which the learned junior counsel for the 1st – 8th and 10th – 12th Defendant did not objected to it and there was acquiescence on the part of the junior counsel. Therefore 1st – 8th and 10th – 12th Defendant could not complaint against the order as they have participated in the proceedings on 07.070.2015.The complaint of the heirs of the Plaintiff is on a different ground which should be seriously considered by this Court.

At this stage it is relevant to cite two cases referred to in Jeyaraj Fernandopulle Vs. De Silva and others (supra) which has some relevance to this case.

Ranmenikhamy Vs. Tissera (65 NLR 214) is an application to set aside the order of the Supreme Court rejecting the Appeal as an order made per incuriam.

In this case the Appeal which was preferred to the Supreme Court was rejected, on the application of Counsel for certain Respondents, on the ground that notice of appeal had not been served on one of the other Respondents. It was later proved to the court that the respondent in question was a minor who was represented in the action by a duly appointed guardian-ad-litem on whom notice of appeal had been duly served. It was also conceded that the objection was raised and not resisted as the result of a mistake common to both Counsel and that there had been substantial notice of appeal to the minor respondent.

Held, that, in as much as the order rejecting the appeal was made per incuriam, the Court had inherent jurisdiction to set aside its own order."

This support the proposition that the 'Supreme Court has power to vacate its orders in appropriate circumstances if it is an order made by it per incuriam'.

Menchinahamy Vs. Muniweera (52NLR Page 409) refers to an Application for revision or in the alternative for Restitutio in Integrum.

In the partition action S who was added as a party died , but no steps were taken to have his heirs, namely his widow and children substituted in his place. The case proceeded to interlocutory decree which was upheld by the Supreme Court in appeal. Thereafter, S's heirs moved the Supreme Court by way of revision/ restitutio in integrum.

Held, that the interlocutory decree was irregularly entered and that the case should be sent back for S's heirs to be added and for investigation of the claims of S and the children of N.

This decision was made in a revision application and during the period the Partition Act No 16 of 1951 was in force. However, the principle is the same that if an order was made without notice to the parties it is liable to be set aside.

In the case before us the Court made order on 07.07.2016 on the basis of submissions made by the learned President Counsel for the 9th Defendant-Respondent-Petitioner to which the learned junior counsel for the 1st – 8th and 10th – 12th Defendant-Respondent-Respondent did not objected to it and there was acquiescence on the part of the junior counsel. The Provincial High Court judgement is in favour of the deceased Plaintiff- and the heirs of the Plaintiff are prejudicially affected by this order. As the heirs of the deceased Plaintiff-Respondent were not substituted they were deprived of right of hearing which they are entitled to. Therefore, principles of natural justice were violated. The order was made by this Court under a mistaken belief that all parties were before Court and that they agreed that the judgment of the Provincial High Court was a nullity. Therefore the order made on 07.07.2015 is an order made per incuriam.

It is an established rule that no party should suffer due to an act of court. It is set out in the case of Rodger v Comptoir D'Escompte de Paris (1871) LR 3/1 4C 465 that:

> "One of the first and highest duties of all Courts…. to take care that the act of the Court does no injury to any of the suitors

We hold that the order made on 07.07. 2015 is an order made per incurim and the Court in the exercise of its inherent jurisdiction set aside the order. Applications for re-listing allowed.

Judge of the Supreme Court

Upali Abeyrathne J.
I agree.

Judge of the Supreme Court

Anil Goonerathne J.
I agree.

Judge of the Supreme Court