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

Subasinghe Mudiyanselage Rosalin
Bertha of Dummalasooriya (Deceased).
Plaintiff

Mary Margrat Miranda
Solangarachchi of Dummalasooriya.
Substituted Plaintiff

SC APPEAL NO: SC/APPEAL/160/2016
SC LA NO: SC/SPL/LA/454/2013
CA NO: NWP/HCCA/KUR/161/2003
DC KULIYAPITIYA NO: 5879/P

Vs.

1. Maththumagala Kankanamlage Juwan Appu of Dummalasooriya (Deceased).
1A. Maththumagala Kankanamlage Rathnasena of Dummalasooriya.
2. Bulathsinhala Arachchige Karunarathne of Dummalasooriya (Deceased).
2A. Randeni Koralalage Ewgin Hemalatha Randeni of Dummalasooriya (Deceased).
2A1. Bulathsinhala Arachchige Indrani Mallika of Abaya Dispensary, Abinawarama Road, Balapitiya.

2B. Bulathsinhala Arachchige Siriwardena of Dummalasooriya.

2C. Bulathsinhala Arachchige Indrani Mallika of Abaya Dispensary, Abinawarama Road, Balapitya.

2D. Bulathsinhala Arachchige Rohini Thamara of Dummalasooriya.

3. Mihindu Kulasooriya Muthuporuthotage Edward Fernando of Dummalasooriya (Deceased).

3A. Mihindu Kulasooriya Muthuporuthotage Mary Theresa Fernando of Dummalasooriya.

4. Rathnasekera Don Steven of Dummalasooriya (Deceased).

4A. Rathnasekera Don Francis of No. 311, North Bathagama, Ja-Ela.

5. Hetti Arachchige Saranelis of Madampe (Deceased).

5A. G.B. Kusuma Doluweera of Paththalagedara, Weyangoda.

5AA. Karuppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.

5B. Kuruppu Appuhamilage Karu Hemachandra of Paththelagedara, Weyangoda.

6. Vidane Kankamalage Agnes of Dummalasooriya (Deceased).

6A. Herath Mudiyanselage Anulawathi of Suduwella, Warimarga Bungalow, Madampe.

7. Wickarama Arachchige Podihamy of

Katuwalla, Pannala.

8. Jayasekera Vidanelage Edward Jayasekara of Koruwalla,
Pannala (Deceased).
9. Herath Mudiyanselage Tikiri Bandara of Dummalasooriya.
10. Doluwarannegamage Don Kusumawathie of Paththalagedara, Weyangoda (Deceased).

10A. K.H. Premachandra of
Paththalagedera, Weyangoda.

11. Wanni Arachchige Siyadoris Appuhamy of Dummalasooriya (Deceased).

11A. Wanni Arachchige Wasantha Soma Wanniarachchi of
Dummalasooriya.

12. Maththumagala Kankanamlage Podi Hamine of Dummalasooriya.
13. Randeni Koralalage Ewgin Hemalatha of Dummalasooriya.

13A. Bulathsinhala Arachchilage Siriwardena of Dummalasooriya.

14. K.A. Baba Singho of Dummalasooriya.

14A. Kangani Arachchilage Gunawathie of Dummalasooriya.

15. Administrative Officer of Village Council of Dummalasooriya.

15A. District Development Council of Kurunegala.

15B. Bingiriya Pradeshiya Sabawa of Bingiriya.

15C. Kurunegala Provincial Council of

Kurunegala.

16. Maththumagala Kankanamlage Jayasekera of Dummalasooriya.

Defendants

AND BETWEEN

16. Maththumagala Kankanamlage Jayasekera of Dummalasooriya.

16th Defendant-Appellant

Vs.

Mary Margrat Miranda Solangarachchi of Dummalasooriya.

Substituted Plaintiff-Respondent

1A. Maththumagala Kankanamlage of Rathnasena, Dummalasooriya (Deceased).

2A1. Bulathsinhala Arachchige Indrani Mallika of Abaya Dispensary, Abinawarama Road, Balapitiya.

2B. Bulathsinhala Arachchige Siriwardena of Dummalasooriya.

2C. Bulathsinhala Arachchige Indrani Mallika of Abaya Dispensary, Abinawarama Road, Balapitiya (2A1 Defendant).

2D. Bulathsinhala Arachchige Rohini Thamara of Dummalasooriya.

3A. Mihindu Kulasooriya Muthuporuthotage

Mary Theresa Fernando of Dummalasooriya.

4A. Rathnasekera Don Francis of No. 311, North Bathagama, Ja-Ela.

5AA. Karuppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.

5B. Kuruppu Appuhamilage Karu Hemachandra of Paththelagedara, Weyangoda.

6A. Herath Mudiyanselage Anulawathi of Suduwella, Warimarga Bungalow, Madampe.

7. Wickarama Arachchige Podihamy of Kotuwalla, Pannala.

8. Jayasekera Vidanelage Edward Jayasekera of Kotuwalla, Pannala.

9. Herath Mudiyanselage Tikiri Bandara of Dummalasooriya.
Presently at No. 8/26, Beddagana Road (North), Rajamal Uyana Housing Scheme, Pitakotte, Kotte.

10A. K.H. Premachandra of Paththalagedera, Weyangoda.

11A. Wanni Arachchige Wasantha Soma Wanniarachchi of Dummalasooriya.

12. Maththumagala Kankanamlage Podi Hamine of Dummalasooriya.

13A. Bulathsinhala Arachchilage Siriwardena of Dummalasooriya.

14A. Kangani Arachchilage Gunawathie of Dummalasooriya.

15B. Bingiriya Pradeshiya Sabawa of Bingiriya.

15C. Kurunegala Provincial Council of
Kurunegala.
Defendant-Respondents

AND BETWEEN

2B. Bulathsinhala Arachchige Siriwardane of
Dummalasooriya.
2B/13A Substituted Defendant-Respondent-
Petitioner

2C. Bulathsinhala Arachchige Indrani Mallika of
Abaya Dispensary, Abinawarama Road,
Balapitiya.
2A1/2C Substituted Defendant-
Respondent-Petitioner

Vs.

Mary Margrat Miranda Solangarachchi of
Dummalasooriya.
Substituted Plaintiff-Respondent
Respondent

1A. Maththuumagala Kankanamlage
Rathnasena of Dummalasooriya (Deceased).
1B. M.K Manel of Dummalasooriya.
2D. Bulathsinhala Arachchige Rohini Thamara
of Dummalasooriya (Deceased).
2DA. Bulathsinhala Arachchige Sirwardena of

Dummalasooriya.

3A. Mihindu Kulasooriya Muthuporuthotage Mary Theresa Fernando of Dummalasooriya (Deceased).

4A. Rathnasekera Don Francis of No. 311, North Bathagama, Ja-Ela (Deceased).

5AA. Karuppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.

5B. Kuruppu Appuhamilage Karu Hemachandra of Paththelagedara, Weyangoda.

6A. Herath Mudiyanselage Anulawathi of Suduwella, Warimarga Bungalow, Madampe.

7. Wickarama Arachchige Podihamy of Kotuwalla, Pannala.

8. Jayasekera Vidanelage Edward Jayasekara of Kotuwalla, Pannala (Deceased).

8A. Wickrama Arachchige Podihamy of Kotuwalla, Pannala.

9. Herath Mudiyanselage Tikiri Bandara of Dummalasooriya.
Presently at No. 8/26, Beddagana Road (North) Rajamal Uyana Housing Scheme, Pitakotte, Kotte.

10A. K.H. Premachandra of Paththalagedera, Weyangoda.

11A. Wanni Arachchige Wasantha Soma Wanniarachchi of Dummalasooriya.

12. Maththuumagala Kankanamlage Podi Hamine of Dummalasooriya (Deceased).

12A. Wanniarachchige Wasanthasoma Wanniarachchi of Dummalasooriya.

13A. Bulathsinhala Arachchilage Siriwardena of Dummalasooriya.

14A. Kangani Arachchilage Gunawathie of Dummalasooriya.

15B. Bingiriya Pradeshiya Sabawa of Bingiriya.

15C. Kurunegala Provincial Council of Kurunegala.

Defendant-Respondent-Respondents

16. Maththumagala Kankanamlage Jayasekera of Dummalasooriya.

16th Defendant-Appellant-Respondent

AND NOW BETWEEN

Bulathsinhala Arachchige Indrani Mallika of No. 17, Abaya Dispensary, Abinawarama Road, Balapitiya.

2C/2A Substituted Defendant-Respondent-Petitioner-Petitioner

Vs.

Bulathsinhala Arachchige Siriwardane of Dummalasooriya.
Presently at Gampahawaththa,

Dummalasooriya.
2D A/2B/13A Substituted Defendant-Respondent-Petitioner-Respondent

AND

Mary Margrat Miranda Solangarachchi of Dummalasooriya.
Substituted-Plaintiff-Respondent-Respondent

1B. M.K Manel of Dummalasooriya.
2DA. Bulathsinhala Arachchige Siriwardena of Gampahawaththa, Dummalasooriya.
3AA. Kasadoruge Hubert Thimothi Perera
3AB. Thanuja Subashini
3AC. Nayana Ruwan Eranda
3AD. Lahiru Mahesh Niranda
All of Ranthatiyana, Weerakodiyana.
4AA. Rathnasekara Don Leynard Hilary Ranjith of Bernadeth Mawatha, Kandana, Rilaula.
5AA. Kuruppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.
5B. Kuruppu Appuhamilage Karu Hemachandra of Paththalagedera, Weyangoda.
6A. Herath Mudiyanselage Anulawathi of Suduwella, Warimarga Bangalow, Madampe.
7. Wickrama Arachchige Podihami, Katuwallam of Pannala.
8A. Wickrama Arachchige Podihamy of

Katuwalla, Pannala.

9. Herath Mudiyanselage Tikiri Bandara of Dummalasooriya.
   Presently at No. 8/26, Beddegana Road (North) Rajamal Uyana Housing Scheme, Pitakotte, Kotte.

10A. K.H. Premachandra of Paththalagedera, Weyangoda.

11A. Wanni Arachchige Wasantha Soma Wanniarachchi of Dummalasooriya.

12A. Wanniarachchige Wasanthasoma Wannirachchi of Dummalasooriya.

13A. Bulathsinhala Arachchige Siriwardane of Dummalasooriya.

14A. Kangani Arachchige Gunawathie of Dummalasooriya.

15B. Bingiriya Pradeshiya Sabawa of Bingiriya.

15C. Kurunegala Provincial Council of Kurunegala.
   Defendant-Respondent-Respondents

16. Maththumagala Kankanamalage Jayasekera of Dummalasooriya
   16th Defendant Appellant Respondent

Before: L.T.B. Dehideniya, J.
Murdu N.B. Fernando, P.C., J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Rohan Sahabandu, P.C., with Nathasha Fernando and S. Senanayake for the 2A/2C Substituted Defendant-Respondent-Petitioner-Appellant.

Dr. Sunil Coorey with Sudarshani Coorey for the Substituted Plaintiff-Respondent-Respondent.

S.N. Vijithsingh for the 1A Defendant-Respondent-Respondent- Respondent.

Rajitha Perera, D.S.G., for the 15C Defendant-Respondent-Respondent-Respondent.

Argued on : 13.09.2022

Written submissions:

by 2A/2C Substituted Defendant-Respondent-Petitioner-Appellant on 31.10.2016. and 07.10.2022

by Substituted Plaintiff-Respondent-Respondent on 22.02.2017 and 26.10.2022

by Substituted 1B Defendant-Respondent-Respondent on 29.09.2022

by 15C Defendant-Respondent-Respondent-Respondent on 18.11.2022

Decided on: 02.12.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court of Kurunagala on 07.01.1966 (about 57 years ago) seeking to partition the land described in the schedule to the plaint among the plaintiff and the 1st-9th defendants. The judgment of the District Court was delivered on 27.10.2003 (nearly 38

years after the institution of the action). Only the 16th defendant appealed against the judgment. The High Court of Civil Appeal in Kurunagala by judgment dated 21.07.2011 dismissed the appeal. The 16th defendant did not appeal to the Supreme Court against that judgment. Nearly one year after the pronouncement of the judgment of the High Court of Civil Appeal, the then substituted 2nd defendant, namely Bulathsinhala Arachchige Siriwardana (who is also designated as the 2B/13A/2C/2A1 defendant), filed an application in the High Court of Civil Appeal by way of a petition and affidavit dated 07.06.2012 seeking to set aside the judgment of the High Court of Civil Appeal and the District Court "on the ground of *per incuriam*" and order retrial. Perusal of the said petition and affidavit makes it crystal clear that the substituted 2nd defendant challenges the judgment of the District Court on the merits. According to him, the District Judge's analysis of the evidence led at the trial and the share allocation in the judgment, particularly in respect of his case, are wrong. After canvassing the judgment of the District Court on the merits, he also attempts to challenge the judgment on the premise that, although the 1(a) defendant had died before the delivery of the judgment in the District Court, and the 3(a) and 12th defendants and some other defendants had also died between the delivery of the judgment in the District Court and the delivery of the judgment in the High Court of Civil Appeal, the judgments had been delivered without effecting substitution of the deceased parties.

In my view, the High Court of Civil Appeal should have dismissed this application *in limine* because the substituted 2nd defendant could not have made "a *per incuriam* application", so to speak, seeking to set aside the partition judgment delivered nine years ago. If the substituted 2nd defendant was dissatisfied with the judgment of the District Court, he ought to have filed (a) a final appeal or (b) a revision application or (c) a *restitutio in integrum* application against the judgment of the District

Court. If he was dissatisfied with the judgment of the High Court of Civil Appeal, he ought to have filed an appeal in this Court with the leave of this Court first had and obtained. The substituted 2nd defendant actively participated at the trial and the District Judge allotted him shares in the judgment. Having failed to file a final appeal against the judgment of the District Court, he would have known that his revision or *restitutio in integrum* application would not have passed the threshold test. This may be the reason he filed a special *per incuriam* application seeking to set aside the partition judgment, which, in my view, has no place in law.

It is a rudimentary principle in law that a decision is not considered *per incuriam* because the judge's factual findings are faulty. The conclusiveness and finality of partition judgments subject to very limited grounds is well-established. It is not necessary to discuss that aspect in detail in this judgment. Simply stated, a partition judgment cannot be challenged in the manner the substituted 2nd defendant attempts to do in this case. The substituted 2nd defendant has no right to seek to set aside the judgments on the ground that some parties had died pending action simply because he cannot represent them in Court or speak on their behalf. The intention of the substituted 2nd defendant is clear; he wants to see that the judgment of the District Court is set aside at any cost. This is clearly an abuse of the process of Court to achieve his ulterior motive.

Be that as it may, the High Court of Civil Appeal accepted the application, issued notice on the parties and, after inquiry, dismissed the application on the basis that the failure to substitute deceased parties does not vitiate the judgment entered in a partition case. The High Court of Civil Appeal relied upon the judgment of the Court of Appeal in *Jane Nona and Others v. Surabiel and Others* [2013] 1 Sri LR 346 in preference to the judgment of the Supreme Court in *Karunawathie v. Piyasena and Others* [2011] 1 Sri LR 171. It is against this judgment of the High Court of Civil Appeal

dated 26.09.2013 that the substituted 2nd defendant filed this appeal with leave obtained from this Court. This Court granted leave on two questions of law:

(a) Was the judgment of the Supreme Court in Karunawathie v. Piyasena and Others [2011] 1 Sri LR 171 given per incuriam?

(b) Can an inferior Court refuse to follow a judgment of the Supreme Court or the Court of Appeal on the ground of per incuriam?

These two questions revolve around three main concepts: *stare decisis*, precedent and *per incuriam*.

Stare decisis is an abbreviation of the Latin phrase *stare decisis et non quieta movere* (to stand by precedent and not to disturb settled points). Edgar Bodenheimer in *Jurisprudence: The Philosophy and Method of the Law*, Harvard University Press (1976), describes *stare decisis* in the following terms:

> *Stated in a general form, stare decisis signifies that when a point of law has been once settled by a judicial decision, it forms a precedent which is not to be departed from afterward. Differently expressed, a prior case, being directly in point, must be followed in a subsequent case.*

This doctrine is not a rule of statute but a concomitant of judicial comity. The main object of *stare decisis* is to ensure the uniformity, consistency, certainty and predictability of the law. Let the law be stable rather than perfect is the rationale of this doctrine. It is conceded that one of the hallmarks of any good decision-making process is consistency. If the law is uncertain, people will find it difficult to conduct their day-to-day affairs: they enter into agreements, purchase properties etc. predicting fixed legal consequences. If a decision on identical facts is to change from one division of the Court to another, not only individuals but the whole system

will suffer. Basnayake C.J. in *Bandahamy v. Senanayake* (1960) 62 NLR 313 at 344 remarked:

> *It is recognised on all hands that especially in regard to property rights and in commercial matters where frequent changes in the law would be unsettling it is better that a decision should be wrong than that it should upset what has been settled and on the basis of which people have transacted business and dealt with property.*

A precedent in law is a decision of the Court which is considered an authority for deciding subsequent analogous cases involving identical or similar facts or similar legal issues. The application of precedent is not mechanical. The judge must decide whether or not the precedent is authoritative or binding. If the facts or issues of a case differ from those in a previous case, the previous judgment cannot be a precedent. This is distinguishing which is different from overruling. Overruling is a method by which the Court negates a precedent.

However, it may be emphasised that the doctrine of *stare decisis* should not be an excuse for inertia nor should it facilitate the judge's desire to rest in the comfort zone. In *Gunaratne Menike v. Jayatilaka Banda* [1995] 1 Sri LR 152 at 157, G.P.S. de Silva C.J. remarked that "*The principle laid down in a decision must be read and understood in the light of the nature of the action, and the facts and circumstances the Court was dealing with.*" In *Mary Beatrice v. Seneviratne* [1997] 1 Sri LR 197 at 203, Senanayake J. quoted with approval the following pertinent observation of Earls of Halsbury L.C. in the House of Lords decision of *Quinn v. Leathem* [1901] AC 495 at 506:

> *that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found they are not intended to be*

> *expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.*

The House of Lords and now the Supreme Court of the United Kingdom stands at the summit of the English Court structure and its decisions are binding on all lower Courts (*Broome v. Cassell & Co Ltd* [1972] AC 1027).

L.J.M. Cooray in *An Introduction to the Legal System of Sri Lanka*, page 156 states:

> *Sri Lanka has adopted the English doctrine of stare decisis. Yet the opinions of the writers on the Roman-Dutch law have been referred to by our courts, and cases are decided on their authority. Thus it can be said that Sri Lanka has been influenced both by the common law doctrine of judicial precedent (to a greater degree) as well as the civil law doctrine of textual precedent.*

Decisions that the highest Court make become binding precedent on lower Courts in the hierarchy (*Walker Sons & Co UK Ltd v. Gunatilake and Others* [1978-79-80] 1 Sri LR 231). The seven-judge bench that heard *Bandahamy v. Senanayake* (1960) 62 NLR 313 accepted the theory of precedent as part of our law. *Vide* also *Billimoria v. Minister of Lands and Land Development and Mahaweli Development* [1978-79-80] 1 Sri LR 10, *Ganeshanantham v. Vivienne Goonewardene and Three Others* [1984] 1 Sri LR 319, *Jeyaraj Fernandopulle v. Premachandra De Silva* [1996] 1 Sri LR 70, *Gunasena v. Bandaratilleke* [2000] 1 Sri LR 292, *Stassen Exports Ltd. v. Lipton Ltd. and Another* [2009] 2 Sri LR 172.

Nevertheless, in *Bandahamy v. Senanayake*, Basnayake C.J. at page 344 accepted that:

> *It would appear from the decisions both here and abroad cited above that the doctrine of stare decisis is not a rigid doctrine and that the practice varies from country to country and that the attitude of Judges to the doctrine is not uniform and varies according to the class of case which comes up for consideration.*

Summarising the *cursus curiae* developed over the years it was *inter alia* further stated at page 345:

> *(i) That however representative a bench may be, its decision is not regarded as binding if there has been a mistake in the decision, or relevant decisions or statutes have not been considered.*
>
> *(j) That the Court is slow to depart from a decision of long standing affecting property rights or commercial transactions even where it does not agree with it.*
>
> *(k) That in criminal matters, where the interests of justice or the liberty of the subject requires it, previous decisions are not adhered to with the same rigidity as in civil cases, where it is in the interests of justice or the liberty of the subject that a different view which commends itself to the Court should be taken.*

In this sense, precedent, unlike statute, does not absolutely bind judges. There is space for flexibility. If judges are absolutely bound by precedent, there is no room for the development of the law. Conversely, if there is no binding force of precedent, the doctrine of *stare decisis* will be confined to law books and law schools and uncertainty in the law will be the order of the day.

That *stare decisis* is not an absolute rule of law is undisputed; there are widely accepted exceptions to the doctrine of *stare decisis*. One such exception is the previous decision being given *per incuriam*, a matter alluded to in *Bandahamy v. Senanayake*, as reproduced above. It is this exception which is the subject matter of this appeal.

The earliest leading case which considered exceptions to the doctrine of *stare decisis* is *Young v. Bristol Aeroplane Co. Ltd.* [1944] KB 718, decided by the full Court of six members of the Court of Appeal of England and Wales in the year 1944. The exceptions as summarised by Lord Green M.R. in the course of his judgment are:

(i) *The court is entitled and bound to decide which of two conflicting decisions of its own it will follow.*
(ii) *The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords.*
(iii) *The Court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.*

In elaborating on *per incuriam*, Lord Greene M.R. at page 729 stated:

> *Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but 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 the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.*

Vide Halsbury's Laws of England, 5th edition (2015), Volume 11, Lexis Nexis, page 63.

The word *incuria* means carelessness and the term *per incuriam* appears to mean *per ignoratium* – through ignorance or lack of care. *Black's Law Dictionary*, 11th edition, pages 1374-1375, defines *per incuriam* as *"(Of a judicial decision) wrongly decided, usu. because the judge or judges were ill-informed about the applicable law*."

The primary value of a precedent is not the decision reached but the reason for the decision or the proposition of law which forms part of the *ratio decidendi*. The judgment is authoritative only as to its *ratio decidendi*. If the reason is faulty, the precedent loses its character.

In *Moosajee v. Carolis Silva* (1967) 70 NLR 217 at 228-229, Tambiah J. held that if the *ratio decidendi* of a judgment is obscure, the decision has no binding effect.

> *The three judges who decided the case of Neate v. de Abrew [(1883) 5 SCC 126] had given three different reasons. With respect to the learned judges who decided that case, the reasons given by them are demonstrably erroneous. Are the hands of future generations of judges tied and are they to follow this erroneous decision? The answer to this question is found in the dictum of Denning L.J. who said: (vide the dictum of Denning L.J. in Ostime v. Australian Provident Society (1959) 2 A.E.R. 245 at 256). "The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps."*

> *The English principle of stare decisis has been adopted by us. As this dictum of Lord Denning shows, in the United Kingdom a liberal view is now being taken permitting judges to depart from wrong decisions of a binding nature. In the Dominion jurisdiction, even a more liberal view is being now taken. In Ceylon, it would be sufficient to state that we should be content to follow the English principles on this matter which has been succinctly set out by the House of Lords in Scrutton Ltd. v. Midland Silicones Ltd. (1962) 1 A.E.R. 12. One of the principles enunciated in this case is that if a ratio decidendi of a case is obscure, the decision has no binding effect. The ratio decidendi of Neate v. de Abrew is obscure and we are not bound to follow it.*

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.

This does not mean that a decision *per incuriam* is only a decision given in ignorance of either statute or binding precedent; there can be other instances where a decision may be regarded as *per incuriam*, but such instances are rare. However, of these two exceptions also (i.e. failure to follow a statutory provision and failure to abide by binding precedent), ignorance or forgetfulness of a statute is undoubtedly an instance of a decision given *per incuriam*.

In *Bonulami v. Home Secretary* [1985] QB 675 Stephenson L.J. stated at 682:

> *Failure to consider a statutory provision is one of the clearest cases in which, on the principles laid down in Young v. British Aeroplane Co., this court is not bound to follow its own decisions.*

Morrelle Ltd. v. Wakeling [1955] 2 QB 389 is considered a leading authority that defined *per incuriam*. Lord Evershed M.R. declared at 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 forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some feature 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 part of our law, be of the rarest occurrence.*

In *Nicholas v. Penny* [1950] 2 KB 466 at 472 Lord Goddard C.J. refused to follow an earlier decision stating:

> *That decision is not a very satisfactory one because the prosecutor was not represented on appeal, and a case which has not been argued on both sides has nothing like the weight of authority of one that has been fully argued… Without necessarily saying that we can always differ from previous decision of the divisional court merely because it has not been argued on both sides, the court is not obliged to follow that decision for it has been laid down by the Court of Appeal in Young v. British Aeroplane Co.…that where material cases or statutory provisions, which show that a court has decided a case wrongly, were not brought to its attention the court is not bound by that decision in a subsequent case.*

In *Farook v. Attorney General* [2006] 3 Sri LR 174 the Court of Appeal refused to follow the Supreme Court case of *Weerappan v. The Queen* (1971) 76 NLR 109 on the premise that the attention of the Court had not been drawn to the relevant provisions of the law. Basnayake J. (with the agreement of Balapatabendi J.) stated at 177:

> *In Weerappan Vs. Queen one accused held the hands of the deceased while another stabbed him on the chest and inflicted an injury which cut the cartilage of two ribs and cut also the walls of the pericardium and the right ventricle. The injury was necessarily fatal. The court considered that the single stab injury inflicted might indicate the absence of the murderous intention. Hence the verdict was substituted to one of culpable homicide not amounting to murder. The third limb of Section 294 of the Penal Code and Illustration (c) was given no attention. Therefore with all due respect to the Their Lordships, I am of the view that this Judgment was decided per incuriam and should not be followed.*

Karunawathie v. Piyasena [2011] 1 Sri LR 171 is a partition case where the 20th defendant had filed an appeal before the Supreme Court against the judgment of the High Court of Civil Appeal. After leave to appeal had been granted and prior to the argument, counsel for the 20th defendant-appellant moved the Court to effect substitution of the deceased 2nd and 15th defendants. The Supreme Court noted that the 2nd defendant had died before the judgment of the High Court of Civil Appeal and the 15th defendant had died before the judgment of the District Court but substitution for the deceased parties had not been effected. The Court, having taken the view that when a party to a case dies during the pendency of the case it would not be possible for the Court to proceed with the matter without bringing in the legal representatives of the deceased in his place, set aside the judgments of both Courts and directed the District

Court to rehear the case after taking steps according to the law. The Supreme Court did not hear the appeal on the merits.

In *Jane Nona v. Surabiel* [2013] 1 Sri LR 346, the Court of Appeal, after analysing the applicable legal provisions in the case of substitution pending determination of a partition action, did not follow the Supreme Court decision in *Karunawathie v. Piyasena* on the basis of *per incuriam*. Chitrasiri J. stated at pages 357-358:

> *In the circumstances, this Court is entitled in law to consider the said decision in Karunawathie Vs. Piyasena (supra) was given in per incuriam and accordingly to consider it as an exception to the application of the doctrine of stare decisis. This is absolutely because the case law cannot overrule statutory provisions laid down by an enactment of the Legislature.*
>
> *In the circumstances, if I may say so respectfully, that the decision in Karunawathie Vs. Piyasena is not absolutely binding the Court of Appeal since there had been failure to consider specific provisions in the partition law in respect of non-substitution, in the room of deceased parties in partition actions.*

In the Court of Appeal case of *Sitti Nufeesa v. Chandrasena and Others* (CA/APPEAL/654 & 655/2000(F), CA Minutes of 03.08.2018) Amarasekara J. took the same view:

> *This court observes that the Honorable Supreme Court in making the decision in Gamaralalage Karunawathie Vs. Godayalage Piyasena has not considered the amendments brought to the Partition Law by the amending Act No.17 of 1997. Especially it has not considered the provisions of section 48(1) and section 81 mentioned before in this order. K.T. Chithrasiri J., Judge of the Court of Appeal (as he then was) in the aforesaid Judgement Jane Nona and Others Vs. Chalo*

> *singho has discussed in detail a similar situation and has considered the Judgement in Gamaralalage Karunawathie Vs. Godagelage Piyasena is not absolutely binding on this court as it was given in per incuriam, since the Supreme Court failed to consider the specific provisions in the Partition Law. I too agree with the view that the aforesaid decision of the Supreme Court was made in per incuriam. For the reasons mentioned before, I am of the view that this court need not follow the aforesaid decision of the Supreme Court as it was made in per incuriam without considering of the relevant statutory provisions.*

The Supreme Court judgment in *Karunawathie v. Piyasena* is *per incuriam*, as section 48(1)(b) and 48(6) of the Partition Law No. 21 of 1977 and section 81(9) of the Partition Law as amended by the Partition (Amendment) Act No. 21 of 1997 expressly stipulate that failure to substitute the heirs or legal representatives of a party who dies pending determination of the action does not invalidate the proceedings in such action or judgment or decree entered thereon; anything done in the action shall be deemed to be valid and effective and in conformity with the provisions of the Partition Law and shall bind the legal heirs and representatives of such deceased party or person.

Section 48(1)(b) reads as follows:

> *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 therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and 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, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree. In this subsection "omission or defect of procedure" shall include an omission or failure to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action.

Section 48(6) is to the following effect:

Where by an interlocutory or final decree a right, share or interest has been awarded to a party but such party was dead at the time, such decree shall be deemed to be a decree in favour of the representatives in interest of such deceased person at the date of such decree.

Section 81 of the Partition Law was repealed and replaced by the Partition (Amendment) Act No. 17 of 1997. After this amendment, section 81(1) reads as follows:

Every party to a partition action or any other person required to file a memorandum under this Law, (hereinafter referred to as "the nominator") shall file, or cause to be filed in court, a memorandum, substantially in the form set out in the Second Schedule to this Law, nominating at least one person, and not more than three persons, in order of preference, to be his legal representative for the purposes of the action in the event of his death pending the final determination of the action.

Section 81(9) enacts:

> *Notwithstanding that a party or person has failed to file a memorandum under the provisions of this section, and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made, partition or sale effected or thing done in the action shall be deemed to be valid and effective and in conformity with the provisions of this Law and shall bind the legal heirs and representatives of such deceased party or person. Such failure to file a memorandum shall also not be a ground for invalidating the proceedings in such action.*

I must add that these provisions are equally applicable in proceedings before the Court of Appeal or the Supreme Court.

By reading the judgment of the Supreme Court in *Karunawathie v. Piyasena*, it is abundantly clear that unfortunately the attention of the Supreme Court had not been drawn to any of these sections of the Partition Law, and the judgment of the Supreme Court was delivered in ignorance or forgetfulness of the said express statutory provisions. The judgment of the Supreme Court is based on a series of Indian authorities which are irrelevant in the teeth of our express statutory provisions. I have no scintilla of doubt that if the attention of the Supreme Court had been drawn to those statutory provisions, the Court would not have set aside the judgments of both Courts on failure to effect substitution of the deceased parties.

The five-judge bench of the Court of Appeal in *Davis v. Johnson* [1979] AC 264 presided over by Lord Denning M.R. who at page 271 described the said bench as "a court of all the talents" considered the binding nature of previous wrong decisions of the Court of Appeal. Sir Barker P. in the course of his judgment stated at page 290:

> *The Court is not bound to follow a previous decision of its own if satisfied that that decision was clearly wrong and cannot stand in the face of the will and intention of Parliament expressed in simple language in a recent statute passed to remedy a serious mischief or abuse, and further adherence to the previous decision must lead to injustice in the particular case and unduly restrict proper development of the law with injustice to others.*

Lord Denning M.R. in *Farrell v. Alexander* [1976] 1 QB 345 at 359 stated:

> *No court is entitled to throw over the plain words of a statute by referring to a previous judicial decision. When there is a conflict between a plain statute and a previous decision, the statute must prevail. That appears from the decision of the House of Lords in Campbell College, Belfast (Governors) v. Northern Ireland Valuation Commissioner [1964] 1 WLR 912.*

The Supreme Court judgment in *Karunawathie v. Piyasena* is *per incuriam* and we would accordingly overrule that decision.

Learned President's Counsel for the substituted 2nd defendant candidly and unequivocally admits that the judgment in *Karunawathie v. Piyasena* is *per incuriam*. The next question is, if a judgment delivered by a superior Court is *ex facie per incuriam*, should lower Courts be bound by it until it is overruled by a numerically superior bench? Learned President's Counsel for the substituted 2nd defendant strenuously submits that this is so.

According to this argument, even if the Supreme Court decision in *Karunawathie v. Piyasena* is *ex facie per incuriam* due to failure to follow statutory law, lower Courts including the Court of Appeal shall disregard the statute and follow the erroneous decision of the Supreme Court

because of the operation of the doctrine of *stare decisis*. I am afraid I cannot agree.

The doctrine of *stare decisis* did not come about to protect the hierarchy of the Courts; it is not a question of superiority. The maxim *judicandum est legibus non exemplis* means adjudication is to be according to declared law, not precedent. If a decision is *ex facie per incuriam*, such as in *Karunawathie v. Piyasena*, it ceases to be a binding precedent and the doctrine of *stare decisis* has no applicability. There is no necessity to wait until it is overruled by a five-judge bench. What happens if it is never overruled? Then should all Courts perpetuate the admittedly erroneous decision and act in violation of the express statutory provisions, in derogation of the intention of the legislature? The Supreme Court judgment in *Karunawathie v. Piyasena* was delivered on 05.12.2011 (11 years ago) and it has not been overruled until today. Far from being overruled, learned President's Counsel for the substituted 2nd defendant submits that a numerically equal bench of the Supreme Court in *William Singho v. Japin Perera and Others* (SC/HC/CALA/145/2011, SC Minutes of 08.06.2012) followed the judgment in *Karunawathie v. Piyasena* by refusing leave to appeal. If the Court of Appeal in *Jane Nona v. Surabiel* had also followed *Karunawathie v. Piyasena*, knowing very well that it is *per incuriam* but on the basis of a self-imposed fetter and ordered retrial as was done in *Karunawathie v. Piyasena* and the appellant did not have the financial resources to come before this Court to challenge the bad precedent, what would have been the position? Then should all Courts continue to breach express statutory provisions by following an erroneous decision in the name of *stare decisis*? I repeat I cannot subscribe to such a view.

This is not a case of misinterpretation of the law but misapplication of the law. If it were the former, the legislature could have passed new legislation

practically overruling the Supreme Court decision in *Karunawathie v. Piyasena* as has been done in the past. For instance, to nullify the effect of the judgment of the Court of Appeal in *Wilson v. Sumanawathie* (CA 535/95/F, CA Minutes of 30.11.2007), which was confirmed by the Supreme Court by refusing leave, where it was held that a donor could revoke a deed of gift on gross ingratitude without a decision of Court, the Revocation of Irrevocable Deeds of Gift on the Ground of Gross Ingratitude Act No. 5 of 2017 was passed. To give another example, to nullify the effect of several judgments handed down by the Supreme Court including *Mervin Silva v. Anil Shantha Samarasinghe* (SC/APPEAL/45/2010, SC Minutes of 11.06.2019), where it was held that compliance with section 68 of the Evidence Ordinance is mandatory in order to prove any document such as a deed irrespective of an objection taken against it, section 154A was introduced to the Civil Procedure Code by Civil Procedure Code (Amendment) Act No. 17 of 2022. But the legislature cannot rectify the error made in *Karunawathie v. Piyasena* by passing new legislation because legislation has already been passed to this effect and the error was misapplication of such legislation by the Supreme Court.

However much a decision is bad in law, the overruling of it does not automatically take place. A litigant has to invoke the jurisdiction of the Supreme Court in that regard, as in this case, and bear the costs of litigation. Litigation is not only costly but also time-consuming. This case which commenced in 1966 is a textbook case to illustrate this.

Learned President's Counsel for the substituted 2nd defendant argues that the Court of Appeal ought to have referred the question to the Supreme Court *ex mero motu* in terms of Rule 21 of the Supreme Court Rules of 1991.

According to Rule 20(1), the Court of Appeal can, upon an application made by a party, grant leave to appeal to the Supreme Court in respect of any substantial question of law. Rule 20(1) reads as follows:

> *When a submission is made, by or on behalf of a party to any matter or proceeding in the Court of Appeal, at any time before the conclusion of the hearing by the Court of Appeal, that a substantial question of law is involved in such matter or proceeding, it shall be lawful for an application to be simultaneously made, by or on behalf of any party, that such question of law be forthwith recorded and that the Court of Appeal, in its final order or judgment, do grant leave to appeal to the Supreme Court in respect of such question.*

According to Rule 21, the Court of Appeal can, *ex mero motu*, grant leave to appeal to the Supreme Court upon any substantial question of law. Rule 21 reads as follows:

> *Notwithstanding that no such submission or application has been made in terms of rule 20(1), it shall be lawful for the Court of Appeal, ex mero motu, either in its final order or judgment, or in a separate order made at the time of such final order or judgment, to grant leave to appeal to the Supreme Court upon any substantial question of law involved in such matter or proceeding:*
>
> *Provided that any party may make an application for leave to appeal upon any other substantial question of law under and in terms of rule 22.*

In *Jane Nona v. Surabiel*, the appellant did not appeal to the Supreme Court against the dismissal of his appeal by the Court of Appeal; either he would have been content with the decision of the Court of Appeal or he did not have the time and money to expend on flogging a dead horse. In such circumstances, if the Court of Appeal had granted leave to appeal to the

Supreme Court *ex mero motu* on the question whether the Supreme Court judgment in *Karunawathie v. Piyasena* is *per incuriam* (which has already been held by the Court of Appeal to be so), the appellant in the Court of Appeal would have had to carry the burden of prosecuting the appeal in the Supreme Court. Who will bear the costs of litigation in such an appeal? Can such a burden be thrust upon a party by Court? Is it fair? If the appellant upon legal advice or otherwise thinks that the Court of Appeal judgment is correct on that matter, what is expected from the appellant in the Supreme Court? Are we to engage in an academic exercise in Court at the expense of litigants? As Abrahams C.J. stated more than eight decades ago in *Velupillai v. The Chairman, Urban District Council* (1936) 39 NLR 464 at 465 "*This is a Court of Justice, it is not an Academy of Law*." We need to understand the practical realities of the law. We must at least strike a balance between the spirit of the law and its letter.

Lord Denning M.R. in *Farrell v. Alexander* [1976] 1 QB 345 at 359-360 explained this in this way:

> *I have often said that I do not think this court should be absolutely bound by its previous decisions, any more than the House of Lords. I know it is said that when this court is satisfied that a previous decision of its own was wrong, it should not overrule it but should apply it in this court and leave it to the House of Lords to overrule it. Just think what this means in this case. These ladies do not qualify for legal aid. They must go to the expense themselves of an appeal to the House of Lords to get the decision revoked. The expense may deter them and thus an injustice will be perpetrated. In any case, I do not think it right to compel them to do this when the result is a foregone conclusion. I would let them save their money and reverse it here and now. I would allow the appeal, accordingly.*

Learned President's Counsel for the substituted 2nd defendant strongly relies on the House of Lords decision in *Cassell & Co Ltd v. Broome* [1972] AC 1027 in support of his argument. Hence let me dwell on that case for a while. In this case, the House of Lords totally disapproved of the observations made by Lord Denning M.R. in the Court of Appeal case of *Broome v. Cassell & Co Ltd* [1971] 2 QB 354 in relation to a former House of Lords decision, namely *Rookes v. Barnard* [1964] AC 1129, which severely limited the circumstances under which exemplary (punitive) damages could be awarded. The Court of Appeal described *Rookes v. Barnard* as decided "*per incuriam*" or "unworkable". This the Court of Appeal stated on two fundamental grounds: that in coming to the conclusion on the question of awarding exemplary damages in addition to compensatory damages, Lord Devlin in *Rookes v. Barnard* overlooked (a) two previous House of Lords decisions; and (b) the two categories identified as those in which the power to award exemplary damages should be retained had not been suggested by counsel in the course of their arguments. In the Court of Appeal case, Lord Denning at page 384 further stated:

> *This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by Rookes v. Barnard are so great that the judges should direct the juries in accordance with the law as it was understood before Rookes v. Barnard. Any attempt to follow Rookes v. Barnard is bound to lead to confusion.*

The House of Lords found these statements unwarranted. Lord Hailsham of St. Marylebone L.C. who presided over the bench of the House of Lords stated at page 1054:

Moreover, it is necessary to say something of the direction to judges of first instance to ignore Rookes v. Barnard as "unworkable." As will be seen when I come to examine Rookes v. Barnard in the latter part of this opinion, I am driven to the conclusion that when the Court of Appeal described the decision in Rookes v. Barnard as decided "per incuriam" or "unworkable" they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection. The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even

> *this House, since it has taken freedom to review its own decisions, will do so cautiously.*

The two previous decisions of the House of Lords which the Court of Appeal considered to have been overlooked in *Rookes v. Barnard* are *E. Hulton & Co. v. Jones* [1910] AC 20 and *Ley v. Hamilton* 153 LT 384. On this point and the second point that the decision in *Rookes v. Barnard* was not based on the arguments of counsel, Lord Diplock in the House of Lords in *Cassell & Co Ltd v. Broome* stated at page 1131:

> *I find the suggestion that E. Hulton & Co. v. Jones, the leading case on innocent defamation, is to be regarded as an authority for an award of exemplary damages, quite unacceptable. Ley v. Hamilton was discussed at some length in Lord Devlin's speech. I myself agree with his interpretation of Lord Atkin's speech. The Court of Appeal did not and in this they now have the powerful support of my noble and learned friend, Viscount Dilhorne. But, however wrong they may have thought Lord Devlin was, they cannot have thought that he had overlooked Ley v. Hamilton.*
>
> *The second reason I find equally unconvincing. On matters of law no court is restricted in its decision to following the submissions made to it by counsel for one or other of the parties. After listening to a lengthy argument which embraced a full examination of a large and representative selection of the relevant previous authorities this House was fully entitled to come to a conclusion of law and legal policy different from that which any individual counsel had propounded.*

This goes to show that the two reasons given by Lord Denning to treat the House of Lords decision in *Rookes v. Barnard* as *per incuriam* is clearly unacceptable and the advice given to the lower Court judges not to follow

the House of Lords decision in *Rookes v. Barnard* is unwarranted. The Court of Appeal merely did not agree with the judgment of the House of Lords. That does not give licence to the Court of Appeal to treat the House of Lords decision as *per incuriam*.

Lord Hailsham at page 1075 stated:

> *Lord Devlin [in Rookes v. Barnard] was, of course, perfectly well aware that, in drawing these conclusions from the authorities, he was making new law in the sense in which new law is always made when an important new precedent is established. Thus, he said, at p. 1226:*
>
> *"I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not, therefore, conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance they may be said to afford."*

It was held by the House of Lords in *Cassell & Co Ltd v. Broome* that *Rookes v. Barnard* was not inconsistent with any earlier decision of the House of Lords. On the other hand, if the House of Lords consciously departed from settled law for whatever reason, the Court of Appeal cannot treat such decision as *per incuriam*.

The facts in *Karunawathie v. Piyasena* are totally different to those of *Cassell & Co Ltd v. Broome*. Unlike in *Cassell & Co Ltd v. Broome*, everybody including the learned President's Counsel for the substituted 2nd defendant-appellant in the instant case say in unison that *Karunawathie v. Piyasena* is *per incuriam* for failure to follow statute law.

The dicta in *Cassell & Co Ltd v. Broome* should be appreciated and understood on the unique facts and circumstances of that case.

It is well-known that distinguishing the undistinguishable on spurious grounds is a popular method adopted by judges to not follow bad precedents. In *Jones v. Secretary of State* [1972] 1 All ER 145 at 149, Lord Reid acknowledged this when he stated "*it is notorious that where an existing decision is disapproved, but cannot be overruled courts tend to distinguish it on inadequate grounds*".

Referring to Rule 21 of the Supreme Court Rules (cited earlier in this judgment), learned President's Counsel for the substituted 2nd defendant submits that "*The observations of Cross is not applicable to our decisions, as there are provisions, to deal with that kind of situation.*" I have already stated that Rule 21 has no practical value to the litigant. What are the "observations of Cross" learned President's Counsel is alluding to? Professor Rupert Cross on *Precedent in English Law*, 1st edition (1961), at pages 130-131 states:

> *No doubt any court would decline to follow a case decided by itself or any other court (even one of superior jurisdiction) if the judgment erroneously assumed the existence or non-existence of a statute, and that assumption formed the basis of the decision. This exception to the rule of stare decisis is probably best regarded as an aspect of a broader qualification of the rule, namely, that courts are not bound to follow a decision reached per incuriam.* (emphasis added)

Justice Soza (with the agreement of Justice Tambiah) in the Court of Appeal case of *Ramanathan Chettiar v. Wickramarachchi and Others* [1978-79] 2 Sri LR 395 at 411 quoting with approval the above paragraph of Professor Cross states "*This is obviously because case law cannot overrule statutory provisions laid down by enactments of the Legislature*."

Although we discuss this under the rule of *per incuriam*, this is attributable to legislative supremacy over common law.

Justice Soza in this case after analysing the law on *stare decisis* and *per incuriam* in great detail refused to follow two Supreme Court decisions (*Messrs. Kurunegala Estate Limited v. The District Land Officer, Matale District*, Appeal No. BR/3528/ML/47, Supreme Court 4 of 1976 decided on 01.04.1977, BR 3325/CL/834, Supreme Court 1/75 decided on 11.05.1977) on an identical question on the basis that in those two decisions the Supreme Court had failed to consider the statute law as amended, and had the attention of the Court been properly drawn to those substantial amendments, the Court would have decided the case differently. Accordingly, the Court of Appeal held at page 411 "*Both these decisions have been given per incuriam and accordingly we are not bound by them*."

This judgment of Soza J. has been followed by subsequent decisions including *The Galle Municipal Council and Others v. Galle Festival (Guarantee) Ltd.* (CA/PHC/155/2010, CA Minutes of 01.03.2019) where Janak de Silva J. in the Court of Appeal stated "*This court is bound by the Judgment of the Supreme Court unless it is one made per incuriam (Ramanathan Chettiar v. Wickremarachchi and Others (1979) 2 Sri LR 395).*" Accordingly, the Court of Appeal did not follow the Supreme Court decision in *Sirimal and Others v. Board of Directors of the Co-operative Wholesale Establishment and Others* [2003] 2 Sri LR 23 stating that "*the dicta of Weerasuriya J. in Sirimal and Others v. Board of Directors of the Co-operative Wholesale Establishment and Others (supra) is per incuriam as R. v. North and East Devon Health Authority, ex p. Coughlan [2000] 2 WLR 622) was not considered.*" *R. v. North and East Devon Health Authority, ex p. Coughlan* is a leading English authority on legitimate expectation which recognises three possible categories with the Court taking a different role

in respect of each category but the Supreme Court in that case did not consider the third category at all.

According to *Salmond on Jurisprudence* (edited by Glanville Williams), 11th Edition, London Sweet & Maxwell, page 203, even a lower Court can impugn a precedent if the previous decision has been given in ignorance of a statute. It is further stated that even if the attention of the Court is drawn to the relevant statute, if the Court fails to apply it, the binding effect of the authority dwindles.

> *Ignorance of statute. A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of a statute, i.e. delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case, and for the Court of Appeal it was given as the leading example of a decision per incuriam which would not be binding on the court. The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. Even a lower court can impugn a precedent on such grounds*. (emphasis added)

In the name of certainty in law, which is the main objective to be achieved by the doctrine of *stare decisis*, we must not perpetuate error. Justice Soza at page 410 emphasises this in the following manner:

> *The doctrine of stare decisis is no doubt an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Certainty in the law is no doubt very*

> *desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into. Further there is also the especial need for certainty as to the criminal law. While the greatest weight must be given to these considerations, certainty must not be achieved by perpetuating error or by insulating the law against the currents of social change.*

When the precedent is plainly and admittedly wrong, the obligation to follow ceases because then the judge has a greater obligation to preserve the rule of law. There cannot be any difficulty in understanding the underlying rationale: in order to be a binding precedent, the judgment must be according to the law. C.K. Allen, *Law in the Making*, 7th edition (1964), at pages 294-295 states:

> *For all practical purposes, a precedent which ignores or misconceives a clear and positive rule of law is no precedent. In the last analysis, the judge follows 'binding' authority only if and because it is a correct statement of the law. In almost all cases it is, to him, a correct statement of the law because it is not open to him to set up his own opinions against a higher authority; but where it is plainly and admittedly founded on error, his obligation disappears. He owes a higher obligation to his mistress, the law.*

Professor Allen at page 294 cites *Dugdale v. D.* (1872) LR 14 Eq 234 where Malins V.C. went so far as to say: '*The Court is not bound to follow a decision even of the Court of Appeal if clearly erroneous*'.

The foregoing analysis goes to show that although the principal requirement of the doctrine of *stare decisis* or precedent is that the Court respects earlier judicial decisions on materially identical facts, the doctrine also requires the Court to depart from such decisions when

following them would perpetuate legal error or injustice. Between uniformity and accuracy, the latter must prevail. The beneficial effect of such a flexible course of action outweighs the harmful effect of uncertainty which it may induce. Uniformity in decision making is good but justice is better. The law cannot, nay need not, be separated from justice. Uniformity may not always be appropriate as judges need to stay alert and keep apace with changes in society; law is not a static but dynamic concept.

I answer the two questions of law upon which leave to appeal was granted in the following manner;

(a) Yes, the judgment of the Supreme Court in *Karunawathie v. Piyasena* [2011] 1 Sri LR 171 has been given *per incuriam*.

(b) Yes, a lower Court can decline to follow a decision given *per incuriam* by a superior Court in instances where the defect clearly appears on the face of the judgment such as in *Karunawathie v. Piyasena*. The decision not to follow a previous binding authority on the basis of *per incuriam* shall not be a matter of interpretation or preference (as in the Court of Appeal judgment in *Cassell & Co Ltd v. Broome* [1971] 2 QB 354).

The appeal is accordingly dismissed. Given the importance of the question of law involved in this appeal, I make no order for costs.

Judge of the Supreme Court

L.T.B Dehideniya, J.
I agree.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court