JEYARAJ FERNANDOPULLE
V.
PREMACHANDRA DE SILVA AND OTHERS

SUPREME COURT.
G.P.S. DE SILVA, C. J.,
AMERASINGHE, J.,
WADUGODAPITIYA, J.,
RAMANATHAN, J. AND
ANANDACOOMARASWAMY, J.
S. C. APPLICATION NOS. 66 & 67/95.
JUNE 10, 1996.

Revision, Review or Re consideration of the judgment of the Supreme Court – Practice of the Court – Curses curiae est lex curiae *– Judicial comity - Powers of the Supreme Court – Powers of the Chief Justice – Constitution of Benches – Finality of judgments and orders of the Supreme Court – Constitution, Article 132 – Inherent Powers of the Court - The* per incuriam *principle – Relevance of questions of general and public importance.*

The violations of fundamental rights found to have been committed by the 10th, 11th, 13th and 14th respondents in Applications 66/95 and 67/95 were held to have been instigated by the 1st Respondent-petitioner by a majority of three judges of the Supreme Court. The disagreement between the majority and minority of the Bench was based on –

(i) the admissibility of a speech in Parliament made by the 1st Respondent-petitioner and reported in Hansard for the purpose of contradicting his affidavit filed in Court having regard to the privileges enjoyed by him as a member of Parliament;

(ii) the evidentiary value to be attached to the matters referred to in the speech, having regard to the context in which it was made.

The 1st Respondent-petitioner prayed that the Court be pleased to revise and/or review and/or further consider the use of Hansard by referring the same for consideration by a fuller Bench.

The Acting Chief Justice nominated a Bench of five judges to hear the petition of the 1st Respondent-petitioner, himself being one. However of the nominated Bench, the Acting Chief Justice declined to serve on the Bench and another nominated Judge relinquished his office to take over the office of Attorney-General. Thereafter the present Bench was constituted to hear the case.

Held:

1. Usually, in the case of a petition, motion, application or letter addressed either to the Chief Justice or to the Chief Justice and the other Honourable Judges of the Supreme Court, the Registrar submits it to the Chief Justice for directions; if it pertains to an appeal, proceeding or matter pending before or decided by a Bench of the Court, the Chief Justice refers it to the Judges who heard the case to which the petition, motion, application or letter relates. If upon consideration in Chambers of the documents and affidavits submitted, an oral hearing is, in the opinion of the Judges, not warranted, the Judges would refuse to entertain the matter. The Judges concerned may decide to hear the party in support of his petition, motion or application. If they so decide after the hearing, they may reject it, and notice will not be issued on the other party and the matter will be at an end. If the Judges so decide, the Judges may request the Chief Justice to constitute a Bench of five or more Judges to hear the matter; or the Judges to whom the matter had been referred in the first place, may hear the matter and either grant the relief prayed for or refuse to grant relief. Where by an oversight the matter is listed before another Bench, that Bench will direct that the matter be listed before a Bench composed of the Judges who made the order. *Cursus curiae est lex curiae.* The practice of the Court is the law of the Court. It is in accord with the conventions of judicial comity.

2. It is an inveterate practice of the Court which the Court has regarded as having hardened into a rule that the same Judges who participated in the formal hearing should constitute the new Bench or should also be included, as far as possible in the new Bench where a re-examination is decided. Not only *may* the Judges who were supposed to be in error be the persons to whom the matter should be addressed, they *ought* to be the persons to whom the matter should be referred. Apart from the need to observe the conventions of judicial comity, there is the further consideration that, unless the practice of the Court in this regard is adhered to, the Court's position as the final court will be placed in jeopardy.

3. (i) When the Supreme Court has decided a matter, the matter is at an end, and there is no occasion for other judges to be called upon to review or revise a matter. The Supreme Court is a creature of statute and its powers are statutory. The Court has no statutory jurisdiction conferred by the Constitution or by any other law to re-hear, review, alter or vary its decision. Decisions of the Supreme Court are final.

(ii) 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.

(iii) A Court has no power to amend or set aside its judgment or order where, it has come to light or if it transpires that the judgment or order has been obtained by fraud or false evidence. In such cases relief must be sought by way of appeal or where appropriate, by separate action, to set aside the judgment or order. The object of the rule is to bring litigation to finality.

4. However all Courts have inherent power in certain circumstances to revise an order made by them such as –

(i) An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion exercised judicially and not capriciously.

(ii) When a person invokes the exercise of inherent powers of the Court, two questions must be asked by the Court :

(a) Is it a case which comes within the scope of the inherent powers of the Court?

(b) Is it one in which those powers should be exercised?

(iii) A clerical mistake in a judgment or order or some error arising in a judgment or order from an accidental slip or omission may be corrected.

(iv) A Court has power to vary its own orders in such a way as to carry out its own meaning and where the language is doubtful, to make it plain or to amend it where a party has been wrongly named or described but not if it would change the substance of the judgment.

(v) A judgment against a dead party or non-existent Company or in certain circumstances a judgment entered in default or of consent will be set aside.

(vi) The attainment of justice is a guiding factor.

(vii) An order made on wrong facts given to the prejudice of a party will be set aside by way of remedying the injustice caused.

5. Public or general importance of a matter or dissent by a minority of the Judges constituting the Bench does not give the Chief Justice the authority

to constitute an appellate division of the Supreme Court to review and revise its own decisions. Apart from exceptional instances in which it has been statutorily vested with jurisdiction to express its opinions, the business of the Court is adjudication. A "question" or "issue" of general or public importance in the abstract cannot be the subject of a judgment of the Supreme Court - it is not a matter susceptible to adjudication. A judgment is a judicial determination of a cause agitated between real parties; upon which a real interest has been settled.

6. When any division of the Supreme Court constituted in terms of the Constitution sits together, it does so as the Supreme Court. It is one Court though it usually sits in several divisions. Each division has co-ordinate jurisdiction. What is conveniently, but inaccurately called a "fuller Bench" has no greater powers or jurisdiction than any division of the Court though a decision of such a court carries greater weight. The judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority regardless of the fact that it may, in the opinion of any person whomsoever, be wrong. Nor is it open to anyone to devalue a decision of the Court on the assumption that one or more judges "merely agreed" with the opinion of another judge.

7. Article 132 (3) does not confer any right of appeal, revision or review. It has always been taken for granted that a matter is referred to a Bench of five or more judges by the Chief Justice, whether of his own motion, or at the request of two or more judges hearing the matter, or on the application of a party, because the question is one of general and public importance. Article 132 provides for the manner in which the jurisdiction of the Court may be ordinarily exercised. It does not confer any *jurisdiction* on the Court nor does it empower the Chief Justice to refer any matter of public or general importance to a Bench of five or more judges. It empowers him to constitute a Bench of five or more judges to hear an appeal, proceeding or matter which the Court has jurisdiction to entertain and decide or determine. The Court has no statutory jurisdiction to re-hear, 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.

8. The Court has inherent powers to correct decisions made *per incuriam.* A decision will be regarded as given *per incuriam* if it was in ignorance of some inconsistent statute or binding decision - wherefore 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.

9. The fact that the question involved is a matter of general or public importance has never been regarded as a ground for the exercise of the Courts' inherent powers.

Per Amerasinghe, J:

> "The inherent powers of a Court are adjuncts to existing jurisdiction to remedy injustice. They cannot be made the source of new jurisdictions to revise a judgment rendered by Court".

Cases referred to :

1. Gamage William Singho and Others S.C. LA No. 60/96.
2. *All Ceylon Commercial and Industrial Workers Union v. The Ceylon Petroleum Corporation and Others* [1995] 2 Sri L.R. 295, 296, 297.
3. *Re Ganeshanathan's Application - S. C. Application* No. 20/83 *S.C. Minutes of* 21.07.1983.
4. *Hettiarachchi v. Seneviratne and Others* (No. 2) - [1994] 3 Sri L. R. 293, 296, 297 - 299, 304 - 305.
5. *Senerath v. Chandraratne, Commissioner of Excise and Others* [1995] 1 Sri L.R. 209, 212, 216.
6. *Suren Wickremasinghe and Others v. Cornel Perera S.C.* (SLA) No. 49/96 S. C. Minutes of 21.3.1996.
7. *Wayland v. Transvaal Government* 1904 TS 758.
8. *Moosajees Ltd., v. Fernando and Others* (1966) 68 N.L.R. 414.
9. *Liyanage and Others v. The Queen* (1965) 68 N.L.R. 265, 420.
10. *Ganeshanatham v. Vivienne Goonewardene* [1984] 1 Sri L. R. 319, 329, 340, 355, 377, 378.
11. *Vivienne Goonewardene v. Hector Perera and Others* [1983] 1 Sri L.R. 305.
12. *Tucker v. New Brunswick Trading Company of London* 1890 Ch. D. 249.
13. *Palitha v. O.I.C. Police Station, Polonnaruwa and Others* [1993] 1 Sri L.R. 161.
14. *Billimoria v. Minister of Lands* [1978-80] 1 Sri L.R. 10, 14, 15.
15. *Young v. Bristol Aeroplane Co.,* [1944] 2 All E. R. 293, 298, 300.
16. *Marambe Kumarihamy v. Perera* [1919] VI C.W.R. 325.
17. *Thynne Marchioness of Bath v. Thynne (Marquess of Bath)* [1955] 3 All E. R. 129, 145, 146.
18. *Mapalathan v. Elayavan* (1939) 41 N.L.R. 115.
19. *Elo Singho v. Joseph* (1948) 49 N.L.R. 312.
20. *The London Street Tramways Company Limited v. The London County Council* [1898] AC 375, 380.
21. *Duchess of Kingston's Case* 20 St. Tr. 355, 478, 479.

22. *Bandon v. Becher* 3 Cl. & F 479, 510.
23. *Husaam Haj Yihyeh v. The State of Israel: The Jerusalem Post Law Reports reported in Asher Felix Landau* 1993 p. 234.
24. *Wijesinghe et al v. Uluwita* (1933) 34 N.L.R. 362, 364.
25. *Easwaralingam v. Sivagnanasunderam* (1962) 64 N.L.R. 396, 398.
26. *Meier v. Meier* (1948) p. 89, 95.
27. *Mohamed v. Annamalai Chettiar* (1932) 12 CL Rec. 228, 229.
28. *Padma Fernando v. T. S. Fernando* (1956) 58 N.L.R. 262.
29. *Lawrie v. Lees* (1881) 7 App. Cas. 19, 34.
30. Re Swire (1895) 30 CH. D. 239, 246.
31. *Paul E. de Costa & Sons v. S. Gunaratne* (1967) 71 N.L.R. 214, 215.
32. *Hatton v. Harris* (1892) A.C. 547, 560.
33. *Raju v. Jacob* (1968) 73 N.L.R. 517.
34. *Kariapperuma and Another v. D. J. Kotelawala* (1971) 77 N.L.R. 193.
35. *Valliammai Atchi v. O.L. M. Abdul Majeed* 45 N.L.R. 169.
36. *Jonga v. Nanduwa* 45 N.L.R. 128.
37. *Menchinahamy v. Muniweera* (1950) 52 N.L.R. 409, 414 - 415.
38. *Caldera v. Santiagopillai* (1920) 22 N.L.R. 155.
39. *Juan Perera v. Stephen Fernando* (1902) 2 Brown Rep. 5.
40. *Thambiraja v. Sinnamma* (1935) 36 N.L.R. 442.
41. *Publis v. Eugena Hamy* (1948) 50 N.L.R. 346.
42. *Sirivasa Thero v. Sudassi Thero* (1960) 63 N.L.R. 31,33,34.
43. *Rodger v. Comptoir D' Escompte de Paris* (1871) LR 3 1/4C 465.
44. *Kadiramanthamby and Another v. Lebbethamby Hadjiar* (1971) 75 N.L.R. 228, 231.
45. *Paulusz v. Perera* [1933] 34 NLR 433
46. *Loku Banda v. Assen* (1897) 2 N.L.R. 31.
47. *Karuppannan v. Commissioner for Registration of Indian and Pakistani Residents* (1953) 54 N.L.R. 481.
48. *Velupillai v. The Chairman Urban District Council, Jaffna* (1936) 16 CL Rec. 75, 76.
49. *The Police Officer of Mawalla v. Galapatta* (1915) 1CWR 197.
50. *P. C. Batticaloa 8306, In Revision* (1921) 23 N.L.R. 475.
51. *The King v. Baron Silva et al* (1926) 4 Times of Ceylon Reports 3.
52. *Ranmenikhamy and Another v. Tissera and Others* (1962) 65 N.L.R. 214, 215.
53. *Farrell v. Alexander* (1976) 1 All ER 129, 145.
54. *Huddersfield Police Authority v. Watson* (1947) 2 All ER 193, 196.
55. *Alasuppillai v. Yavetpillai* (1948) 39 CLW 107.
56. *Morelle Ltd., v. Wakeling* (1955) 1 All ER 708,718.
57. *Craig v. Kanssen* (1943) 1 All ER 108.
58. *Chief Kofi Forfie v. Barima Kwabena Sheifah Kenyaschene* (1958) 1 All ER 289 (PC).

59. *Woolfenden v. Woolenden* (1947) 2 All ER 653.
60. *Nisha Sudarshi Ganeshi Kumarasena v. Sub-Inspector Sriyantha and Others* SC Application 257/93 - SC Minutes 23.5.1994.
61. Re a Solicitor [1944] 2 All ER 432, 434.
62. *Rost v. Edwards and Others* (1990) 2 All ER 641, 644, 645.
63. *A. G. of Ceylon v. De Livera* (1962) 3 All ER 1066, 1069, (1963) AC 103, 120.
64. *Dissanayake v. Kaleel* [1993] 2 Sri LR 135.
65. *Jayatillake v. Kaleel* [1994] 1 Sri LR 319.
66. *London Street & Tramways Co., v. London Council* (1898) AC 375, 380, 381.
67. *Jones v. National Coal Board* (1957) 2 QB 55, 64.
68. *Broome v. Cassell & Co., Ltd., & Another*(1971) 2 All ER 187, 198 - 200.
69. *Rookes v. Barnard* [1964] 1 All ER 367.
70. *Brown v. Deam and Another* (1910) AC 373, 375.

Petition for revision and/or review and/or further consideration by a fuller Bench of the use of Hansard in Court Proceedings.

R. K. W. Goonesekera with *J.C. Weliamuna* for the 1st Respondent-Petitioner *in S. C. Application* No. 66/95.

Faiz Musthapa, P.C. with *Dr. J. Wickramaratne, Mahanama de Silva* and *S. M. Senaratne* for the 1st Respondent - Petitioner *in S.C. Application* No. 67/95.

T. Marapana P.C. with D. Weerasuriya, N. Ladduwahetty, Jayantha Fernando, A Premaratne and S. Cooray for the 1st - 29th Petitioners-Respondents *in S. C. Application* No. 67/95.

Upawansa Yapa P.C., Solicitor-General with *Chanaka de Silva, S.C.* for the Attorney-General.

Cur. adv. vult.

July 09, 1996.
AMERASINGHE, J.

This is a matter relating to a petition by Mr. Jeyaraj Fernandopulle, M.P., dated the 19th of December, 1995, addressed to his Lordship the Chief Justice and the other Honourable Judges of the Supreme Court.

Two applications numbered 66/95 and 67/95 had been filed in this Court under Article 126 of the Constitution alleging that certain fundamental rights of the petitioners in those applications had been violated by the respondents cited in those applications. Mr. Jeyaraj Fernandopulle, M.P., was the 1st Respondent in both those applications. Since he is the petitioner in the matter before us, I shall hereafter, unless the context otherwise requires, refer to him as the 1st Respondent-petitioner.

Argument on the two applications was heard on the 13th and 27th of September by a Bench of three Judges. Their Lordships took time for consideration. Judgment was delivered on the 30th of November 1995. Albeit in separate judgments, the three Judges agreed that the petitioners were entitled to a declaration that their fundamental rights under Articles 12(1), 12 (2) and 14(1) (c) read with 14(1) (g) had been violated by the 10th, 11th, 13th and 14th respondents; and to the reliefs granted by the Court.

However, although two of the Judges were of the view that the violations had resulted from the first Respondent-Petitioner's instigation and that he should therefore pay a sum of Rs. 50,000 as costs; Rs. 25,000 to the petitioner-society, the 63rd petitioner, in S.C. Application No. 66/95 and Rs. 25,000 to the petitioner-society, the 30th Petitioner, in S. C. Application No. 67/95, the third Judge was of the view that the first Respondent-Petitioner had not been proved to have acted in violation of any of the fundamental rights of the petitioners, and consequently that he was not liable to pay any sum by way of costs.

The disagreement between the majority and minority was based on –

* the admissibility of a speech in Parliament made by the 1st Respondent-Petitioner and reported in Hansard for the purpose of contradicting the affidavit of the 1st Respondent-Petitioner, having regard to the privileges enjoyed by him as a Member of Parliament;

* the evidentiary value to be attached to the matters referred to in the speech, having regard to the context in which it was made.

On the 19th of December, 1995, the 1st Respondent-Petitioner submitted a petition supported by an affidavit to this Court. After setting

out the views expressed by the Judges on these matters, he stated in paragraph 16 of his petition that "the question of the use of Hansard to assess the veracity of the affidavit of the 1st Respondent (petitioner) is a matter of public or general importance and having regard to the expression of dissent by (one of the Judges), the issue merits further consideration and/or review and/or revision by a fuller Bench of Your Lordships' Court".

In his petition, the 1st Respondent-Petitioner prayed that this Court be pleased,

"(a) to revise and/or review and/or further consider the aforesaid issue of the use of Hansard, by referring the same for consideration by a fuller Bench, and

(b) to grant such other and further relief as Your Lordships' Court shall seem meet."

When a petition addressed to his Lordship the Chief Justice and the other Judges of the Supreme Court relating to a concluded matter is received, the Registrar of the Court submits it with the record of the case to his Lordship the Chief Justice for directions. In the matter before us, since his Lordship the Chief Justice was out of the country, the Registrar submitted the documents to his Lordship the Acting Chief Justice on the 19th of December, 1995. On the 22nd of December, 1995, his Lordship the Acting Chief Justice stated as follows:

> The 1st Respondent-(Petitioner) in SC (FR) Applications Nos. 66/95 and 67/95 has made application in terms of Article 132 (3) of the Constitution by way of petition and affidavit, moving that a fuller bench of the Supreme Court be constituted to consider a question which he says is a matter of general and public importance that arose in the course of hearings before a Bench of 3 Judges in the aforesaid Fundamental Rights applications; to wit: that the use of the contents of Hansard - P 16 - containing speeches, debates and proceedings in Parliament by the majority of Judges of the said Court, to assess the veracity or reliability or acceptability of affidavits filed by him as 1st Respondent to those applications, and the decision of the said majority as to the legal relevance of

speeches, debates and proceedings in Parliament as contained in Hansard amounts to a violation of the freedom of speech, debates and proceedings in Parliament in terms of the Parliament (Powers and Privileges) Act recognized and kept alive by Article 67 of the Constitution.

A perusal of the judgments of theCourt that heard the said applications shows a strong division of opinion on this question of the use of speeches, debates and proceedings in Parliament as reflected in Hansard. The majority of judges of that Court used extracts from Hansard to discredit the affidavits of the 1st Respondent-Petitioner filed in the said applications and declare the contents of the affidavits as unreliable. The minority judgment sharply disapproves of the use to which extracts from Hansard have been put by the said majority of judges and has concluded that the privilege of freedom of speech and debate associated with proceedings in Parliament - quote - "being the cornerstone of a democratic Parliamentary system" - has been gravely prejudiced and has ruled out its use to impeach the creditworthiness of the 1st Respondent-Petitioner (*sic*) in his responses by way of affidavit to the complaint of infringement of the Petitioners-Respondents, fundamental rights.

I am of opinion that the question whether speeches, debates and proceedings in Parliament and reflected in Hansard can be used as being legally relevant evidence to compare and contrast and confirm or reject or discredit as inconsistent or unreliable affidavits of members of Parliament or of other persons filed in Court proceedings or before other Tribunals referring to events and matters outside Parliament is a question of general and public importance, all privileges of Parliament being part of the general and public law of the land which ought to be considered and decided by a fuller Bench comprising five (5) judges of the Supreme Court.

I am further of the opinion that the nomination of any of the Honourable Judges who comprised the Court of three (3) Judges to a fuller Bench is not appropriate in the circumstances. One of the Hon. Judges that comprised the majority dealt with the point raised in this petition only as a response to the view of the other who expressed the minority dissenting view, while the third Hon. Judge

merely agreed with the view that now forms the majority viewpoint that has given rise to the present petition. The Hon. Judge who expressed the minority viewpoint thereupon responded to the majority view point in his judgment.

I accordingly nominate the following Hon. Judges to constitute a Bench of Five (5) Judges of the Supreme Court, namely,

Hon. G. P. S. de Silva
Hon. G. R. T. D. Bandaranayake
Hon. P. Ramanathan
Hon. S. W. B. Wadugodapitiya
Hon. S. N. Silva

to hear, consider and determine the question whether speeches, debates and proceedings in Parliament as reflected in Hansard can be used as being legally relevant evidence to compare and contrast and confirm or reject or discredit as inconsistent or unreliable, affidavits of members of Parliament or of other persons filed in Court proceedings or before other Tribunals referring to events or matters outside Parliament, or that they cannot be so used for other purposes, for to do so could strike at or inhibit the freedom of speech, debate and proceedings in Parliament there by constituting a breach of the privileges of Parliament as recognized by law; and to make consequential orders thereto. Consequently the following findings and orders made and reliefs awarded in each case and contained in the judgment of Hon. Wijetunge, J. at pp. 36 and 37 noted as (i) and (iv) thereof with which Hon. Fernando, J. has agreed, consequent to the use of Hansard, would lie in suspense until the Fuller Bench of Five (5) judges has come to its decision, as those orders and reliefs affect the 1st Respondent-Petitioner in each case; to wit:

(a) the finding that the fundamental rights of each individual petitioner-Respondent in each case,enshrined in Articles 12 (1), 12 (2), 14 (1) (g) read with 14 (1) (c) of the Constitution have been infringed by the 1st Respondent-Petitioner;

(b) the finding that the said violations resulted from the 1st Respondent-Petitioner's instigation; and the order for costs in the stated

sum of money to be paid in each case by the 1st Respondent-Petitioner.

Registrar to notify the parties in each case of the nomination of a fuller bench of five Judges of the Supreme Court to consider and decide the above question of general and public importance marked X and Y and to inform them of the date of hearing.

Registrar to inform the Judges of the Fuller Bench of said nomination.

Hon. G. R. T. D. Bandaranayake
(Acting) Chief Justice
22nd December 1995
PS.

REGISTRAR

Copies of documents placed before Bench of Three (3) Judges and copies of the petition and affidavit of the present 1st Respondent Petitioner to be made available to the judges of the Fuller Bench.

TDB
22/12/95

In response to the directions of the Acting Chief Justice, the Registrar of the Supreme Court on the 29th of February 1996, notified the parties in S. C. Applications Nos. 66/95 and 67/95 as follows:

> WHEREAS the 1st Respondent petitioner abovenamed has filed an application that this matter be referred to a fuller Bench to revise and/or review and/or further consider, the issue of the use of Hansard, take notice that this matter has been listed for hearing on the 10th, 11th & 12th of June 1996 before a Divisional Bench of the Supreme Court to consider and decide the following questions:
>
> (i) Whether speeches, debates and proceedings in Parliament

and reflected in Hansard can be used as being legally relevant evidence to compare and contrast and confirm or reject or discredit as inconsistent or unreliable, affidavits of Members of Parliament or of other persons filed in Court proceedings or before other Tribunals referring to events and matters outside Parliament is a question of general and public importance, all privileges of Parliament being part of the general and public law of the land which ought to be considered and decided by a Fuller Bench comprising 5 (five) Judges of the Supreme Court.

(ii) Whether speeches, debates and proceedings in Parliament as reflected in Hansard can be used as being legally relevant evidence to compare and contrast and confirm or reject or discredit as inconsistent or unreliable, affidavits of Members of Parliament or of other persons filed in Court proceedings or before other Tribunals referring to events or matters outside Parliament, or that they cannot be so used for the above purposes, for to do so would strike at or inhibit the freedom of speech, debate and proceedings in Parliament, thereby constituting a breach of the privileges of Parliament as recognized by Law.

And to make consequential orders thereto.

Copies of petition and affidavit filed by the 1st Respondent-petitioner are annexed.

Registrar of the Supreme Court

The Bench nominated by the Acting Chief Justice could not be constituted, for although his Lordship the Hon. Mr. Justice G. R. T. D. Bandaranayake, when he was Acting Chief Justice, had nominated himself as one of the Bench of five Judges to hear the matter, his Lordship had later indicated to the Honourable Chief Justice that he did not wish to participate in the hearing and determination of the matter. The Hon. Mr. Justice S. N. Silva who had been nominated by the Acting Chief Justice, had, since his nomination, relinquished office to assume duties as Attorney-General. The parties had, as we have seen, been noticed to appear. The matter of the petition was, therefore, listed to be considered by a Bench constituted by His Lordship the Chief Justice.

CURSUS CURIAE

Usually, in the case of a petition, motion, application or letter addressed either to the Chief Justice or to the Chief Justice and the other Honourable Judges of the Supreme Court, the Registrar submits it to the Chief Justice for directions; if it pertains to an appeal, proceeding or matter pending before or decided by a Bench of the Court, the Chief Justice refers it to the Judges who heard the case to which the petition, motion, application or letter relates. If upon consideration in Chambers of the documents and affidavits submitted, an oral hearing is, in the opinion of the Judges, not warranted, the Judges would refuse to entertain the matter. E.g. see *Gamage William Singho and Others.*[1] The Judges concerned may decide to hear the party in support of his petition, motion or application. If they so decide after the hearing, they may reject it, and notice will not be issued on the other party and the matter will be at an end: *All Ceylon Commercial and Industrial Workers Union v The Ceylon Petroleum Corporation and Others,*[2] If the Judges so decide, the parties may be noticed and after hearing them, the Judges may request the Chief Justice to constitute a Bench of five or more Judges to hear the matter: Re *Ganeshanatham's Application,*[3] or the Judges to whom the matter had been referred to in the first place, may hear the matter and either grant the relief prayed for (e.g. see *Hettiarachchi v Seneviratne,*[4]; or refuse to grant relief: (e.g. see *Senerath v Chandraratne, Commissioner of Excise and Others,*[5] *Suren Wickramasinghe and Others v Cornel Perera.*[6] Where by an oversight the matter is listed before another Bench, that Bench will direct that the matter be listed before a bench composed of the Judges who made the order: *Senerath v Chandraratne.*[5]

Cursus curiae est lex curiae. The practice of the court is the law of the Court. Wessels, J in *Wayland v Transvaal Government,*[7] held that it is no argument to say that there was no actual contested case in which this procedure has been laid down; for a course of procedure may be adopted and hold good even though there has been no decision on the point. However, in Sri Lanka the practice of the Court has been recognized in judgments of the Court.

The practice of the Court in these matters is in accordance with the conventions of judicial comity. In *Moosajees Ltd. v Fernando and*

Others,[8] the applications for writs of *certiorari* had been referred under section 51 of the Courts Ordinance for hearing before five Judges in regard mainly to the question whether the tribunal concerned in each application was a "judicial officer". After expressing their views on the question, and assuming that the tribunals had jurisdiction, it was ordered that the applications be set down for further hearing before a Bench of two Judges upon other matters raised by the respective petitioners. As the two Judges before whom they were listed for further hearing were unable to agree in regard to the order they should make, the applications came to be listed before another Court of five Judges. After the earlier Court of five Judges had delivered its judgment, the Privy Council decided *Liyanage and Others v The Queen,*[9]. In the light of that decision, which recognized a separation of powers as between the Legislature, the Executive and the Judiciary, the tribunals concerned had no jurisdiction to entertain the references. It was held by the majority (4-1) that, inasmuch as the earlier Court of five Judges had not entered a decree finally disposing of the applications, it was open to the later Court of five Judges to re-examine, in the light of the decision of the Privy Council, the supreme and ultimate appellate authority at that time, the question whether the tribunals had jurisdiction. H. N. G. Fernando, CPJ at p.420 said:

> In the interests of judicial comity, it would certainly have been preferable if the same five Judges who participated in the former hearings of these applications had also constituted the present Bench. But even if my brother Sri Skanda Rajah had been a member of this Bench, his presence would have made no difference to the ultimate decision. Even on the assumption that he would have adhered to his former opinion, the majority decision of the Bench (The Chief Justice, my brother Fernando and myself) would be that the tribunals in these cases had no jurisdiction and that the relief sought by the petitioners should be granted. That being so, the absence from this Bench of one member of the former Bench becomes a technical consideration only, and I doubt whether our revocation of the former orders will constitute a precedent inconsistent with the conventions of judicial comity. The circumstances of the revocation are probably unique, in that the error of a former judgment has been manifested in a decision of the Privy Council delivered before the former judgment had become effective by the passing of a decree determining the rights and obligations of the parties.

Ganeshanatham v Vivienne Goonewardene,[10] was no exception. Ratwatte, Colin Thome and Soza, JJ had heard and decided *Vivienne Goonewardene v Hector Perera and Others*,[11], in which it had been held that V. Ganeshanatham had been responsible for the arrest of the petitioner in violation of her fundamental rights. The decision of the Court in *Vivienne Goonewardene v Hector Perera* was based upon the affidavit of Ganeshanatham filed by the 2nd Respondent, the Inspector-General of Police, in which Ganeshanatham had stated that he had arrested Mrs. Goonewardene. Ganeshanatham filed an application complaining that the finding against him was made *per incuriam*. Ganeshanatham's application was listed before a Bench comprising the same Judges who had heard *Vivienne Goonewardene's case*. After hearing counsel, on the 21st of July 1983, the Court decided as follows:

> On a consideration of the papers filed before us and the arguments adduced by counsel we are of the view that the following questions arise for determination preliminarily, namely:
>
> 1. Has the Supreme Court jurisdiction to review or revise in any manner its own judgment in S.C. Application No. 20/83?
>
> 2. If so,
>
> (a) on what grounds or under what circumstances can such jurisdiction be exercised?
>
> (b) what procedure should be followed to obtain relief?
>
> In view of the importance of these questions, we think that a fuller Bench of the Supreme Court than at present constituted, should finally decide them. Acting under Article 132 (3) (ii) of the Constitution, we therefore request His Lordship the Chief Justice to put these questions up for early decision before a fuller Bench of the Supreme Court by virtue of the powers vested in him by Article 132 (3) of the Constitution.

The Chief Justice acceded to the request of the three Judges. The Hon. Mr. Justice Colin Thome, who had been one of the Judges who had decided the earlier matter was one of the Judges of the Bench of seven

Judges nominated by the Chief Justice. With great respect, I find it difficult to understand why his Lordship the Acting Chief Justice acted in disregard of an inveterate practice of the Court that this Court has regarded as having hardened into a rule. I respectfully regret my inability to accept his Lordship's explanation in his directions of 22nd December 1995, namely, that the Bench was divided in its opinion, for excluding the Honourable Judges who heard the case from a consideration of the petition before us. I respectfully find myself in disagreement with the view expressed by his Lordship the Acting Chief Justice that he felt constrained to refer the matter to a "fuller Bench" because "One of the Honourable Judges that comprised the majority dealt with the point raised in this petition only as a response to the view of the other who expressed the minority dissenting view, while the third Hon. Judge *merely agreed with the view that now forms the majority viewpoint that has given rise to the present petition.* The Hon. Judge who expressed the minority viewpoint thereupon responded to the majority viewpoint in his judgment."

The emphasis is mine.

Not only may the Judges who were supposed to be in error be the persons to whom the matter should be addressed, they ought to be the persons to whom the matter should be referred to. (Cf. *Tucker v New Brunswick Trading Company of London.*[12]) Apart from the need to observe the conventions of judicial comity, there is the further consideration that, unless the practice of the Court in this regard is adhered to, the Court's position as the final Court will be placed in jeopardy.

When the Supreme Court has decided a matter, the matter is at an end, and there is no occasion for other Judges to be called upon to review or revise a matter. However, as we shall see, the Court has inherent power in certain circumstances to revise an order made by it. On the basis that one division of the Court may do what another may do, it would be competent for one division, in the exercise of that power, to set aside an order of another division of the Court. This must be so, for there may be circumstances in which it may not be possible for the review to be undertaken by the same Bench: For instance, one or more of the Judges who decided the first matter may not be available, due to absence abroad, or retirement or some such reason. E.g. see *Palitha*

O.I.C. Police Station Polonnaruwa and Others,[13] Justice cannot be denied because one or more of the Judges are not available. However, where they are available, such matters should be considered by the same Bench of Judges. *In Billimoria v Minister of Lands*,[14] Samarakoon, CJ said:

> The Attorney-General contended that it was competent for one Court to set aside an order made per incuriam by another Bench of the same Court. Generally this would be so. But it has been the practice of our Courts for parties or their Counsel to bring the error to the notice of the Judge or Judges who made the order so that he or they can correct the order. Indeed this has always been a matter of courtesy between Bench and Bar and I regret to note that it has not been done in this instance nor has the second Court thought it fit to direct Counsel to make the application to the Court that made the stay order.

We have advanced beyond graceful politeness and considerateness in intercourse as a justification of the practice: The Supreme Court in *Suren Wickramasinghe & Others v Cornel Perera & Others*,[5] held that "law, practice and tradition" required that matters pertaining to a decided case should be referred to the Court composed of the Judges who had heard the case. The practice of the Court in this regard is the law of the Court - *lex curiae* - and it must be given effect to in the same way in which a rule of Court must be given effect to. (Cf. the observations of Lord *Greene MR. in Young v Bristol Aeroplane Co*,[15] where his Lordship said that "The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute.")

In the matter before us, following the usual practice of referring a matter for reconsideration to the Judges who decided it was more justified than ever, because the complaint revolves around what transpired in Court and afterwards when the Judges were considering the matter. The Judges who decided the matter seemed to be the obvious choice. In fact, thinking aloud, I did suggest during the argument that this might perhaps yet be done. Upon further consideration, however, since the parties are before us on notice, and there is sufficient material in the Judgments in S. C. Applications 66/95 and 67/95 to decide the matter, I am of the view that we should deal with the matter; but the

course of action we take in the extraordinary circumstances of this case should not be regarded as a precedent for departing from the rule established by practice. An exception confirms the rule.

STATUTORY JURISDICTION

When the matter of the petition of the 1st Respondent-Petitioner was taken up for consideration by this Court, Mr. Marapana submitted that the Court had no jurisdiction conferred on it by the Constitution or by any other law to accede to the prayer of the 1st Respondent-petitioner to revise or review the decision of the Court. .

An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion, exercised judicially and not capriciously. (See *Moosajees Ltd. v. P.O. Fernando and Others.*[8]) However, 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 (cf. *Marambe Kumarihamy v. Perera,*[16]) either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. If it is suggested that a Court has come to an erroneous decision either in regard to fact or law, then amendment of the judgment or order cannot be sought, but recourse must be had to an appeal to the extent to which the appeal is available. (See *per Morris, LJ in Thynne (Marchioness of Bath) v Thynne (Marquess of Bath).*[17] A Court has no power to amend or set aside its judgment or order where it has come to light or if it transpires that the judgment or order has been obtained by fraud or false evidence. In such cases relief must be sought by way of appeal or where appropriate, by separate action, to set aside the judgment or order. (Halsbury, paragraph 556). The object of the rule is to bring litigation to finality. The rule is subject to certain exceptions (See Halsbury, Vol. 26 paragraph 556) which I shall deal with later, but taking one thing at a time, let me deal with the question of statutory jurisdiction.

In *Ganeshanatham v. Vivienne Goonewardene and Three Others,* (*supra*), Ganeshanatham sought relief from theSupreme Court in the exercise of the revisionary and inherent powers of the Court. His complaint was that another Bench of the Court had, to his detriment, acted *per incuriam* for the several reasons set out in his application.

Samarakoon, CJ (at pp. 327 - 328) referred to the provisions of the Constitution conferring jurisdiction on the Supreme Court and stated that none of those provisions gave the court a jurisdiction to revise its own decisions. Nor had the Legislature, the Chief Justice further observed, acting in terms of Article 118 (g) conferred such a jurisdiction by law. His Lordship held "that this Supreme Court has no jurisdiction to act in revision in cases decided by itself." Justices Sharvananda, Wimalaratne, Colin Thome, and Wanasundera agreed with the Chief Justice. Ranasinghe, J. and Rodrigo, J. dissented. However, the dissenting Judges granted the relief prayed for, not in the exercise of the Court's ordinary, statutory jurisdiction but in the exercise of the Court's extraordinary, inherent jurisdiction.

In general, a decision of the Court is final: it is not subject to an appeal, revision, review, reargument, or reconsideration: *Hettiarachchi v Seneviratne and Others*,[4] *Suren Wickramasinghe and Others v Cornel Perera and Others*,[5] Cf. *Mapalathan v. Elayavan*,[18] (17) cf. *Elo Singho v Josep*.[19]

The Supreme Court is a creature of statute and its powers are statutory. The Court has no statutory jurisdiction conferred by the Constitution or by any other law to re-hear, review, alter or vary its decision. The decisions of the Supreme Court are final. (E. g. see *Senerath v. Chandraratne, Commissioner of Excise and Others*,[5] *All Ceylon Commercial & Industrial Workers Union v The Ceylon Petroleum Corporation and Others*,[1]. In *Ganeshanatham*,(*supra*), Samarakoon, CJ. (at p. 328) drew attention to the fact that the use of the phrase "shall finally dispose of" in Article 126 (5), in dealing with the exercise of the court's powers in relation to fundamental rights and language rights petitions, and the phrase "final and conclusive" in Article 127 in dealing with the Court's appellate jurisdiction, signified that once a matter was decided by the Supreme Court, the thing is over. There is nothing more that can be done. As far as the matters which are the subject of the decision are concerned, it is all over. There is an end to such litigation - as needs must be with all litigation. Public policy requires that there must be an end to litigation, for the sake of certainty and the maintenance of law and order, in the pacific settlement of disputes between the citizen and the State or between other persons; for the sake of preventing the vexation of persons by those who can afford to indulge in

litigation; and for the conservation of the resources of the State. *Interest rei publicae ut sit finis litium.*

Some people may regard a particular case as being unusual or extraordinary or of special significance for one reason or another. However, when the decision is that of the "final" Court, as is every decision of the Supreme Court, due consideration should be given to that fact. The Earl of Halsbury, LC, (Lords MacNaughten, Morris and James of Hereford concurring) in *The London Street Tramways Company Limited v The London County Council,*[20] observed as follows with regard to decisions of the final Court in the U.K.:

> My Lords, it is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an "extraordinary case" an "unusual case", a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the rehearing and rearguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience - the disastrous inconvenience - of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Apeal? My Lords, "interest *rei publicae*" that there should be "*finis litium*" at some time, and there could be no "*finis litium*" if it were possible to suggest in each case that it might be reargued because it is "not an ordinary case," whatever that may mean. Under these circumstances I am of opinion that we ought not to allow this question to be reargued.

WHAT WAS THE HON. ACTING CHIEF JUSTICE ATTEMPTING TO ACHIEVE?

The Hon. Acting Chief Justice, in his Lordship'directions of the 22nd of December, 1995 explained that he referred the matter to a Bench of five Judges because there was "a strong division of opinion", and because the "minority judgment sharply disapproves of the use to which

extracts from Hansard have been put by the said majority . . ." The Hon. Acting Chief Justice states that the question on which the Judges were divided was a matter of "general and public importance". What, may I respectfully inquire, might his Lordship's position have been had there been unanimity in regard to either of the views taken? Would he have then deemed it appropriate to refer the matter to a "fuller Bench" because it was still a matter of general and public importance?

Mr. Marapana conceded that the matter of parliamentary privilege was important, but inquired, "So, what?". The public or general importance of a matter does not give the Chief Justice the authority to constitute an appellate division of the Supreme Court to review and revise its own decisions. Indeed, if "general or public importance" is a compelling reason for referring a matter to a Bench of five or more Judges, then in every case that the Supreme Court grants leave under the Proviso to Article 128 (2) (which requires that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance), the Chief Justice on the application of a party would be obliged to refer the matter to a Bench of five or more Judges, unless he is prepared to say that, although the Court had held it to be otherwise, the question was not one of general and public importance. Ought the Chief Justice to come to such a conclusion after the Supreme Court has decided otherwise? From where is such a power derived by the Chief Justice? Each Bench of the Supreme Court constituted according to law, is the Supreme Court and its decision on a matter is final. The Chief Justice is the head of the Judiciary and as such he has certain unique powers and privileges; but he has no superior powers *vis-a-vis* the other Judges of the Court in the matter of adjudication. He is not empowered to overrule or even to suspend the decisions of the Court. Nor can he confer jurisdictions on Benches nominated by him which the law has not given the Court. Article 132 (3) does not confer an appellate or consultative jurisdiction on a Bench constituted by the Chief Justice.

What is it that the Acting Chief Justice referred to a Bench of five Judges purporting to act under the provisions of Article 132 (3) ? It is not an "appeal", for it is not sought to obtain the assistance of the Court to correct any error in fact or in law which has been committed by the Court of Appeal or any Court of First Instance, tribunal or other institution.

(Article 127). As we have seen, the Supreme Court is the highest and final Superior Court of record (Article 118) and, therefore there can be no appeals from its decisions. Indeed, the 1st Respondent-Petitioner does not in his petition state that the decision of the court was incorrect. His position, on a plain reading of the petition, is that "the question of the use of Hansard to assess the veraciy of the affidavit of the 1st Respondent is a matter of public or general importance and having regard to the expression of the dissent by (one of the Bench of three judges), the issue merits further consideration and/or review and/or revision by a fuller Bench of Your Lordships Court." In his prayer, the 1st Respondent-petitioner does not clearly and directly request the Court to set aside its order, but prays instead in an ambiguous manner that the Court be pleased "to revise and/or review and/or further consider the aforesaid issue of the use of Hansard, by referring the same for consideration by a fuller Bench". "Revision", "review" and "further consideration" are quite distinct functions. Of course, the usual general prayer was added: "to grant such other and further relief as to Your Lordship"s Court shall seem meet."

> The Acting Chief Justice in his directions of the 22nd of December 1995 nominated a Bench of five Judges,
>
> to hear, consider and determine the question whether speeches, debates and proceedings in Parliament as reflected in Hansard can be used as being legally relevant evidence to compare and contrast and confirm or reject or discredit as inconsistent or unreliable, affidavits of members of Parliament or of other persons filed in Court proceedings or before other Tribunals referring to events or matters outside Parliament, or that they cannot be so used for other purposes, for to do so could strike at or inhibit the freedom of speech, debate and proceedings in Parliament thereby constituting a breach of the privileges of Parliament as recognized by law; and to make consequential orders thereto. . . .

What, I might respectfully inquire, were the "consequential orders" that were contemplated upon a determination of the Court with regard to the complex matters on which the Acting Chief Justice sought the opinion of the Bench of Judges His Lordship has constituted? How does all this relate to what the 1st Respondent-petitioner actually said in his

petition? Was his Lordship primarily seeking an opinion of a "fuller Bench" on the questions formulated by him?

Most certainly, if it is empowered to do so, the Supreme Court may provide its *opinion*, as distinguished from a *judgment*, on any matter upon which it is empowered by the law to render. The Constitution provides for those matters. E.g. see Articles 120, 121, 122, 123, 125 and 129.

Article 129 (1) of the Constitution provides as follows:

> If at any time it appears to the President of the Repubic that a question of law or fact has arisen or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.

The Chief Justice is not empowered by the Constitution to call upon the Supreme Court to express its opinion on a matter of public importance; nor has the Court the jurisdiction to entertain such a request.

Apart from the exceptional instances in which it has been statutorily vested with jurisdiction to express opinions, the business of the Court is adjudication. A "question" or "issue" of general or public importance in the abstract cannot be the subject of a judgment of this Court. A petition for the consideration of a matter merely on the ground of its importance in general should be rejected by this Court, for it is not a matter susceptible to adjudication. A judgment "is a judicial determination of a cause agitated between real parties; upon which a real interest has been settled." Otherwise, "there is no judge; but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." (per Solicitor-General Wedderburn during the argument in the *Duchess of Kingston's Case*,[21] and adopted by Lord Brougham in *Bandon v Becher*.[22]

There could be no "*finis litium*" if it were possible to suggest in each case in which leave to appeal has been granted under Article 128(2) or in a case referred by the Chief Justice under Article 132 (3) to a Bench of five or more Judges, that it might be reargued becuse it was concerned with a matter of public or general importance: The unsuccessful party each time would have a right to have his matter considered by a another Bench of five or more Judges. Notwithstanding the declaration in the Constitution that the Supreme Court is the final court of appeal, in effect we would have no final Court of Appeal if the decision of one division of the Court was subject to review or revision or rehearing or further consideration in any manner whatsoever by another division of the Court. At the heart of the matter before us seems to be a misunderstanding of what is a decision of the Supreme Court.

WHAT IS A DECISION OF THE SUPREME COURT?

There can be no appeal to a higher court or institution from a decision of the Supreme Court, for Article 118 of the Constitution declares the Supreme Court to be the highest and final Superior Court of Record.The Supreme Court consists of the Chief Justice and of not less than six and not more than ten other Judges. (Article 119). The jurisdiction of the Supreme Court may be exercised in different matters at the same time by the several judges of that Court sitting apart, provided that its jurisdiction shall, subject to the provisions of the Constitution, be ordinarily exercised at all times by not less than three Judges of the Court sitting together as the Supreme Court. (Article 132 (2)). In the matter of considering whether leave to proceed should be granted when a person alleges that his fundamental rights or language rights have been violated, the jurisdiction of the Court may be exercised by a Bench of not less than two judges. (Article 126 (2)). In the exercise of its consultative jurisdiction, the opinion, determination and response of the Court shall be expressed after consideration by at least five Judges of the Supreme Court, of whom, unless he otherwise directs, the Chief Justice shall be one. (Article 129 (1)). The hearing and determination of a proceeding relating to the election of the President of the Republic shall be by at least five Judges of the Supreme Court of whom, unless he otherwise directs, the Chief Justice shall be one. (Article 130).

When any division of the Court constituted in terms of the Constitution sits together, it does so "as the Supreme Court". (Article 132 (2)).

It is one Court though it usually sits in several divisions. Each division has co-ordinate jurisdiction. What is conveniently, but inaccurately called a "fuller Bench" has no greater powers or jurisdiction than any division of the Court. If a Bench of all the Judges is a Bench of the Full Court - there is no such description as the "fullest Court" - what does a "fuller Bench" mean? The judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority (Article 132 (4)), regardless of the fact that it may, in the opinion of any person whomsoever, be wrong. Nor is it open to anyone to devalue a decision of the Court on the assumption that one or more judges "merely agree" with the opinion of another Judge. It would, for more reasons than one, be inconvenient to a regrettable extent if a Judge, who after due consideration of a draft submitted to him feels that he cannot usefully add anything to a judgment of a brother Judge, may not merely say that he agrees with his brother, without running the risk of being taunted directly or by innuendo with mindless, mechanical behaviour.

The Constitution does not provide for an appeal from a decision of one division of the Supreme Court to another division of the Court. Numbers are of no consequence, except that a decision of a Bench of five or more Judges carries greater weight. What can be done by a Bench of five or more Judges can equally well be done by a duly constituted Bench of a smaller number of Judges. The Court acts as the Supreme Court. And the corollary of that is that what cannot be done by the smallest number of Judges acting as the Supreme Court in terms of the law, cannot be done by a Bench of five or more Judges. (Cf. per Lord Greene, MR in *Young v Bristol Aeroplane Co.*, (*supra*) at p. 298).

In *Hettiarachchi,* (*supra*), at p. 296, where the Court had refused leave to proceed in the matter of an application for the alleged infringement of the petitioner's fundamental rights, the petitioner applied to the Court for a "fuller Bench" to determine the matter of his appeal for a revision of the decision of the Court. The Court observed as follows:

> The petitioner's motion of 30.5.94 was filed under a misapprehension that other Judges of the Court or more Judges, or even all the Judges could constitute an appellate tribunal in respect of that decision of the Supreme Court which refused him leave to proceed under Article 126 (2). While other Judges of the Supreme Court

> might regard that decision as erroneous, and refuse to follow it when deciding other matters, it was final as far as that case was concerned.

One division of the court may, as stated in *Hettiarachchi*, (*supra*) refuse to follow a decision of another division; however, it would be only in the most exceptional circumstances that the court would depart from one of its own precedents. An eminent scholar-judge, the late Justice Silberg of Israel, had once commented that if a court departed from its own precedents frequently, it would no longer be a "court of justice", but that it would be a "court of judges". Justice Silberg's observations were quoted with approval in *Husaam Haj Yihyeh v The State of Israel*,[23] In that case, the issue was whether a Bench of three judges of the Supreme Court of Israel could dissent from a decision of a Bench of five Judges. It was held that while it was possible, it was undesirable, unless the precedent was incorrect. If it was clearly incorrect, it should not be followed. As Chief Justice Smoira had said: "Between truth and stability, truth must prevail". On the other hand, if both points of view were possible, then as Justice Barak had said, "Between truth and truth, stability must prevail".

In *Suren Wickramasinghe,* (*supra*), an application to review an order granting special leave to appeal had been made and a "fuller Bench" had been requested. The Court said:

> Apart from instances where the law expressly provides otherwise, a bench of more than three Judges can only be constituted under Article 132 (3) of the Constitution, and the power to do so is vested in the Chief Justice alone. Article 132 shows, *ex facie*, that that power can only be exercised in respect of a *pending* appeal, proceeding or matter - but not in respect of a *concluded* matter. SC (SLA) Application No. 49/96 is a concluded matter. Further, in terms of Article 132 (2) a judgment or order delivered by a bench of three Judges is the judgment or order of theSupreme Court, and not of "some fragmented part of the Court"; it is final (cf. Article 127 (1)), and is not subject to appeal to another bench of the Court, even if it were to consist of five, or seven, or nine, or even all the Judges: *Hettiarachchi v Seneviratne (No. 2)*, (*supra*), where it was also pointed out that,

> It is quite wrong to assume . . . that the power of the Chief Justice under Article 132 (3) to direct that an appeal, proceeding or matter be heard by a bench of five or more Judges . . . makes any difference. That provision confers no right of appeal, revision or review.

ARTICLE 132 (3) OF THE CONSTITUTION

The learnd Solicitor-General, agreeing with the submissions of Mr. Marapana, stated that Article 132 (3) did not confer any right of appeal, revision or review. That was also the view of this Court in *Hettiarachchi*, (*supra*), and in *Suren Wickramasinghe*, (*supra*). I find myself in agreement with that view.

Article 132 (3) provides as follows:

> The Chief Justice may-
>
> (i) of his own motion; or
>
> (ii) at the request of two or more Judges hearing any matter; or
>
> (iii) on the application of a party to any appeal, proceeding or matter if the question involved is in the opinion of the Chief Justice one of general and public importance,
>
> direct that such appeal, proceeding or matter be heard by a Bench comprising five or more Judges of the Supreme Court.

Perhaps Article 132 (3) in certain respects may be capable of more than one interpretation. It has, as far as I know, been always taken for granted that a matter is referred to a Bench of five or more Judges by the Chief Justice, whether of his own motion, or at the request of two or more Judges, or on the application of a party, because the question is one of general and public importance. The Article it seems to me has been taken to mean as follows:

If in the opinion of the Chief Justice the question involved in any appeal, proceeding or matter is one of general or public importance, he may

(i) of his own motion; or

(ii) at the request of two or more Judges hearing any matter; or

(iii) on the application of any party in such appeal, proceeding or matter,

direct that such appeal, proceeding or matter be heard by a Bench composed of five or more Judges of the Supreme Court.

Be that as it may, there has been no doubt that Article 132 provides for the *manner* in which the jurisdiction of the Court may be ordinarily exercised. Article 132 does not confer any *jurisdiction* on the Court. Nor does Article 132 (3) empower the Chief Justice to refer *any* matter of public or general importance to a Bench of five or more Judges. It empowers him to constitute a Bench of five or more Judges to hear an appeal, proceeding or matter *which the Court has jurisdiction* to entertain and decide or determine. 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. In *Hettiarachchi v Seneviratne*,[4] followed in *Suren Wickramasinghe and Others v Cornel Lionel Perera and Others*,[6] it was pointed out that,

> It is quite wrong to assume . . . that the power of the Chief Justice under Article 132 (3) to direct that an appeal, proceeding or matter be heard by a bench of five or more Judges . . . makes any difference. That provision confers no right of appeal, revision or review.
>
> To use Article 132 in that way would be to usurp legislative power, in order to create an additional right of appeal which the Constitution did not confer; and, indeed, in effect to create a right of appeal with leave from the Chief Justice sitting alone.

There have been, as far as I have been able to ascertain, at least 58 appeals, proceedings or matters heard by Benches of five or more

Judges since 1978. It came as no surprise to find that there is no instance of a concluded matter ever having been referred to such a Bench under Article 132 (3) for revision, review or further consideration. In *Suren Wickramasinghe and Others v Cornel Lionel Perera and Others, (supra)*, Fernando, J. (Dheeraratne and Wijetunga, JJ. agreeing) said as follows:

> Apart from instances where the law expressly provides otherwise, a bench of more than three judges can only be constituted under Article 132 (3) of the Constitution, and the power to do so is vested in the Chief Justice alone. Article 132 shows, *ex facie*, that power can only be exercised in respect of a *pending* appeal, proceeding or matter - but not in respect of a *concluded* matter.

The Court had more than enough justification for arriving at that decision.

Ganeshanatham (*supra*) is not, as it is sometimes supposed, an illustration of a reference of a concluded matter for review or revision or reconsideration of its decision by way of an appeal or otherwise. The petitioner in that case was not a party in S.C. Application 20/83 *Vivienne Goonewarden v Hector Perera and Others* (*supra*). Indeed, his complaint was that he had been found guilty of violating Mrs. Goonewardene's fundamental rights without being made a party to the proceedings and without being heard. It was not a case of the same question as had been already judicially decided by a Bench of three Judges once again being raised between the same parties before a Bench of seven Judges.

When an application was made by the petitioner in *Ganeshanatham, (supra)*, the matter was listed in the usual way before a Bench composed of the same three Judges who had heard *Vivienne Goonewardene's* case because there was reference in the petition to a matter that had arisen in the hearing and determination of *Ganeshanatham*. The caption in *Ganeshanatham* was as follows: "In the matter of an application in revision and for the exercise of the inherent powers and jurisdiction of the Supreme Court." The three Judges, as we have seen, acting under Article 132 (3) of the Constitution requested the Chief Justice to determine two questions: "(1) Has the Supreme Court jurisdiction to review or revise in any manner its own

judgment in S.C. Application No. 20/83 (*Vivienne Goonewardene's* case)? (2) If so (a) on what grounds or under what circumstances can such jurisdiction be exercised?; (b) what procedure should be followed to obtain relief?" Accordingly, the Chief Justice, acting under the powers vested in him by Article 132 (3), constituted a Bench of seven Judges.

The Court decided that it had no jurisdiction conferred by the Constitution or any other law to review or revise its own judgment in any matter. However, it was held that the Court had inherent powers to revise its decisions in certain circumstances, but that the petitioner's matter was not one in which those powers should be exercised.

In the matter before us, the 1st Respondent-petitioner prays that the Court be pleased to (a) "revise and/or review and/or further consider the aforesaid issue of Hansard, by referring the same for consideration by a fuller Bench, and (b) to grant such other and further relief as to Your Lordships Court shall seem meet." The 1st Respondent-petitioner in paragraph 16 of his petition, stated that "the question of the use of Hansard to assess the veracity of the affidavit of the 1st Respondent is a matter of public or general importance and having regard to the expression of dissent by (one of the Judges), the issue merits further consideration and/or review and/or revision by a fuller Bench of Your Lordship's Court.".

In the matter before us, the 1st Respondent-petitioner, unlike the petitioner in *Ganeshanatham*, was a party in a proceeding that had been finally decided by the Court. For the reasons I have explained, the Court has no statutory jurisdiction to revise, review or further consider all or any of the matters that have been adjudicated upon. The fact that a matter was decided by a majority does not assist him, for the decision of the majority, whether it be right or wrong, is the decision of the Supreme Court in terms of Article 132 (4) of the Constitution. The importance of a matter does not, as we have seen, make any difference. Article 132 does not confer any jurisdiction on the Court. It merely provides for the manner in which the jurisdictions of the Court, conferred by the Constitution or by law, may be exercised. Article 132 (3) does not empower the Chief Justice to refer *any* appeal, proceeding or matter *whatsoever* to a Bench of five or more Judges: It empowers him to constitute a Bench to hear an appeal, proceeding or matter in which the Court has *jurisdiction.*

THE INHERENT JURISDICTION OF THE SUPREME COURT

Although as a general rule, no court or judge has power to rehear, review, alter or vary any judgment or order after it has been entered, either in an application made in the original action or matter or in a fresh action brought to review the judgment or order, yet the rule is subject to certain exceptions.

All Courts have inherent jurisdiction to vary their orders in certain circumstances. (E.g. see *Hettiarachchi*, (*supra*) at 297; *Wijeyesinghe et al. v Uluwita*[24] *Easwaralingam v Sivagnanasunderam*,[25])

Mr. Marapana submitted that, as far as the Supreme Court - the final Court - was concerned, the exceptions were limited to those mentioned in *Ganeshanatham*, (*supra*), at page 377 by Rodrigo, J. I am reluctant to limit the exceptions by any list that purports to be exhaustive, and that is the preferable course in the consideration of mattters of this kind. I see the difficulty of defining where you are to stop. In the words of Evershed, MR in *Meier v Meier*[26] "I prefer not to attempt a definition of the extent of the court's inherent jurisdiction to vary, modify or extend its orders if, in its view, the purposes of justice require that it should do so." The view of the Master of the Rolls was followed by Morris, LJ in *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)*, (*supra*) at pp. 145, 146). I shall, as Morris, LJ did, without purporting to categorise, mention some illustrations of the scope of the Court's powers.

However, let me first say this: When a person invokes to exercise its inherent powers, the Court must ask itself two questions, as Garvin, SPJ did in *Mohamed v Annamalai Chettiar*,[27]:

(a) Is it a case which comes within the scope of the inherent powers of this Court; and
(b) Is it one in which those powers should be exercised?

There is no doubt that a clerical mistake in a judgment or order or some error arising in a judgment or order from an accidental slip or omission may be corrected under the Court's inherent jurisdiction. (See Halsbury, Vol. 26 Paragraphs 556 and 557; cf. *Marambe Kumarihamy v Perera*, (*supra*).

For instance, in *Padma Fernando v T. S. Fernano,*[28] in the matter of an application for a writ of *habeas corpus*, H.N.G. Fernando, J. delivered his judgment on the 24th of October, 1956 holding that a father's right to the custody of his child during the subsistence of his marriage may be overridden on the ground that if the child is permitted to continue in the custody of the father there would be detriment to the life, health or morals of the child. In the circumstanes of the case, his Lordship directed the father to deliver custody of the child to the mother. On October 29th 1956, H.N.G. Fernando, J. said (at p. 264): "My attention has been drawn to provide in the above order that the Respondent (the father) may have access to the child. I direct that the Respondent should have the right to visit the child. . . ."

A court has the power to vary its orders in such a way as to carry out its own meaning and, where the language used is doubtful, to make it plain. (See per Lord Penzance in *Lawrie v Lees,*[29]. In *Re Swire*[30] Lindley, LJ. said that ". . . if an order . . . does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right . . . It appears to me, therefore that, if it is once made out that the order . . . does not express the order actually made, the Court has ample jurisdiction to set that aright, whether it arises from a clerical slip or not."

In *Paul E. de Costa & Sons v S. Gunaratne,*[31] the decree of the District Court was that the petitioners who carried on business under the name of "Paul E. de Costa & Sons" should pay a sum of Rs. 60,000 from their personal and private assets. However, according to the judgment, the sum was payable out of the firm"s money and not out of the personal property of the partners. The decree had been affirmed in appeal by the Supreme Court. Upon application for revision, Manicavasagar, J. (Samerawickrame, J. agreeing) said at p. 215 as follows:

> . . . the Court has the inherent power, if the judgment does not correctly state what it actually decided and intended, to vary its judgment so as to carry out its manifest intention. The law on this point was stated by Lord Watson in the case of *Hatton v Harris*[32] and it supports the proposition I have just stated:
>
> > When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened

> which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce.

The Supreme Court held that the decree should be amended by the addition of the stipulation that "the said sum of Rs. 60,000 and interest shall not be recoverable from the personal and private assets of the petitioners save and except to the extent of their interests in the said firm of Paul E. de Costa and Sons."

In *Raju v Jacob*,[33] the petitioner, who had been sentenced to a term of one year's rigorous imprisonment, did not appeal against the order of the Magistrate but made an application in revision. The Supreme Court ordered that hard labour be stayed from the 19th of July 1967 till the disposal of the application. When the application was subsequently dismissed on the 14th of September 1967, the Court made no order regarding the resumption of hard labour as the fact that hard labour had been stayed was not brought to its notice. Further, on account of the delay, through oversight, in the communication to the authorities of the order dismissing the application in revision, hard labour was not resumed until the 30th of October 1967. It was contended on behalf of the petitioner that the entire period during which he was kept in remand without hard labour should be deducted from the term of one year's rigorous imprisonment imposed on him. There was no authority or provision of law in regard to a similar matter in so far as applications for *revision* were concerned although there was statutory provision with regard to appeals. The Criminal Procedure Code provided that in the case of an appellant who was in custody pending an appeal, the Supreme Court had the power to order that the time so spent or any part thereof shall be reckoned as part of the term of his sentence. Weeramantry, J. in granting the petitioner the benefit of the period spent in remand said as follows:

> I see little distinction in principle between an appeal in which hard labour is stayed and a revision application in which this court has made express order to the same effect. Moreover the revision application in this case has been filed in respect of an appealable order and I do not think it would be correct to deny relief to the applicant on the mere technicality that what came before this court

> was a revision application and not an appeal. If in the exercise of its jurisdiction this court may give by way of revision the same relief it may grant by way of appeal I see no justification for denying to an applicant in revision, whose application has been entertained by this court, an elementary right which is conferred on every appellant.The silence of the Criminal Procedure Code on this matter cannot take away from the inherent powers of this court to grant relief of the nature contemplated by section 341 (5) to an applicant in revision. The grant of such relief is of course a matter entirely in the discretion of the court and will always be dependent on the circumstances of each case. In the circumstances of this case I cannot lose sight of the fact that notice has issued upon the revision application and that a stay of hard labour has been expressly ordered by this court. It is also most unusual for revision applications to be filed by accused in jail and I understand this to be the only application so filed over a long period of time.

In *Kariapperuma and Another v. D.J. Kotelawala,*[34] H. N. G. Fernando, CJ. (Thamotheram, J. agreeing), allowed an appeal and dismissed the plaintiff's action. The Chief Justice in his judgment considered the judgment of Keuneman, J. in *Valliammai Atchi v. O. L. M. Abdul Majeed* [35] and the decision of the Privy Council in that case reported in 48 NLR 289. In a "Post-Script" to the judgment, the Chief Justice explained as follows:

> I much regret that owing to an error in my note of the arguments in this appeal, my judgment attributed to Counsel for the Respondent a submission different from that which he actually made. His submission that a trust arose in this case did not depend on the judgment of Keuneman, J. in *Valliammai Atchi's*[35] case, although it happens somewhat curiously that that judgment was of assistance in considering the question to be decided in the present case. But Counsel had depended instead on a judgment of the same learned Judge reported in the same volume of the Report - *Jonga v Nanduwa.*[36]

The Chief Justice then examines the matter in the light of the decision in *Jonga v Nanduwa (supra),* and after finding that the facts of that case were "in no way comparable", confirms the view expressed by him earlier.

Halsbury, Vol. 26 paragraph 556 states that,

> The court has inherent jurisdiction to vary or clarify an order so as to carry out the court's meaning or make the language plain, or to amend it where a party has been wrongly named or described unless this would change the substance of the judgment. The court will treat as a nullity and set aside, of its own motion if necessary, a judgment entered against a person who was in fact dead or a non-existent company or, in certain circumstances, a judgment in default or a consent judgment. Where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the Court will set it aside.

In *Menchinahamy v Muniweera*,[37] about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court "for revision or in the alternative for *restitutio-in-integrum* by the heirs of a party-defendant who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. There was no other remedy open to the petitioner except to move the Supreme Court for relief. Dias, SPJ (Gunasekera, J. agreeing) said at pp. 414-415 as follows:

> We now come to the substantial point which has been urged in this case, namely, that not only are there no merits in the present application of the petitioner, but also that if we grant her the relief she seeks we will in effect be sitting in judgment on a two-Judge decision of this Court in the earlier appeal and which is now embodied in a decree of the Supreme Court which has passed the Seal of the court. It was argued that the Supreme Court by means of *restitutio in integrum* cannot vary its own decrees, especially after they have passed the Seal of the Supreme Court. It was pointed out that the powers of this Court are not unlimited. It is urged that section 36 of the Courts Ordinance (Chapter VI) defines the jurisdiction of the court, while section 37 only permits this Court to interfere with the judgments of an original Court and it cannot interfere with the orders of the Supreme Court. It is pointed

out that section 776 of the Civil Procedure Code deals with the sealing of decrees of the Supreme Court, and that once a decree has been sealed, such decree, if it is a judgment of two Judges of this Court, cannot be varied by another bench of two Judges.

The question, however, is whether such arguments can prevail in a case of this kind. Let me take one example. P files a partition action against A. B and C. A and B appear and file answer. C does not. There is a contest and a trial. The District judge enters an interlocutory decree. There is an appeal to the Supreme Court which affirms the judgment and decree of the District Court. The Supreme Court judgment is sealed. Thereafter, before final decree is entered, C comes forward and satisfies the Court by proof that there was, in fact, no service of summons on him. It is everyday practice in a case like that for the Court to hold that all the earlier proceedings are abortive and of no effect. If authority is needed this is supplied by the following cases:- *Caldera v Santiagopillai*,[38] *Juan Perera v Stephen Fernando*,[39] and *Thambiraja v Sinnamma*.[40] The last case on this point is that of *Publis v Eugena Hamy*[41] which laid down that where a summons in a partition action is not properly served on a party, such party is not bound by the final decree in the case and it can be vacated even when the irregularity has been discovered after final decree was entered. It is to be noted that in the present case final decree has not yet been entered.

The situation which emerges in the present case is that Saineris was a party. He died before the trial without steps having been taken to substitute his heirs who were, therefore, not bound by the subsequent proceedings. In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. In my opinion, therefore, the order of this Court should be that the petitioner and the other heirs of Saineris should be forthwith added as parties to this action, and that after she has filed her statement of claim, the District Judge should proceed to

adjudicate on the merits of her application. It will also be the duty of the plaintiff to see that all the necessary parties are before the Court before any further application is made. I would go further and say that in view of the irregularity in not joining Saineris' heirs, in my opinion both the interlocutory decree in this action and the subsequent judgment of this Court in appeal are of no effect, because by reason of the non-observance of the steps in procedure no proper interlocutory decree was, in fact, entered in this case. . . .

W. Sirivasa Thero v Sudassi Thero,[42] was not a case in which the Supreme Court varied its own order; but it is instructive. In that case, the plaintiff sued three other priests for a declaration that he was entitled to the office of Viharadhipathi, incumbent and trustee of a Vihara and Pansala and to the management and control of their temporalities. He did not ask for possession of any property. He obtained judgment and decree as prayed for and, upon his application to execute the decree, a writ of possession was issued in respect of a room in the Pansala. The petitioner who was in occupation of the room was ejected. The petitioner filed action in the District Court in respect of his eviction, but the District Judge held that he was not in law entitled to possession because the defendant as Viharadhipathi was entitled to control the occupation of the Pansala. In appeal, it was held that the Court had no jurisdiction to isue the writ of possession and the Court ordered that the petitioner be restored to possession. Sansoni, J. (H.N.G. Fernando, J. agreeing) said as follows at pages 33-34:

Since the decree was one in respect of which, under the Code, the judgment-creditor could not ask for, and the Court had no power to issue a writ of possession, it seems to me that the Court was acting without jurisdiction in issuing such a writ. The foundation of a writ of possession is a decree for possession, and a writ of possession which is not founded on such a decree is a nullity, because in issuing it the Court acts in excess of its jurisdiction. Where a Court makes an order without jurisdiction, as in this case, it has inherent power to set it aside; and the person affected by the order is entitled *ex debito justitiae* to have it set aside. It is not necessary to appeal from such an order, which is a nullity . . .

> The question now arises as to what order we should make on this appeal. The plaintiff asked the Court to restore him to possession of the room, because he had been dispossessed of it in execution of the decree. Section 328, no doubt, contemplates dispossession under decrees for possession of immovable property, but this is not a matter which we can allow to stand in the way of the plaintiff, for we must have regard to the substance rather than the form. Justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act: see *Rodger v Comptoir D' Escompte de Paris.*[43]
>
> I would, therefore, direct that the plaintiff be restored to possession of the room . . .

In *Katiramanthamby and Another v Lebbethamby Hadjiar,*[44] Lebbethamby Hadjiar was the sole beneficiary named in the last will of a Tamil lady who died in Batticaloa leaving valuable property. He made an application for probate of the Will. He named no respondents to his application and averred in an affidavit that to the best of his knowledge and belief the deceased had left only himself as her sole heir. The District Judge made order *nisi* declaring the Will to be proved and directed that a copy of the Order shall be published in the *Government Gazette* and in the Daily News. The order *nisi* was in fact published not in the Daily News as ordered by the Court but in the *Daily Mirror.* Thereafter order absolute was entered but probate of the Will was not actually issued by the Court. Then Katiramanthamby and his brother filed an application objecting to the grant of probate and seeking to intervene in the testamentary proceedings. They claimed that they were the sons of a sister of the deceased and that they were her intestate heirs. After inquiry, the District Judge made order vacating the order absolute and allowing the intervention of the petitioners and fixed the case for further inquiry. Lebbethamby Hadjiar then appealed against the order of the District Judge vacating his earlier order, and the Supreme

Court set aside the order of the District Judge on the ground that the latter had no jurisdiction to vacate the order absolute previously made. Katiramantamby and his brother then made an application in revision in which they prayed that the Court set aside the order absolute and allow them an opportunity to show cause against the order absolute being entered. They claimed by affidavit that the Respondent was a Muslim and a complete stranger to the deceased, and that the Respondent deliberately omitted in his original petition to inform Court that the petitioners were the lawful intestate heirs. It is significant that in his application for probate, the Respondent had made no averment in terms of section 525 of the Civil Procedure Code that he "has no reason to suppose that his application will be opposed by any person." According to the affidavits of the petitioners, the deceased, the Respondent and the petitioners were all residents of Valaichenai. The principal ground on which the petitioners relied in support of their application was that section 532 of the Civil Procedure Code imperatively required the District Judge to select a newspaper for the publication of the order *nisi* "with the object that notice of the order should reach all persons interested in the administration of the deceased's property." In the opinion of the Supreme Court the publication of the order in the *Daily Mirror* or in the *Daily News,* which were English Newspapers, "did not suffice to reach persons in the position of the petitioners, whose interests section 532 was intended to protect." H. N. G. Fernando, C.J. (Weeramantry, J. agreeing) stated as follows at p. 231:

> I must therefore hold when the District Judge failed to select a newspaper which would satisfy the object mentioned in section 532, he failed to comply with a mandatory provision of law, and thus the mandatory requirement of publication was not satisfied.
>
> The remaining question is whether our powers in revision to set aside the order absolute cannot now be exercised, because in the previous appeal the Supreme Court restored the Order Absolute. . . In that appeal however, the Supreme Court only held that the District Judge should not have set aside his own order and the judgment cites a passage from the case of *Paulusz v Perera,* [45] to the effect that "the correction of all errors of fact and law of a District Court is vested (by) the Courts Ordinance in the Supreme Court". While no doubt the present petitioners could at that stage

> have invited this Court to exercise its powers of revision in their favour, the petitioners took substantially the same course, when within a few weeks after the decision of that appeal, they made the present application in revision.We must I think take into account the fact that there appear to have been grave deficiencies in the respondent's original application for probate, and also the fact that, *prima facie*, this was an unusual Will.
>
> For these reasons the application of the present petitioners is allowed; the order absolute for probate is set aside, and the petitioners will be permitted to intervene in the testamentary proceedings . . .

As pointed out in *Hettiarachchi*, (*supra*) at p. 299, the headnote in the report of *Katiramanthamby*, (*supra*) is misleading, for the Supreme Court did not set aside its own order. What it was requested to do by the petitioners, and what it did in fact, was to set aside the first order of the District Judge which he himself could not have set aside, thereby enabling the nephews of the deceased to intervene in the testamentary proceedings. The District Judge was wrong and realized his mistake, but he could do nothing about it, for, as Halsbury (Vol. 26 paragraph 557, p. 281) observes:

> A judgment or order will not be varied . . . when it correctly represents what the court decided and where the court itself was wrong, nor can the operative and substantive part of the judgment be varied and a different form substituted . . .

Halsbury (Vol 26, paragraph 560, page 285) states that

> A judgment which has been obtaind by fraud either in the court or of one or more of the parties may be impeached by means of an action . . . In such an action it is not sufficient merely to allege fraud without giving any particulars, and the fraud must relate to matters which *prima facie* would be a reason for setting the judgment aside if they were established by proof, and not to matters which are merely collateral. The court requires a strong case to be established before it will set aside a judgment on this ground, and the action will be stayed or dismissed as vexatious unless the fraud

alleged raises a reasonable prospect of success and was discovered since the judgment . . .

An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the Court. It must be shown (1) that the evidence could not have been obtained with reasonable diligence for use at the trial and (2) that the further evidence is such that if given it would have an important effect on the result of the trial although it need not be decisive and (3) that the evidence is such as is presumably to be believed. (Halsbury, Vol. 26 paragraph 561). In *Loku Banda v Assen*,[46] Withers, J. affirmed the decision of the Court of Requests. However, he ordered the record to be brought up to decide whether there should be a new trial because an important piece of evidence in the form of a document was reported to have been discovered in the record room of the trial court after the Supreme Court had decided the appeal. In the circumstances of the case, however, Withers, J. declined to vary his order although he held that the Court had the power to review a judgment of its own passed in appeal where it appears that fresh evidence has been discovered since such judgment was pronounced.

In *Palitha v O.I.C. Polonnaruwa and Others*,[13] the Supreme Court had to decide on the alleged infringement of the petitioner's fundamental rights guaranteed by Article 13 of the Constitution. The application had been dismissed on the 12th of February 1993 since the Court was informed by learned State Counsel that the petitioner was due to be released on the 30th of April 1993 after rehabilitation. However, due to a typographical error, the order made by the Court stated that the petitioner had been so released on the 30th of April 1992. The petitioner's father requested the Commissioner-General of Rehabilitation to release the petitioner on the basis of the Court's order. On the 2nd of April, 1993 the Commissioner-General informed the Court that the petitioner had not been sent for rehabilitation and that he was still in custody at the Pelawatta detention camp. State Counsel confirmed that the petitioner had not been sent for rehabilitation even after the Attorney-General had on the 19th of February, 1993 communicated the fact that the Court had been informed that the petitioner was due to be rehabilitated. The petitioner was released from the Detention Camp on the 30th of April, 1993. The Court restored the matter and granted the petitioner

a declaration that his rights under paragraphs (2) and (4) of Article 13 had been infringed and directed the State to pay a sum of Rs. 17,500 as compensaton. Kulatunga, J. (Ramanathan and Wijetunga, JJ. (agreeing) said at p. 162:

> Considering the fact that the order of this Court dated 12.02.1993 was made on wrong facts given to the prejudice of the petitioner, we set aside the said order by way of remedying the injustice caused to the petitioner (notwithstanding the failure of his Counsel to appear in Court though noticed, which failure appears to be due to the short notice given to him) - vide *Wijesinghe v Uluwita* [24] and *Ganeshanatham v Goonewardene* (*supra*) at p. 329.

Costs have been awarded to a successful party in the exercise of its inherent powers Gratiaen, J. observing that he was resorting to the inherent jurisdiction of the Court "especially as it is in aid of justice" : *Karuppannan v Commissioner for Registration of Indian and Pakistani Residents.*[47]

Whether it is in the exercise of its extraordinary inherent jurisdiction or otherwise in the performance of its ordinary statutory duties, the Court is obliged to keep the attainment of justice in view. *Velupillai v The Chairman Urban District Council, Jaffna,*[48] was not a case relating to the inherent powers of the court, but the observations of the Chief Justice in that case provide us with valuable guidance. In that case the plaintiff had a cause of action against the Urban District Council of Jaffna. His proctor was under the erroneous impression that the Council could not be sued and therefore action was filed naming the Chairman of the Council as the defendant. When the parties came to trial the preliminary issue was raised on behalf of the defendant that the action against the Chairman was not properly instituted. The District Judge allowed that issue. The proctor for the plaintiff moved to amend the caption. The District Judge refused him permission to amend the caption. Abrahams, CJ. (with whom Soertsz, J. agreed) at p. 76 said:

> I think that if we do not allow the amendment in this case we should be doing a very grave injustice to the plaintiff. It would appear as if the shortcomings of his legal adviser, the peculiarities of law and procedure and the congestion in the courts have all combined to

> deprive him of a cause of action and I for one refuse to be a party to such an outrage upon justice. This is a Court of Justice, it is not an Academy of Law.
>
> I would allow the amendment . . .

However, as we shall see, justice must be done according to law. Moreover, in applying the law to the circumstances of a case, different conclusions may be reached by the Judges hearing the matter. Thus in *Ganeshanatham*, (*supra*), although the seven Judges who heard the matter were of the opinion that, as a Superior Court of Record, the Supreme Court has inherent powers to make corrections to meet the ends of justice (see per Samarakoon, C.J. at p. 329 - Sharvananda, Wimalaratne, Colin Thome and Wanasundera, JJ. agreeing - see p. 340; per Ranasinghe, J. at p. 355; and per Rodrigo, J. at p. 377), the Court (5-2) did not think that the case was one in which the inherent powers of the Court should be exercised.

The court has consistently recognized the fact that it has inherent power to correct decisions made *per incuriam.* (E.g. see *The Police Officer of Mawalla v Galapatta,*[49] P.C. Batticaloa, 8306, In Revision,[50] *The King v Baron Silva et al.,*[51] *Mohamed v Annamalai Chettiar,* (*supra*); *Elo Singho v Joseph,* (*supra*); *Ranmenikhamy and Another v Tissera and Others,*[52] *Ganeshanatham* (*supra*) (Seven Judges) at 329, 355, 377; *Hettiarachchi,* (*supra*); *Senerath v Chandraratne, Commissioner of Excise and others,* (*supra*) at 212, 216; *All Ceylon Commercial & Industrial Workers Union v Ceylon Petroleum Corporation and Another,* (*supra*) at 297.

Earl Jowitt in his *Dictionary of English Law,* (2nd Ed. 1977, Vol. 2 p. 1347) translates the phrase to mean "through want of care". He goes on to explain that "A decision or dictum of a judge which clearly is the result of some oversight is said to have been given *per incuriam.*" In *Farrell v Alexander,*[53] Lord Justice Scarman in the Court of Appeal translated *per incuriam* as "Homer nodded". Others, however, have given the phrase a more restricted meaning. Lord Chief Justice Goddard in *Huddersfield Police Authority v Watson,*[54] said:

> What is meant by giving a decision *per incuriam* is giving a decision when a case or statute has not been brought to the

> attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.

Lord Goddard's definition was adopted by Basnayake, J. in *Alasuppillai v Yavetpillai*,[55] and by Kulatunga, J. (G.P.S. de Silva, CJ. and Ramanathan, J. agreeing) in *All Ceylon Commercial and Industrial Workers Union*, (*supra*) at 297. In *Hettiarachchi*, (*supra*), at p. 299 the Court (Fernando, Amerasinghe and Perera, JJ.) said that "A decision will be regarded as given *per incuriam* if it was in ignorance of some inconsistent statute or binding decision . . . "

In The *King v Baron Silva*, (*supra*), the petitioners were the 3rd and 4th accused in a case in which they were charged with agreeing with three others to act together with the common purpose of committing the offence of extortion and that they thereby committed the offence of conspiracy punishable under sections 113 (b) and 373 of the Penal Code. They were convicted and the convictions were upheld by the Supreme Court. They applied to the Court to revise the judgment in appeal on the ground that section 113 (b) of the Penal Code was not in force on the date of the alleged commission of the offence, namely the 23rd of March 1924. That section was introduced by the Penal Code Amendment Ordinance No. 5 of 1924. It was passed on the 20th of March 1924, but did not receive the sanction of the Governor till the 6th of May 1924. There was no doubt that the offence of conspiracy as defined in that amendment was not an offence on the date the petitioners were alleged to have committed the offence. Maartensz, J. said:

> Two questions arise from the application, first, whether this Court has the power to revise its own judgment, and second, whether in the circumstances of this case the verdict should be altered or the accused acquitted. The first point is free from difficulty for I think that if this Court *per incuriam* affirms the conviction of a man for an offence which at the time of the alleged committal of it was not an offence under the law, the Court has inherent power to revise its verdict. There is ample authority for this proposition in the case of the *Police Officer of Mawilla v. Galapatha* (*supra*) and in the anonymous case reported in the 2nd Volume of the New Law Reports p. 475. In both cases it was held that the Supreme Court had power acting in revision to vacate its own order made *per incuriam.*

The sentences were varied.

In *P.C. Batticaloa, 8306 In Revision*, (*supra*), in an appeal from the decision of a Police Magistrate, Shaw, J. while dismissing the appeal on the facts, expressed the view that the Magistrate had no jurisdiction to try the case summarily. His attention had not been called to the change effected in the Penal Code by Ordinance No. 31 of 1919, section 22 (b). His Lordship had sent the case back for the Magistrate to take non-summary proceedings. "This decision of mine was undoubtedly wrong and made *per incuriam*", said his Lordship, and varied his order taking the error into account. His Lordship said that the case of *The Police Officer of Mawilla v Galapata*, (*supra*), satisfactorily showed that he had the power to put the matter right in revision.

In *Young v Bristol Aeroplane Co. Ltd, (supra)*(cited with approval by Samarakoon, CJ. in *Billimoria v Minister of Lands*, (*supra*) at p. 14; and by Rodrigo, J. in *Ganeshanatham*, (*supra*) at pp. 377-378), Lord Greene, MR pointed to two classes of decisions *per incuriam* that did not come within the scope of its inquiry in that case:

(1) a decision in ignorance of a previous decision of its own Court or a Court of a co-ordinate jurisdiction covering the case; and

(2) a decision in ignorance of a previous decision of a higher Court covering the case which binds the lower Court.

The definition of the phrase *per incuriam* in Lord Goddard's terms has been regarded as being too restrictive. In *Morelle Ltd. v Wakeling* [56] (followed in *Billimoria v Minister of Lands*, (*supra*) at p. 14 by Samarakoon, CJ. and in *Ganeshanatham*, (*supra*) by Ranasinghe, J. at p. 355 and by Rodrigo, J. at p. 378) Evershed, MR said as follows:

> As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those 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 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 . . . of the rarest occurrence."

There are several instances of the Court acknowledging that it had acted *per incuriam* in circumstances which might not have been accommodated within Lord Goddard's definition.

In the *Police Officer of Mawilla v Galapata*, (*supra*) the accused was charged with an offence under the Excise Ordinance and convicted and sentenced to pay a fine. At the argument of the appeal, his counsel took up the point that the proceedings were bad *ab initio,* inasmuch as there was nothing to show that the complaint or the report on which the accused was brought to Court was made by an Excise Commissioner, a Government Agent, or an Excise officer authorised by either of them on that behalf. Wood Renton, CJ. said;

> I called the attention of counsel to the fact that the prosecution purported to be sanctioned by a signature, which I took from my own personal experience of it, to be that of Mr Forrest. The appellant's counsel accepted my assurance that the signature was that of Mr. Forrest, and after argument the appeal was dismissed. The appellant now applies in revision to have the order of this Court dismissing the appeal set aside on the ground that the signature in question was not that of Mr. Forrest at all, or of any person possessing the necessary status under section 49 of the Excise Ordinance . . . It appears to me that the powers of the Supreme court are sufficiently wide to enable me to interfere by way of revision. I set aside, as having been made *per incuriam* and by what may prove to be a mistake on the part of the Court itself, the order of 23rd July dismissing the appeal and send the case back to the Police Court of Tangalle for further inquiry and adjudication on the question whether the requisite authority for the institution of the proceedings was given. The petition filed in support of the present application does not indicate whose the signature in question is. If it should prove on further inquiry not to be a proper authority for the report, the whole proceedings will be quashed. But if, on the other hand, it should be shown that the

signature, whether it is that of Mr. Forrest or not, is a proper authentication of the prosecution, the conviction and sentence will stand affirmed.

In *Mohamed v Annamalai Chettiar,(supra)* the Supreme Court used its inherent powers to free an insolvent from arrest pending the decision of his appeal to the Privy Council although there was no statutory authority for such an order. Garvin SPJ said:

> I should be reluctant to subscribe to the proposition that this Court has no powers other than those derived from express legislation. Like other courts in the Empire and in particular Superior Courts, this Court has always been considered to possess a certain reserve of powers which are generally referred to as inherent powers. It has been said that these powers are equal to its desire to order that which it believes to be just. This is perhaps too wide and somewhat misleading a statement. No court may disregard the law of the land or purport in any case to ignore its provisions. Where a matter has been specifically dealt with or provided for by law there can be no question that the law must prevail, for justice must be done according to law. It is only when the law is silent that a case for the exercise by a Court for the exercise of its inherent powers can arise . . .
>
> Subject to the limitations above referred to the inherent powers of this Court would seem to extend to the making of such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. But these powers must be exercised in accordance with sound legal principles and not arbitrarily whenever a case arises which is not provided for by legislation.
>
> . . . Is it a case which comes within the scope of the inherent powers of this Court and is it one in which those powers should be exercised?. . .
>
> Must we stand by and do nothing to prevent the arrest and imprisonment of the applicant in the interval, which may well be a long one, before the order of the Privy Council is made known? His estate is under sequestration and no pecuniary or other loss or

prejudice to the opposing creditors is involved in granting his prayer for protection. It only means that their right to arrest his person and cast him in prison for debt will be postponed until the Privy Council decides whether he is a person who is liable to be arrested and imprisoned.

For my part, I am satisfied that this is a case in which the Court has inherent power which should be exercised to prevent what might prove to be a grave injustice to the applicant and that in granting his application we shall be acting on sound judicial principle and in accordance with the intention of the Legislature manifested in parallel cases for which it has made provision.

I would accordingly direct that the insolvent be granted protection until the decision of His Majesty in Council upon his appeal is made known.

In *Ranmenikhamy and Another v Tissera and Others,* (*supra*), an appeal 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 might be observed that the failure to serve notice on a party against whom an order is made, is a serious procedural irregularity on which the Court may set aside its order: *Craig v Kanssen*[57] ; *Chief Kofi Forfie v Barima Kwabena Sheifah Kenyaschene,*[58] *Woolfenden v Woolenden,*[59] cf. *Katiramathamby and another v Lebbethamby Hadjiar,* (*supra*); *Menchinahamy v Muniweera,* (*supra*). 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. The Court (T.S. Fernando and Herat, JJ) set aside its order on the ground that it had acted *per incuriam.*

In *Nisha Sudarshi Ganeshi Kumarasena v Sub-Inspector Sriyantha and Others,*[60] the presiding Judge sent his draft judgment to two other Judges who approved it and later signed the three final copies of the judgment. The judgment was reported in the press and was the subject

of adverse comment in the press. The presiding Judge then realized that the two Judges who had agreed with him had not been members of the Bench that heard the matter and submitted the judgment he had delivered as a draft to the two Judges who heard the matter with him. One of those Judges wrote a separate judgment, while the other agreed with the judgment of the presiding Judge. The presiding Judge then directed the Registrar to list the matter for delivery of Judgment and a new Judgment was delivered, the presiding Judge explaining that the former decision of the Court had been made *per incuriam.*

IS THE MATTER BEFORE US ONE THAT COMES WITHIN THE SCOPE OF THE INHERENT POWERS OF THE COURT?

Strictly speaking, the 1st Respondent-petitioner, unlike the petitioner in *Ganeshanatham*, (*supra*), did not in his petition expressly invoke this Court to grant relief in the exercise of its inherent powers.

The directions of the Acting Chief Justice dated the 22nd of December 1995 make no reference to the inherent jurisdiction of the Court. Nevertheless, if, the Acting Chief Justice, of his own motion, was as Humphreys, J. put it in *Re a Solicitor,*[61] endeavouring to place the 1st Respondent-petitioner's petition before the Court "in that most attractive form, an appeal to the inherent jurisdiction of the Court," his Lordship, with great respect, had no power to do so. Article 132(3), in my view, does not empower the Chief Justice to do so. That Article, as I have stated earlier, does not confer jurisdiction. The inherent jurisdiction of the Court is not vested in it by any provision of the Constitution, or by Parliament in terms of Article 118 (g) of the Constitution but is a power intrinsically *attached to the Court* as a superior court of record. (Cf. Article 105 (3); cf. also Article 118).

Moreover, the fact that the question involved is a matter of general or public importance has never been regarded as a ground for the exercise of the Court's inherent powers.

Be that as it may, giving a liberal interpretation to paragraphs 05 and 06 read with the prayer of the petition of the 1st Respondent-petitioner and assuming that the 1st Respondent-petitioner did invoke this Court to grant relief in the exercise of its inherent powers, is his case one that

comes within the inherent powers of the Court? If so, is it a case in which those powers should be exercised?

Mr Marapana submitted that the matter before us did not "even remotely" come within the scope of the inherent powers of the Court .

According to Mr. Goonesekere, the gravamen of the 1st-Respondent-petitioner's complaint is that, although he was noticed and represented by Counsel, there was no opportunity or insufficient opportunity to deal with the matter of the admissibility and evidentiary value of the 1st Respondent-petitioner's speech in Parliament that was used by the majority of Judges to contradict the averments in the 1st Respondent-petitioner's affidavit. The basis for holding him liable was the speech in Parliament. Had it been excluded, the 1st Respondent-Petitioner would have been exonerated. Since he had been found "guilty" on the basis of the inadmissible speech, the 1st Respondent-petitioner had suffered injustice.

The 1st Respondent-petitioner states in his petition as follows:

> 05. The 1st Respondent filed his counter-affidavit dated 23rd May, 1995. The 1st petitioner annexed to his counter-affidavit dated 31.5.95 an extract of Hansard of 7.2.95 containing a speech made by the 1st Respondent. This was marked P 16. As the said extract was filed along with the counter-affidavit, the 1st Respondent was unable to counter the same.
>
> 06. The question as to whether the statement made by the 1st Respondent in Parliament was covered by Parliamentary Privilege, was not raised in the course of the hearing or even thereafter. His Lordship Justice Fernando, in his judgment, stated as follows:-
>
> The second issue, as to Parliamentary privilege is one which no one even mentioned, even in passing. Neither the 1st Respondent nor his Counsel raised it in the pleadings, in the written submissions or in the oral argument - although the Court itself specifically drew the attention of Counsel to the effect of the Hansard extracts on the reliability of the 1st Respondent's affidavit. And they have not sought to raise it even after judgment was reserved.

Mr. Goonesekere also drew our attention to the following passage in the judgment of Fernando, J.:

> . . . Ordinarily I would hesitate to disagree with the considered opinion of Samarakoon, CJ; especially a decision in a case which was argued for twelve days in the Court of Appeal and for another four in this Court. More so here, without the benefit of an iota of research, or a minute of submissions, by Counsel, upon an issue on which we ought not to have to depend on our own researches . . .

Mr. Goonesekere stated that there were two incidents and that it was in respect of the first incident that the affidavit was filed. When Mr. Marapana who appeared for the petitioners addressed Court on the 13th of September, 1995, the Hansard extract was not submitted. Later, Mr. Musthapha made submissions on behalf of the 16th Respondent. It was at the end of the hearing that reference was made to the speech reported in Hansard for the first time. Counsel for the 1st Respondent, therefore had no opportunity of responding to the matters raised. Mr. Goonesekere submitted that the "proper course of action" would have been to invite further argument on the matter during which Counsel could have assisted the Court. The matter is important, because it involves a consideration of the issue of parliamentary privilege and the Court ought, in those circumstances, to have acted "with circumspection and assistance". Mr Goonesekere drew our attention to Popplewell, J's observations in *Rost v Edwards and Others*[62]:

> The courts must always be sensitive to the rights and privileges of Parliament and the constitutional importance of Parliament retaining control over its proceedings. Equally, as Viscount Radcliffe put it in *A-G of Ceylon v De Livera* [63], the House will be anxious to confine its own or its members' privileges to the minimum infringement of the liberties of others. Mutual respect for and understanding of each other's respective rights and privileges are an essential ingredient in the relationship between Parliament and the courts.

In the circumstances, Mr. Goonesekere submitted, the Court ought to have sought the assistance of the Attorney-General in deciding a matter that impinged on parliamentary privilege. That was, he said, the

invariable practice in England, as numerous decisions of the courts of that country showed. Mr. Goonesekere quoted the following words from the judgment of Popplewell, J. in Rost (*supra*) at p 644 to illustrate his submission:

> It became clear after the initial submissions of counsel that the question of parliamentary privilege might be involved and counsel agreed that the only course open to the court was to adjourn further argument and to set out the matters which might give rise to parliamentary privilege in writing; then to submit those questions to the Attorney-General and the court to ask for the assistance of the Attorney-General in resolving what might be a conflict between the privileges of Parliament and the rights of the parties freely to present their case in court.
>
> Accordingly that course was adopted. The court has had the advantage of submissions by the Solicitor-General as well as helpful argument by counsel for the two protagonists in the litigation.

In the cases relating to the petition before us, Mr. Goonesekere submitted that "counsel were not permitted to make their contribution; and the Attorney-General who should have been heard, was also denied the opportunity of assisting the Court."

Mr. Marapana submitted that it was not correct to state that the speech in Parliament was sprung on the respondents at the end of the argument and that there was no opportunity of dealing with the matter. He stated that the extract from Hansard (P 16) was annexed to the counter-affidavit of the petitioners, dated the 31st of May 1995, in which they responded to the 1st respondent's affidavit. The argument took place on the 13th and 27th of September 1995 - several months after the filing of the extract from Hansard.

In paragraph 05 of his petition, the 1st Respondent-petitioner himself states that "The 1st petitioner annexed to his counter-affidavit dated 31.5.95 an extract of Hansard of 7.2.95 containing a speech made by the 1st Respondent."

Wijetunga, J. at p. 21 of his judgment confirms this. His Lordship states as follows:

> In reply to the 1st respondent's affidavit denying the remarks attributed to him, the petitioners filed a counter-affidavit dated 31.5.95 annexing extracts from the Hansard of 7.2.95 (P 16) . . .

Perera, J. too confirms that position at p. 2 of his judgment. His Lordship states as follows:

> In response to this denial, on the part of the 1st Respondent the Petitioners have filed a counter affidavit dated 31.05.95, annexing extracts from the Hansard of 07.02.95 (P 16) which is a record of the proceedings of Parliament on that date.

The 1st Respondent-Petitioner's complaint as stated in his petition was not that the speech had been placed before the Court only at the end of the argument, but that because it was filed with the counter-affidavit of the petitioners, he had no opportunity of refuting it. In paragraph 05 of his petition he states: "As the said extract was filed along with the counter-affidavit, the 1st Respondent was unable to counter the same."

Why could he have not done so through his counsel?

In fact, learned counsel for the 1st Respondent had addressed Court on the matter of the speech in Parliament. Perera, J. in his judgment at p.2 states as follows:

> As regards the statements attributed to the 1st Respondent in the Hansard referred to (P 16), Counsel for the 1st Respondent has in my view, rightly submitted that such statements must be considered in the proper context. The reference to the Katunayake incident in Parliament that day has been triggered off by a statement made by a Member of Parliament based on a newspaper report which appeared in the "Divaina". Counsel submitted that the contents of the said report itself have been proved to be false. There was no reference whatsoever to the 1st Respondent in that report. It was counsel's submission that the 1st Respondent

in this instance has merely retorted or given a "fighting reply" to the jibes as is wont to happen in the floor of the House. This he contended was not a considered reply to an adjournment question. It is a political speech which cannot be taken literally as an admission by the 1st Respondent or the accuracy of what was in the newspaper or his involvements in violence on that day. Counsel submitted that the Court should therefore not place any reliance on the contents of P 16 and invited the Court to reject the same.

In my view there is much substance in the submission of counsel on this matter. The Petitioners' allegations against the 1st Respondent remain uncorroborated. I am of the opinion that it would be highly unsafe to tilt the scales in favour of the Petitioner(s) in this case relying upon, a general statement made by the 1st Respondent in Parliament particularly having regard to the special circumstances in which the Respondent made the statement attributed to him.

At page 23 of his judgment, Wijetunga, J states as follows:

The 1st Respondent did not deny or explain the statements attributed to him, by means of a counter-affidavit; nor did his counsel seek to deny those statements or take any objection to their admissibility in evidence. Learned counsel's position was that such statements made in Parliament must not be treated as if they were precise responses to questions; that when the matter was raised, the 1st Respondent gave a political response, rather than a factual response; that his observations were general and not intended to refer to the facts of this particular incident and that such statements made in the cut-and-thrust of debate often contain over-statements and inaccuracies. Hence, counsel submitted that they cannot be treated in the same way as an averment in an affidavit filed in Court proceedings. He strenuously contended that the 1st respondent's affidavit set out the correct position and that his statements in Parliament should not be used to test the accuracy or credibility of that affidavit.

I am not at all attracted by this contention. An averment in an affidavit, no less than oral evidence, can be tested by reference to a prior inconsistent statement . . .

No question of parliamentary privilege had, it seems, been raised by learned counsel for the 1st Respondent. On the other hand, it appears from paragraph 6 of the 1st Respondent-petitioner's petition, wherein he quotes from Fernando, J's judgment, that the Court had "specifically" drawn the attention of counsel "to the effect of the Hansard extracts on the reliability of the 1st respondent's affidavit". Mr. Goonesekere in making his submissions also quoted the passage from Fernando, J's judgment in which those words occur. Neither the 1st Respondent-petitioner, in his petition and affidavit, nor Mr. Goonesekere challenged the correctness of Fernando, J's statement. There was an indication that the speech would be used, and learned counsel for the 1st Respondent was conscious of that. Had he any reason to believe that the speech would not be used, the trouble he took to explain the way in which the speech should be considered in relation to the 1st respondent's affidavit is inexplicable. Had learned counsel thought that parliamentary privilege stood in the way of the use of the speech, why did he not raise it? He did not raise the objection and then submit that should the Court hold that the speech was admissible, then more weight should be attached to the 1st respondent's affidavit than to his speech in Parliament, or that the speech in Parliament should be disregarded altogether having regard to the circumstances in which the speech was made. Learned counsel did not raise the question of relative worth as an alternative. He tacitly accepted the admissibility of the speech and proceeded to argue that it was the affidavit that should prevail. If it was his view that the Attorney-General should be heard on the matter, why did he not say so?

The matter of the admissibility of the speech appears to have been raised by Perera, J. after perusing the draft judgment of Wijetunga, J. in which Wijetunga, J. had used the extract from Hansard. Perera, J. was of the view that the speech should not be used. Perera, J. then wrote a separate judgment in which he held that parliamentary privilege prevented the use of the extract, citing the provisions of the Parliamentary (Powers and Privileges) Act, No. 21 of 1953 and certain decisions of the courts. Fernando, J. then wrote a separate judgment dealing with the matters raised in Perera, J's draft. After perusing Fernando, J.'s draft, Perera, J then responded, in the judgment his Lordship delivered, to the comments made by Fernando, J with regard to certain observations made in the draft judgment of Perera, J. Fernando, J. complained

that his Lordship received no assistance, and explains that "for that reason I have confined my observations to the two decisions cited by Perera, J. and the precedents referred to therein, and refrain from comment on recent decisions of this Court *(Dissanayake v Kaleel,*[64]; *Jayatillake v Kaleel,*[65]). . . But in this case we do not have to consider whether Samarakoon, C.J. was wrong in regard to the second of the above principles, for this case is covered by the first principle, as the use made by Wijetunga, J. of the Hansard extracts is well within that principle."

Can it be said that the judgments of the Court in S.C. Applications Nos. 66/95 and 67/95 were attributable to the Court having acted in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the Court so that the decision to use the speech was demonstrably wrong? Nothing has been placed before us to support such a position. What were the provisions of the legislature or decisions of the Court that were overlooked? Learned Counsel for the 1st Respondent-petitioner did not refer us to any such matter. Lord Scarman, as we have seen, translated *per incuriam* to mean 'Homer nodded'. Having regard to the lively exchange of views on the matter of parliamentary privilege in the light of the relevant legislation and decisions of the Court that were considered by the learned Judges, I cannot possibly say that the Court acted *per incuriam. Indigor quandoque bonus dormitat Homerus*, said Horace. However, there was, in my opinion, no nod on the Judges' side of the Bar Table. I am not suggesting that there was a nod on the other side: The strategies of counsel are, as we said in *Hettiarachchi, (supra)* entirely up to them. The Court must take the case as learned counsel deems it best presented in the interests of his client. However, once a matter is concluded and a decision is given, that is an end of the matter.

Let us assume that Perera, J. was right in the interpretation of the law and that the majority was wrong in using the speech as it did. If so, can we review or revise that order? We have no statutory powers to do so. May we do so in the exercise of our inherent powers?. The fact that a decision is wrong is not a ground for the exercise of the Court's inherent powers. As Samarakoon, CJ observed in *Billimoria v Minister of Lands*, (*supra*) at p. 15:

> The Attorney-General contended that section 24 applied to stay orders as well. This is a moot point. The Judges who made the stay order appeared to have thought otherwise. They may be right or they may be wrong. Assuming they are wrong - how does that make it an order *per incuriam*? If the order appealed against is allowed to stand it will open the flood gates for one Bench of the Court that disagrees with another's interpretation, made after due consideration, to assume a jurisdiction that it does not have.

Naturally, the Court welcomes the assistance of counsel. Indeed, as it was pointed out in Hettiarchchi (*supra*), following *Jones v National Coal Board, (infra)*[67], the nature of proceedings in our Courts is such that the assistance of counsel is indispensable. I might venture to add that the quality of justice partly depends on the degree of assistance given by the Bar, including the "official Bar". The Attorney-General was a party to the proceedings, the 79th Respondent in S.C. Application No. 66/95 and the 46th Respondent in S.C. Application No. 67/95; but he was not present or represented though noticed. When assistance is not available, or is inadequate, the Court must nevertheless act, doing the best it can in the circumstances.

In Billimoria's case, (*supra*), Samarakoon, CJ. at p. 15 observed, with some asperity, as follows: "The Attorney-General stated that had the Court the benefit of a full argument it would not have made the stay order. This kind of argument gives little credit to the Judges and undue credit to the pleader." In the cases relating to the petition before us, the question of parliamentary privilege in regard to the admissibility of the report of the speech received the consideration it did in the judgments delivered because one of the Judges raised it, supplying what some people may suppose was a gap in the case for the 1st Respondent. However, there is nothing to show that had the matter not been raised by Perera, J. the Court would have acted *per incuriam.* Admittedly Wijetunga, J. in his draft judgment did not deal with the question of parliamentary privilege; not being a contentious matter when he prepared his judgment, he was not obliged to deal with it. It does not mean that he had overlooked the question.When Perera, J. expressed his views, neither Wijetunga, J. nor Fernando, J. were convinced by his Lordship's reasoning. Perhaps, had learned Counsel dealt with the matter, he might have been more persuasive? But does that make the

decision one that was given *per incuriam*? Halsbury (Vol. 26 paragraph 578, followed with approval in *Hettiarachchi* (*supra*) at p. 299) states: "A decision should not be treated as given *per incuriam*, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument".

In *London Street & Tramways Co. v London Council,*[66] where the question was whether a decision of the House of Lords was conclusive and binding, it was held that it was. The Earl of Halsbury, LC, at pp. 380 - 381, responded as follows to the submission of counsel:

> My Lords, I only wish to say one word in answer to a very ingenious argument which the learned counsel set before your Lordships. It is said that this House might have omitted to notice an Act of Parliament, or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a very manifest one - namely, that that would be a case of a mistake of fact. If the House were under the impression that there was an Act when there was not such an Act as was suggested, of course they would not be bound, when the fact was ascertained that there was not such an Act or the Act had been repealed, to proceed upon the hypothesis that the Act existed. They would then have ascertained whether it existed or not as a matter of fact, and in a subsequent case they would act upon the law as they then found it to be, although before they had been under the impression, on the hypothesis I have put, either on the one hand that an Act of Parliament did not exist, or on the other hand that an Act had not been repealed (either case might be taken as an example) and acted accordingly. *But what relation has that proposition to the question whether the same question of law can be reargued on the ground that it was not argued or not sufficiently argued, or that the decision of law upon the argument was wrong? It has no application at all.*

The emphasis is mine.

Hettiarachchi's case is not an exception to the rule that the Court will not review or revise its judgment in the exercise of its inherent powers on the ground that the Court had not the benefit of the best argument.

In fact, the Court, at page 299, expressly said otherwise. In that case, Mr. Goonesekere who subsequently appeared for the petitioner and pleaded his cause with success, unreservedly accepted the correctness of the decision of the Court on the two matters that had originally been argued. The petitioner's application could not be sustained on those two grounds. Counsel who had appeared earlier failed to respond to "several not-so-subtle indications" from the Bench that certain relevant matters should be adverted to in support of the application, (see page 295). The Court was unwilling to descend into the forum and supply the deficiency. At pages 300-301, the Court explained its position as follows:

> . . . should the Court have intervened to do what learned Counsel who then appeared for the Petitioner had failed to do? That would have been quite improper; proceedings under Article 126 are essentially adversarial in nature. Of course, the Court has ample power to probe a matter for the purpose of ascertaining the truth; to expedite the work of Court by suggesting the consideration of issues of fact and law which seem to arise; and by indicating how a submission might be clarified or refined; and by guiding an argument in the direction of the matters of fact and law actually in issue. But it will nevertheless leave Counsel entirely free to decide what he wishes to place before the Court, and how he proposes to do so. The Court recognizes and respects Counsel's right to do so. It will not encroach on Counsel's rights, especially when he repeatedly insists on following a plan of action he appears to have set himself and disregards suggestions from the bench as to an alternative course that might be followed. We must take the case as Counsel deems it best presented in the interest of his client. Moreover, the Court must take care to guard itself against any appearance of bias which might result from intervention, for justice must not only be done, but must be seen to be done. As Judges, we are expected to be neutral. Therefore the Court must refrain from entering into the arena by initiating and presenting legal and factual submissions on behalf of a party. *In Jones v National Coal Board,*[67] Lord Denning said:
>
> (The judge) must keep his vision unclouded . . . let the advocates one after the other put the weights into the scales - the nicely

> calculated less or more - but the judge at the end decides which way the balance tilts, be it ever so slightly . . . The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well . . . Such are our standards.

The subsequent matter before the Court in *Hettiarachchi, (supra)* was not an application for review or revision. The Court had refused the petitioner leave to proceed with his application. Although the decision of the Court was final, the terms of its order clearly indicated that the Court was not satisfied that all the relevant material had been placed before it. In the "exceptional circumstances of the case", (pp. 304-305) the Court granted the petitioner leave to proceed.

Nor is *Broome v Cassell & Co Ltd. & Another,*[68] a persuasive precedent that might assist the 1st Respondent -petitioner. In *Rookes v Barnard,*[69] Lord Devlin, in the words of Lord Denning at p. 198 in *Broome's* case,

> . . . threw over all that we ever knew about exemplary damages. He knocked down the common law as it had existed for centuries. He laid down a new doctrine about exemplary damages. He said that they could be awarded in two very limited categories but in no other, and all the other Lords agreed with him . . .

Denning, MR, quoting examples, pointed out that there had been a "wholesale condemnation" of the new doctrine in Commonwealth countries. His Lordship pointed out (at pp. 198 - 200) that counsel who argued *Rookes v Barnard* had

> . . . accepted the common law as it had been understood for centuries and did not suggest any alteration of it. Yet the House,

> without argument, laid down this new doctrine. If the House were going to lay down this new doctrine - so as to be binding on all our courts - it ought at least have required it to be argued. They might then have been told of the difficulties which it might bring in its wake . . . Next I say that there were two previous cases in which the House of Lords clearly approved the award of exemplary damages . . .It was not open to the House in 1964 to go against those decisions. Lord Devlin must have overlooked them, for he said that 'there is not any decision of this House approving an award of exemplary damages'. Finally, I say that the new doctrine is hopelessly illogical and inconsistent . . . All this leads me to the conclusion that, if ever there was a decision of the House of Lords given *per incuriam*, this was it.

A decision of the Supreme Court, that is to say a decision of the majority of Judges of any Bench of the Court constituted according to the provisions of law, is the decision of the Supreme Court. Such a decision is final and conclusive. The Supreme Court has no statutory jurisdiction to vary, review, revise or in any way alter or amend its decision, even though it may be alleged to be wrong. The Supreme Court as a superior court of record, however, has a certain reserve of powers which are generally referred to as 'inherent powers' which the Constitution recognizes in Article 105 (3): (Per Samarakoon, CJ. in *Ganeshanatham*, (*supra*) at p. 329; cf. Garvin, SPJ in *Mohamed v Annamalai Chettiar*, (*supra*). In the exercise of its inherent powers, the Court may revise its decision in certain limited circumstances. "The grant of such relief is of course a matter entirely in the discretion of the Court and will always be dependent on the circumstances of each case". (*Per* Weeramantry, J. in *Raju v Jacob* (*supra*). The exercise of the jurisdiction of the inherent powers of a Court, including the Supreme Court, must be in "appropriate circumstances" (Per T.S. Fernando, J. in *Ranmenikhamy*, (*supra*) at p. 215). In that connection, it must be remembered that the jurisdiction which the Court is called upon to exercise is "extraordinary" (per Kulatunga, J. *in All Ceylon Commercial & Industrial Workers Union*, (*supra*) at p. 296). Where it is not a matter in which a decision has been given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on it - so that it cannot be said that it is a case in which some part of the decision or some step in the reasoning on which it is based is, on that account,

demonstrably wrong, then, as pointed out in *Morelle Ltd.*, (*supra*) and followed by Ranasinghe, J. in *Ganeshanatham,* (*supra*), at p. 355, an intervention on the ground that the Court had acted *per incuriam* must be "of the rarest occurrence". In deciding whether it is a case which comes within the scope of the inherent powers of this Court, and whether it is one in which those powers must be exercised, the Court must act "in accordance with sound legal principles and not arbitrarily" : (per Garvin, SPJ in *Mohamed v Annamalai Chettiar).* The Court guides itself by reference to parallel instances in legislation, (e.g. see *Mohamed v Annamalai Chettiar* (*supra*); and *Jacob v Raju,* (*supra*)); or by decisions in analogous cases, (e.g. see *The King v Baron Silva,* (*supra*) ; *Palitha v O.I.C. Polonnaruwa and others,* (*supra*), and *All Ceylon Commercial & Industrial Workers Union v Ceylon Petroleum Corporation and another,* at p. 297); or by reference to the practice of the courts in comparable situations, or by a combination of such methods (e.g. see *Menchinahamy v Muniweera,* (*supra*)), having regard to what is appropriate in the circumstances of the case. The Supreme Court is "a Court of Justice" (per Abrahams, CJ in *Velupillai v The Chairman U.D.C., Jaffna,* (*supra*) and the Court can intervene to prevent injustice. (Cf. per Samarakoon, CJ. in *Ganeshanatham* at p. 329). However, as Garvin, SPJ pointed out in *Mohamed v Annamalai Chettiar,* (*supra*), the powers of the Court in that regard, are not, as it is sometimes supposed, "equal to its desire to order that which it believes to be just". No Court, much less any judicial officer, including the Chief Justice, may disregard the law of the land or purport for any reason whatsoever to ignore its provisions, for justice must be done according to law: (cf. per Garvin, SPJ in *Mohammed v Annamalai Chettiar,* (*supra*); and per *Lord Loreburn in Brown v Deam and Another.*[70], including the provisions of the Constitution, (and Rules made thereunder: cf. *Young v Bristol Aeroplane Co.*(*supra*) at p. 300), the enactments of the Legislature and the inveterate practices of a Court. (Cf. *Suren Wickramasinghe and Others v Cornel Lionel Perera and Others*(*supra).* The inherent powers of a Court are adjuncts to existing jurisdiction to remedy injustice.They cannot be made the source of new jurisdictions to revise a judgment rendered by a Court. (Per Samarakoon, J. in *Ganeshanatham,*(*supra*) at 329; per G.P.S. de Silva, CJ. in *Senerath v Chandraratne* (*supra*) at p. 216; per Kulatunga, J. *in All Ceylon Commercial & Industrial Workers Union* (supra) at p. 297).

For the reasons stated in my judgment, this Court has no statutory powers to rehear, revise, review or further consider its decisions in S.C. Applications Nos. 66/95 and 67/95; and there are no grounds for holding that there are circumstances that bring those decisions within the scope of the inherent powers of this Court. I, therefore, reject the petition.

For the removal of doubt, I declare the directions made by the Hon. Acting Chief Justice dated the 22nd of December 1995 suspending the operation of the decisions of the Court in S.C. Applications Nos. 66/95 and 67/95 to be of no force or avail.

There will be no costs.

G.P.S. DE SILVA, C.J. – I agree.

WADUGODAPITIYA, J. – I agree.

RAMANATHAN, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Petition rejected.