MUNASINGHE AND ANOTHER
v.
MOHOMED JABIR NAVAZ CARIM

COURT OF APPEAL,
K. PALAKIDNAR, J. AND H. W. SENANAYAKE, J.
C. A. No. 430/75(F) – D. C. KALUTARA No. 2756 (F).
MARCH 20, 1990.

Re-listing of appeal – judgment in appeal delivered before substitution in the room of dead party – Section 760A of the Civil Procedure Code – Supreme Court Rules gazetted in Gazette Extraordinary of the Republic of Sri Lanka 44/23 dated 23.01.1974 – Rules 2, 3, 4, and 5 – Inherent powers.

Plaintiff respondent died in July 1980 during the pendency of an appeal lodged by the 17th and 18th defendant-appellants – petitioners on 14.11.1975. The appeal was argued on 27.01.1987 and dismissed on 27.03.1987. Counsel marked his appearance for the substituted plaintiff-respondent on 27.01.1987. Substitution had taken place on 20.11.1987 after the record was sent back to the District Court of Kalutara after the judgment of the Court of Appeal. Counsel could not have made his appearance in Court for the substituted plaintiff-respondent as no substitution had been made in terms of Rule 4 or Rule 5 of the Supreme Court Rules gazetted in Gazette Extraordinary of the Republic of Sri Lanka No. 44/23 dated 23.01.1974. The action of the counsel misled the Court and the parties to the action.

Held :

(1) The record was defective and the judment delivered by the Court of Appeal was a nullity. Counsel had no status to appear for the substituted plaintiff-respondent as at that time no substitution had been made.

(2) The Court has inherent powers to set aside its own judgment which is a nullity.

(3) In the interests of justice the appeal should be re-listed for hearing.

Cases referred to :

(1) *Moosajees V. Fernando 68 NLR 414, 419*

(2) *Batuwatte Piyaratne Thero V. Liyanage Noris Jayasinghe, S.C.39/73 – S.C. Minutes of 08.02.1976*

(3) *Ganeshanathan V. Vivienne Goonewardena [1984] 1 Sri LR 319*

(4) *Ehambaran and Another V. Rajasuriya 34 C. L. W. 65*

(5) *Srinivasa Thero V. Sudassi Thero 65 NLR 31*

APPLICATION to re-list appeal
J. W. Subasinghe, P.C. with *W. P. Gunatilake* for the petitioner.
Dr. H. W. Jayawardene Q.C. with *Harsha Cabral* for respondent.

Cur. adv. vult.

May 25, 1990

SENANAYAKE, J.

This is an application to relist the above appeal for a fresh hearing.

The 17th and 18th Defendants-Appellants-Petitioners appealed to the Supreme Court against the judgment dated 14.11.1975 of the learned District Judge of Kalutara.

The said appeal was argued before the Court of Appeal on 27.01.1987 and the appeal was dismissel by the Court of Appeal on 27.03.1987. The Plaintiff-Respondent pending the hearing of the appeal had died and no steps were taken to make any substitution of the deceased Plaintiff-Respondent. However it appears that the learned Counsel who appeared in Court on 27.01.1987 had marked his appearance for the subsitituted Plaintiff-Respondent in both appeals, 430/75 and 431/75.

The Plaintiff-Respondent had died in July, 1980 and substitution had taken place on 20.11.1987 after the case record was sent back to the District Court of Kalutara after the judgment of the Court of Appeal.

The learned Counsel for the Petitioners submitted as the record was defective by reason of the death of the Plaintiff-Respondent at the time of the hearing of the appeal and at the time of the pronouncement of the judgment and therefore he submitted that the judgment was a nullity.

It is apt to refer to Section 760A of the Civil Procedure Code which reads as follows :–

"Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who in the opinion of the Court is the proper person to be substituted . . . . ."

The relevant rules are gazetted in the Gazette Extraordinary of the Republic of Sri Lanka 44/23 dated 23.1.1974. Rule 2 reads as follows :–

"In the case of the death of an appellant, the legal representative may apply to the Supreme Court to have his name entered on the record in place of the deceased-appellant and the Court may thereupon enter his name and proceed with the appeal . . . . ."

Rule 3 reads as follows :–

"If no such application is made within a reasonable time, the Court may make order abating the appeal and award to the Respondent cost of appeal to be recovered from the Estate of the deceased-appellant or the Court may if it thinks proper make such order as it thinks fit to bring in the legal representative of the deceased-appellant . . "

The relevant rule applicable to the instant case is rule 4 which reads as follows :–

"In the case of the death of a respondent the appellant or any other respondent may make an application to the Supreme Court specifying the name and address of any person whom he alleges to be the legal representative of the deceased respondent and whom he desires to be made the respondent in his stead. The Court shall thereupon on being satisfied that there are grounds therefor, enter the name of such representative and shall issue notice on such representative to appear on a date to be therein mentioned. Provided that the person so made respondent may object that he is not the legal representative or make any defence appropriate to his character as such representative. . ."

Rule 5 reads as –

"The legal representative of a deceased respondent may apply to the Supreme Court to have himself made a respondent in place of a deceased respondent and the provision of rule 4 so far as they are applicable, shall apply to the application and to the preceedings and consequence ensuing thereon. . ."

The deceased Respondent's legal representative may apply for substitution. The appearance of the learned Counsel for the Respondent was made on behalf of the substituted Plaintiff-Respondent. Though in fact there was no substitution made the action of the learned Counsel misled the Court and the parties to the action. Therefore when the Court of Appeal heard and delivered the judgment the record was defective. The defect was not cured. No papers were filed by the legal representative of the Respondent for substitution. In the circumstances the learned Counsel could not have made his appearance in Court as there was no substitution done as contemplated by the rules either in terms of Rule 4 or Rule 5.

It was within the knowledge of the legal representative of the deceased Plaintiff-Respondent to know the demise of the Plaintiff-Respondent and to take steps in terms of Rule 5. But in the instant case the learned Counsel has marked his appearance for the substituted Plaintiff-Respondent without in fact any substitution.

The learned Counsel for the Petitioners submitted that as the record was defective the judgment deliverd by the Court of Appeal was a nullity. I am of the view that there is force in the argument. I am of the view that the defective record should have been cured before the pronouncement of the judgment. In the instant case the learned Counsel had no status to appear and mark his appearance on behalf of the substituted Plaintiff-Respondent. Therefore the proceedings of 27.1.1987 and the judgment of 27.3.1987 was a nullity.

The learned Counsel for the Petitioners submitted that this Court should exercise its **inherent powers** and set aside the judgment and allow his application to have the appeal relisted for hearing.

The learned Counsel for the Respondent contended that this Court has no inherent powers to revise its own orders. His contention was that the Court of Appeal was a creature of the Constitution and therefore its

powers were circumscribed by the provisions of the Constitution. I am unable to accept the said submission. This Court in my view has its inherent powers to correct its own orders. It was observed by H. N. G. Fernando, S.P.J. in *Moosajees v. Fernando,* (1) "This Court has also exercised an inherent power to correct error in a judgment which has occurred *per incuriam.* I doubt whether this power is exercisable only by the Judge who had pronounced the judgement, for if so there would be no means of correcting even a manifest clerical error discovered in a judgment after the death or retirement of the Judge who pronounced it. ."

In the case of *Batuwatte Piyaratne Thero v. Liyanage Noris Jayasinghe,* (2) was decided in appeal by Pathirana, J., and Ratwatte, J., on 06.2.1976 with the appeal being allowed. On 06.4.1976 the Respondent filed a motion inviting the Court to rectify an error that had occurred in the judgment. Pathirana, J., observed, "It is not always that this Court is confronted with a situation like in the present case ; there is a manifest error committed by this Court", and this Court acting in revision quashed its earlier judgment of 06.2.1976 and dismissed the appeal.

In the case of *Ganeshanathan v. Vivienne Goonewardena.* (3) the Court reiterated the principle, (page 329), "That as a superior Court of record it has inherent powers to make corrections to meet the ends of justice and that these powers have been used to correct errors which were demonstrably and manifestly wrong and when it was necessary in the interests of justice to put matters right. ."

In *Ehambaran and another v. Rajasuriya,* (4) Nagalingam, A.J., although in the particular case he refused to interfere by way of revision made the observation :-

> "It is true that this Court has, acting in revision, modified or even vacated judgment pronounced by it on appeal when apprised of the circumstances that the Court had erred in regard to an obvious question of fact or of law, and one may go so far as to say that those are cases where an error being pointed out the Court without wanting to hear arguments, would *ex mere motu* proceed to set the error right".

In *Sirinivasa Thero v. Sudassi Thero,* (5) Sansoni, J., stated in page 33, "where a Court makes an order without jurisdiction as in this case it has inherent powers to set it aside and the person affected by the order

is entitled ex debito justitie to have it set aside. It is not necessary to appeal from such order which is a nullity".

I am of the view that the judgment delivered on 17.3.1987 to be nullity as the record was defective. In the circumstances, in the interests of justice I set aside the order and allow the application of the Petitioners to relist the appeal for hearing. The Petitioners would be entitled to Rs. 525 as costs of this application.

PALAKIDNAR, J. – I agree.

Application allowed