KARIAWASAM
v
PRIYADHARSHANI

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A.205/93
D.C.COLOMBO 15353/P
FEBRUARY 25, 2004

Judgment per incuriam – Judgment of the Court of Appeal – Inherent powers to set aside or correct its own judgment.

The District Court held that "G" was not entitled to any shares. The plaintiff whose predecessor in title was 'G' appealed.

ON APPEAL

Two judges of the Court of Appeal had confirmed that the said 'G' was not entitled to any shares and dismissed the appeal. Decree of court was entered and the record sent back to the District Court.

After a period of 1 year and 8 months the plaintiff appellant sought to set aside the said judgment on the basis that "G" was in fact allotted certain shares. The appellant contended that the findings of the Court of Appeal has been made by an oversight/inadvertance/*per incuriam*. The defendant-respondent, objected to the application on the ground that there is no provision in law which enables the plaintiff-appellant to make the said application.

Held:

1. The *per incuriam* findings in the judgment of the Court of Appeal has been as a result of court's attention not being drawn to the second page of the final decree where 'G' has been allotted shares.
2. Having regard to the definition of the *per incuriam* order the facts and circumstances of the instant case warrant the exercise of inherent powers of this Court to rectify the mistake made in the judgment to prevent injustice to be caused to the plaintiff-appellant.
3. No man shall be put in jeopardy by a mistake made by a court.

AN APPLICATION to correct judgment.

Cases referred to:

1. *Gunasena* v *Bandaratilake* – (2000) 1 Sri LR 292
2. *Sivapathalingam v Sivasubramaniam* – (1990) 1 Sri LR 378
3. *Jeyaraj Fernandopulle* v *de Silva and others* (1996) 1 Sri LR 70
4. *Farred* v *Alaxander* - (1976) 1 All ER 129, 145
5. *Hudderspeld Police Authority* v *Wabon* - (1947) 2 All ER 193, 196

Manohara de Silva for plaintiff-appellant-petitioner.

Nihal Jayamanne, P.C. with *Noorani Amarasinghe* for 3rd defendant-respondent-respondent.

Cur.adv.vult

March 23, 2004

DISSANAYAKE, J.

This is an application made by the plaintiff-appellant-petitioner seeking to correct the judgment delivered on 06.09.2000 by Justices Vigneswaran and Shiranee Tilekawardena when they were sitting as Judges of this Court, on the basis that some of the findings in respect of a crucial matter in the said judgment has been made per incurriam.

A preliminary objection has been taken by learned President's Counsel appearing for the 3rd defendant-respondent-respondent, that the said application of the plaintiff-appellant-petitioner is misconceived. Further he has taken up the position that there was no provision in law which enables the plaintiff-appellant-petitioner to make the said application.

The facts relevant to this inquiry briefly are as follows:-

The plaintiff-appellant-petitioner had filed a final appeal to this court against the judgment of the District Judge in District Court Colombo case No.15353/P bearing DC Final appeal No.205/93(F).

The appeal was argued by counsel appearing for both parties

before Justices, Wigneswaran and Shiranee Tilakawardane when they were officiating as judges of this Court. After the conclusion of arguments Justice Wigneswaran delivered judgment on 06.09.2000, dismissing the appeal of the plaintiff-appellant and affirming the judgment of the learned district judge. Justice Shiranee Tilakawardane agreed with him on the aforesaid judgment.

The plaintiff-appellant-petitioner did not make an application for special leave to appeal to the Supreme Court against the said judgment of this Court.

Decree of this court has been accordingly entered by this Court and the record has been sent back to the Registrar, District Court of Colombo.

After a period of nearly one year and eight months later the plaintiff-appellant-petitioner has presented this application on 30.5.2002 to this Court, seeking to set aside the aforesaid judgment.

Learned counsel appearing for the plaintiff-appellant-petitioner adverted attention of this Court to the findings of Justice Wigneswaran which are reproduced as follows:-

"The plaintiff, 2nd and 3rd defendants are brothers and sisters respectively. The final decree in DC. Colombo case No. 34801/P was perused by us. We find that the predecessors in title, Girigoris Perera was not entitled to the lot in question as per the partition decree. Therefore it would have not been possible for Girigoris Perera to have devolved any share to the transferors of P1."

Learned counsel adverted the attention of this Court to the final decree in DC. Colombo case N. 34801/P which has been produced marked X7 and annexed to the present application made by the plaintiff-appellant-petitioner.

This document has not been part of the record at the hearing of the arguments of the appeal.

However on being submitted by counsel during the course of the arguments of the appeal, Justices Wigneswaran and Shiranee Tilakawardena appear to have perused the said document.

It is interesting to note that the predecessor in title of the plaintiff-appellant-petitioner, the 2nd and 3rd defendant-respondent is M.A.Girigoris Perera who had been the 6th defendant in case No.34801/P. On a perusal of page one of the final decree M.A.Girigoris Perera the 6th defendant is not allotted any share. However on page 2 of the final decree it is stated that the application made by Girigoris Perera to allot to him the shares to the 1st and 2nd defendants and the plaintiff, by an order made by Court dated 20.11.1935 has been allowed by court by way of the decree.

Therefore it is manifest that Girigoris Perera has been allotted the shares allotted to the plaintiff, 2nd and 3rd defendants in case No. 34801/P.

Thus it appears that the finding made by Justice Vigneswaran has been made without his attention being drawn to page 2 of the said final decree in case No. 34801/P.

It is to be observed that Justice Wigneswaran's findings in the said judgment has been made by an oversight and/or by inadvertence. The error in the Judgment has been made per incurriam.

Learned counsel appearing for the plaintiff-appellant-petitioner cited to me the decisions of the Supreme Court in *Gunasena* v *Bandaratilake*(1) and *Sivapathalingam* v *Sivasubramaniam*(2) and urged that this Court was vested with inherent power to set aside/or correct the aforesaid judgment delivered by Justice Vigneswaran.

In *Jeyaraj Fernandopulle* v *de Silva and others*(3) it was recognized *inter alia* that all courts have inherent power in certain circumstances to revise orders made by them such as where a clerical mistake in a judgment or order from an accidental slip or omission may be corrected; or 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, the attainment of justice being a guiding factor.

Dealing with the meaning of per incurriam, it was stated there at page 113, et seq:- that 'Earl Jowitt in his Dictionary of English law (2nd Ed, 1997, 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 incurriam. In *Farell* v *Alaxander*(4) Lord Justice Scarman in the Court of Appeal translated "Per Incurriam" as Homer nodded," Others, however have given the phrase a more restricted meaning. Lord Chief Justice Goddard in *Huddersfield Police Authority* v *Wabon*(5) said "what is meant by giving decision *per incurriam* 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, ... The definition of the phrase per incurriam in Lord Goddard's terms has been regarded as being too restrictive ..... There are several instances of the court acknowledgment that it had acted per incurriam in circumstances which might not have been accommodated within Lord Goddard's definition."

In *Gunasena* v *Bandaratillake (supra)* at page 302 Wijetunga, J. observed:

"The phrase per incurriam has been defined in Whertons' Law Lexicon. 13th edition at page 645, as thorough want of care. An order of the court obviously made through some mistake or under some misapprehension is said to be made per incurriam. Classen's Dictionary of Legal Words and Phrases, 1976 edition defines per incurriam at page 137 as by mistake or carelessness, therefore not purposely or intentionally."

Having regard to the above definitions and the many instances where the court has held that it has stated *per incurriam* in situations which do not come within Lord Goddard's definition, I think the facts and circumstances of the instant case may well be regarded as coming within the broader parameters of the concept of per incurriam. Even otherwise, as the earlier Judgment contained a manifest error, the court of Appeal had inherent power to correct the same, in order that a party did not suffer by reason of a lapse on the part of the court. The procedure adopted by the Court of Appeal was what it considered most appropriate in the circumstances. I see nothing objectionable in that procedure."

The per incurriam finding in the judgment of the matter before me presently has been made as a result of Justice Wigneswaran's

attention not being drawn to the second page of the final decree in case No.34801/P where M.A.Girigoris Perera has been allotted the shares of the plaintiff, the 1st and 2nd defendants in that case.

Having regard to the above definition of "per incurriam" order and the many instances where the Courts have held that "per incurriam" orders have to be corrected, I think the facts and circumstances of the instant case warrant the exercise of inherent powers of this Court to rectify the mistake made in the judgment of Justice Wigneswaran, to prevent injustice to be caused to the plaintiff-appellant-petitioner.

I am also mindful of the oft quoted legal principle that no man shall be put in jeopardy by a mistake made by a Court.

Therefore I overrule the preliminary objection of the 3rd defendant-respondent-respondent and allow the application of the plaintiff-appellant-petitioner. Acting under the inherent powers vested in this Court, I vacate the judgement dated 06.09.2000 delivered by Justices Wigneswaran and Shiranee Tilakawardane and order that the matter be fixed for arguments afresh.

The decree entered by this Court is vacated. Registrar of this Court is directed to communicate this order to the Registrar of the District Court of Colombo and call for the record of this case forthwith.

SOMAWANSA, J. – I agree.

Decree of the Court of Appeal vacated;
matter re-fixed for argument.