1962 *Present : T. S. Fernando, J., and Herat, J.*

V. A. RANMENIKHAMY and another, Plaintiffs-Petitioners, *and* B. A. S. TISSERA and others, Respondents

. C. 43—Application to Revise the order of the Supreme Court rejecting Appeal No. 187 of 1958/D. C. Gampaha No. 2796/P

Appeal—Order per incuriam *rejecting appeal—Power of Court to vacate the order.*

The Supreme Court has power to vacate in appropriate circumstances an order made by it *per incuriam.*

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

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

APPLICATION to revise an order made by the Supreme Court *per incuriam.*

H. W. Jayewardene, Q.C., with *E. S. Amerasinghe,* for the plaintiffs-petitioners.

N. E. Weerasooria, Q.C., with *M. T. M. Sivardeen* and *R. Ilayperuma,* for the 1st, 2nd to 9th, 15th, 17th to 21st, 23rd, 25th and 31st to 34th defendants-respondents.

Cur. adv. vult.

March 12, 1962. T. S. FERNANDO, J.—

Appeal No. 187(Final) of 1958 in D. C. Gampaha Case No. 2796/P came on for hearing in this Court before the Chief Justice and K. D. de Silva J. on 23rd September 1959. Argument on the appeal was continued on 25th September before the same Judges and order was made that day that hearing be continued on a date to be fixed in December. On 21st December 1959 the appeal was fixed for hearing before the same two Judges, but on that day the Court directed that this appeal " be listed next term in the ordinary course ", and that it is " not to be treated as a part-heard " appeal. It next came on for hearing before the Chief Justice and H. N. G. Fernando J. on 22nd March 1960 and hearing was continued on 23rd March when apparently

a "preliminary" objection was raised to the hearing in that the appeal was not properly constituted because notice of appeal to be served on defendant-respondent No. 16c had not been tendered. The Court, observing that "it is a fact that the notice has not been tendered" upheld the objection and rejected the appeal, but without costs being awarded to the respondents. Mr. H. W. Jayewardene, Q.C., who appeared for the appellants at the hearing of the appeal stated to us that he had no prior notice of this objection and the order in respect of costs of appeal, following the practice of this Court in the matter, suggests that the objection was indeed taken while the argument in support of the appeal was under way.

The application now before us is designed to have the order rejecting the appeal set aside by way of revision or by way of *restitutio-in-integrum* and to have the appeal restored for hearing. The applicants submitted that (1) defendant-respondent No. 16c was a minor who was represented throughout the proceedings in the District Court by his duly appointed guardian-ad-litem, defendant-respondent No. 16a, (2) notice of appeal was duly served on defendant-respondent No. 16a, (3) defendant-respondent No. 16c was one of the parties substituted in place of original defendant No. 16 who died after the institution of the action and that defendant No. 16 neither claimed any interest in the land nor filed any statement of claim, (4) there was substantial notice of appeal to defendant-respondent No. 16c in that his guardian-ad-litem was duly served with notice of appeal, (5) the order rejecting the appeal was made by this Court *per incuriam*, and that that order would undoubtedly not have been made had the Court been made aware of all the relevant facts, (6) by this order so made *per incuriam* substantial loss and grave prejudice have been caused to the plaintiffs, and (7) after the order of this Court rejecting the appeal was made no rights in the land to which this partition action relates have been acquired by any other person or persons. The last of these submissions, supported as it is by affidavit, has not been contradicted by the respondent.

That this Court has power to vacate in appropriate circumstances an order made by it *per incuriam* appears not to be doubted. Shaw J. so stated in a case reported in 23 New Law Reports 475, following the decision in *Police Officer of Mawalla v. Galapatta* [1]. In the latter case Wood Renton C.J. acting by way of revision set aside an order made earlier by him on the ground that that earlier order dismissing an appeal had been made *per incuriam* as a result of a mistake on the part of the Court itself. Both cases I have referred to above were criminal cases. Our attention was directed to the decision of this Court in a civil case *Menchihamy v. Muniweera* [2], where the Court granted relief by way of *restitutio-in-integrum* which had the effect of getting behind an earlier order of the Court dismissing an appeal in a partition case. In the instant case it is right to act on the assumption that counsel who took the

[1] *(1915) 1 C. W. R. 197.* [2] *(1950) 52 N. L. R. 409*

objection to the constitution of the appeal did so by mistake and failure to point to the Court that the party who had no notice of appeal was a minor who was represented by a guardian-ad-litem who himself had notice duly served on him resulted also from an overlooking of the fact that defendant-respondent No 16c was a minor. Counsel for the appellants must have been taken by surprise if the objection was raised without prior notice in the course of the argument, and this circumstance undoubtedly placed counsel under a disadvantage. Counsel who appeared at the appeal were the same counsel who appeared before us on this application. It is conceded that the objection was taken as a result of a mistake which is proved in this instance to have been common to both counsel. This mistake led to the Court acting on the submission made by the respondents' counsel and acquiesced in by appellants' counsel. As it is now conceded that the mistake has wrongly deprived the appellants of a substantial right they were entitled to at law, and as I am satisfied that the order rejecting the appeal was made *per incuriam*, I am also satisfied that the Court can in its inherent jurisdiction set aside its own order.

The order of this Court made on 23rd March 1960 rejecting the appeal is hereby set aside, and the appeal will now be restored to the pending list of appeals for hearing in due course. There will be no costs of this application.

HERAT, J.—I agree.

Application allowed.