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DIGEST

JAYALATH VS. KARUNATILAKA

COURT OF APPEAL
H.N.J. PERERA, J.
CA 331/96 [F]
DC KURUNEGALA 3792/L
FEBRUARY 20, 2013
MAY 14, 2013
JULY 25, 2013

Rei vindicatio action – Permit holder – Could a permit holder bring a vindicatory action to eject a trespasser? Issues – Admissions – Party cannot resile from admission of fact? – Subject matter admitted – Identification necessary? – Failure to object to documents?

The plaintiff-respondent filed action seeking declaration of title and ejectment of the defendant the plaintiff being a permit holder. The defendant –appellant contended that, he was in possession for a long period of time and claimed the land on long possession and sought the dismissal of the action. The trial Judge granted the reliefs prayed for by the plaintiff.

On appeal,

Held:

(1) The failure to object to the permit [P1] being received in evidence would amount to a waiver of the objection – defendant deems to have waived any objection to the permit.

(2) The holder of a valid permit is entitled to bring a vindicatory action to eject a trespasser.

(3) The purpose – to raise issues and record admissions in terms of the Civil Procedure Code is in one respect to identify each party's case. In a civil case the parties have the right to admit at any stage of the trial a fact which one has not specifically admitted or even denied in the pleadings.

(4) It is a well established principle of law that parties to a case cannot resile from admissions of fact. While it is some times permissible to withdraw admissions on questions of law, admissions of fact cannot be withdrawn.

(5) In a declaration of title or *rei vindicatio* action, if the subject matter is admitted no further proof of the identity of the *corpus* is required; for no party is burdened with adducing further proof of an admitted fact.

(6) If there is no evidence to support a particular conclusion the appellate Court will not hesitate so to decide – but the evidence as a whole can reasonably be regarded as justifying the conclusion at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.

APPEAL from the judgment of the District Court of Kurunegala.

Cases referred to:-

1. *Wijewardane Vs. Ellawala* 1991 2 Sri LR 14
2. *Ports Authority and another Vs. Jugolinija Boat East* 1981 1 Sri LR 18
3. *D. P. Palisena Vs. K.K.D. Perera* 1954 56 NLR 407
4. *Bandaranayake Vs. Karunawathie* 2003 3 Sri LR 29
5. *Luwis Singho and others Vs. Ponnamperuma* 1986 2 Sri LR 320
6. *Leisa and another Vs. Simon and another* 2002 1 Sri LR 148
7. *Uvais Vs. Punyawathie* 1993 2 Sri LR 46
8. *Mariammai Vs. Pethrupillai* 21 NLR 200
9. *M. P. Munasinghe Vs. C. P. Vidanage* 69 NLR 97

Jacob Joseph for substituted defendants-appellants.

Niranjan de Silva for plaintiff-respondent.

Cur.adv.vult.

July 25, 2013

H.N. J. PERERA

The plaintiff-Respondent filed this action seeking declaration of title and ejectment of the defendant from the premises described in the schedule of the plaint. The plaintiff-respondent also prayed for an order of ejectment of the defendant from the *corpus* and damages.

According to plaintiff-respondent the property described in the schedule to the plaint was a state land, and the plaintiff was cultivating the said land since 1970.

The defendant married the plaintiff's sister in the year 1979 and in 1981 with the plaintiff's leave and license came to live in the property in suit and started carrying out a grocery business there. In 1984 the defendant was given a land in Wimalagama by the State and he went to live there. It is the plaintiff's position that in 1985 the defendant informed the plaintiff that he wants to return to the property in suit for a period of one year in order to collect his debts to which the plaintiff consented.

On 27.03.1990 the State issued the plaintiff a permit bearing No 90/1222 to the property in suit. The plaintiff further states that since 1970 he has been continuously living on the property in suit and from early 1990 the defendant has been disturbing the plaintiff's occupation and has been carrying on an illicit liquor business in the said property and the plaintiff requested defendant to leave but however the defendant continued to illegally and forcibly remain in occupation on the said property.

The case for the defendant was that the defendant was in possession of the property since 1979, and had effected

improvements as suggested in issue no 11. It is also the position of the defendant that he is entitled to the land in dispute by long possession. The defendant moved for dismissal of the plaintiff's action and prayed for a judgment on the basis that he is entitled to possession of the house and the property and in the alternatively for compensation in a sum of Rs. 200,000/=

After trial the learned trial Judge by his judgment dated 25.04.1996 entered judgment in favour of the plaintiff with costs.

The plaintiff-respondent in this case sought a declaration that he is the lawful permit holder and for the ejectment of the defendant appellant and damages. The permit bearing No 90/1222 dated 27.03.1990 was marked as P1. The plaintiff called the Land Officer to prove the permit and the said officer compared P1 with her office copy and confirmed that it was the permit issued to the plaintiff-respondent. The counsel for the defendant had not objected to the said document P1 when it was marked and tendered to court by the plaintiff's witness. And further the defendant's counsel did not object to any of the documents when the case was closed for the plaintiff, reading in evidence P1 along with the other documents. In *Wijewardene Vs. Ellawala*[1] it was held that the failure to object to the deed being received in evidence would amount to a waiver of the objection (*Ports Authority and another S. Jugolinija – Boat East*[2]. Therefore the defendant is deemed have waived any objection to P1.

The holder of a valid permit is entitled to bring a vindicatory action to eject a trespasser. In *D. P. Palisena Vs. K.K.D. Perera*[3] it was held that a permit holder under the Land Development Ordinance enjoys sufficient title to enable him

to maintain a vindicatory action against a trespasser. It was further held in that case that:

"The learned judge has misunderstood the scope of the remedy asked for by the plaintiff and failed to appreciate the nature of a permit holder's rights under the Land Development Ordinance.

This is a vindicatory action in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser.

It is very clear from the language of the Ordinance and of the particular permit P1 issued to the plaintiff that a permit holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings."

Bandaranayake Vs. Karunawathie[4]

The moment title to the corpus in dispute is proved, like in this case, the right to possess is presumed.

In Luwis Singho And Others Vs. Ponnamperuma[5] it was held:

(1) Actions for declaration of title and ejectment (as in this case) and Vindicatory actions are brought for the same purpose of recovery of property. In Rei Vindicatio action the cause of action is based on the sole ground of the right of ownership, in such an action proof is required that:

    (i) the plaintiff is the owner of the land in question i.e. he has the dominium and,

(ii) that the land is in the possession of the defendant

Even if an owner never has possession it would not be a bar to a vindicatory action.

Further in *Leisa and another Vs. Simon and another*[6] it was held that -

(1) the contest is between the right of dominium of the plaintiffs and the declaration of adverse possession amounting to prescription by the defendants.

(2) the moment title is proved the right to possess it, is presumed.

(3) ....

(4) ....

(5) for court to have come to its decision as to whether the plaintiff had dominium, the proving of paper title is sufficient.

(6) ....

(7) once paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them.

The plaintiff having proved his title the burden shifted to the defendants to prove an independent title to hold the property.

In this case the defendant did not challenge the plaintiff's permit but alleged that he was in possession of the property from 1979 and that the plaintiff only came subsequently, in around 1989.

The learned Counsel submitted to court that the learned trial Judge has erred as to the purported admission by the defendant, of the possession of the plaintiff since 1970. It was further submitted that the learned trial Judge has held that the defendant deemed to have admitted the averments in paragraph 2 of the plaint since there was no specific denial in the answer when in fact there was no such admission by the parties.

On a perusal of the proceedings of 10.2.1995 this court observes that two admissions have been recorded on that day. Admission No 1 is that the land described in the schedule is State land, And it is further stated that as paragraph two of the plaint is neither admitted nor denied by the defendant, parties admit paragraph two of the plaint.

The purpose to raise issues and record admissions in terms of the Civil Procedure Code is in one respect to identify each party's case before court.

This court cannot agree with the submission made by the Counsel for the defendant – appellant that in fact there was no such admission recorded by parties at the trial. On a perusal of the proceedings it is very clear that the parties have proceeded to record the paragraph two of the plaint as an admission. This court is of the opinion that there is a specific admission recorded to that effect by the parties to this case. Therefore this court is of the view that the cases cited by the Counsel for the defendant-appellant has no relevance to the present case. In paragraph two of the plaint, it is pleaded that the property described in the schedule to the plaint belonged to the State and that the plaintiff has been living there since around 1970 and cultivating the land. The defendant whilst giving evidence, under cross examination too has admitted

the fact that two admissions were recorded to that effect. In a civil case the parties have the right to admit at any stage of the trial a fact which one has not specifically admitted or even denied in the pleadings.

It is well established principle of law that parties to a case cannot resile from admissions of fact. *In Uvais Vs. Punyawathi*[7] it was held that while it is sometimes permissible to withdraw admissions on questions of law, admissions on questions of fact cannot be withdrawn.

In Mariammai Vs. Pethrupillai [8] it was held that:

"if a party in a case makes an admission for whatever reason, he must stand by it; it is impossible for him to argue a point on appeal which he formally gave up in the court below."

It is also submitted on behalf of the defendant-appellant that the plaintiff has not obtained a commission to establish the identity of the land, and the schedule is indefinite to establish the house and the appurtenant land possessed by the defendant with certainty and precision. Even though the corpus was not specifically admitted as an admission, it is observed that in paragraph three of the defendant's answer he pleads that he has been living on the land in suit from 1979.

In a declaration of title or re vindication action, if the subject matter is admitted no further proof of the identity of the corpus is required, for no party is burdened with adducing further proof of an admitted fact. The subject matter of the action is unambiguously set out in the plaint. In paragraph two of the plaint, the plaintiff identifies the corpus in

reference to the land described in the schedule to the plaint. The defendant in his answer sought a declaration of title in his favour for the premises from which the plaintiff wanted him ejected. Furthermore, in the defendant's petition seeking interim relief, he has described the land he is occupying in a schedule, which is the identical description given in the schedule to the plaint which was marked P5 ( ) at the trial.

The Counsel for the defendant-appellant also referred to certain contradictions in the evidence of the plaintiff – respondent. However on a balance of probability the learned Trial Judge has accepted the evidence of the plaintiff-respondent. I have considered the entire judgment, and see no reason to interfere and the trial judge has given cogent reasons. Primary facts have been considered and this court has no reason to interfere with primary facts.

In M. P. Munasinghe Vs. C. P. Vidanage [9] It was held that:

"If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight."

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the defendant-appellant is dismissed with costs.

Appeal dismissed.

JANE NONA AND OTHERS VS. SURABIEL AND OTHERS

COURT OF APPEAL
CHITRASIRI J.
CA 499/98 & 499A/98
DC HORANA 231/P
MAY 28, 2013
JUNE 3, 2013

Partition Law 21 of 1977 as amended by Act, No.17 of 1997 Sections 48, 81 – Substitution – Judgment delivered without substituting heirs – Some parties died whilst case was pending in the trial Court – Application to send case back to the trial Court for retrial – Refused - Was the decision given in Karunawathie Vs. Piyasena [S.C.] made per incuriam? – Starre Decisis.

Held:

(1) A decision *per incuriam* is one given when a case or statute has not been brought to the attention of Court and it was given in ignorance or forgetfulness of that case or that statute.

Per Chitrasiri J.

I have perused the judgment in *Karunawathie vs. Piyasena* carefully and could not find any reference therein to the provisions of Section 81 of the Partition Law 21 of 1977 as amended by Act 17 of 1997.

(2) It is clear that Section 48 of the Partition Law 21 of 1977 as amended by Act 17 of 1997 is drafted to ensure the final and conclusive nature of a decree in a partition action even if no substitution has been effected to represent a decreed party in such an action.

(3) With the introduction of new Section 81 by the Partition (Amendment) Act 17 of 1977 it is crystal clear that a judgment shall be deemed to be valid and effective and in conformity with the provisions of

the law and shall bind the legal heirs and representatives of such deceased party or person, despite the non-appointment of a legal representative in place of a deceased party.

Per Chitrasiri, J.

"In the circumstances, if I may say so respectfully, that the decision in *Karunawathie vs. Piyasena* is not absolutely binding on the Court of Appeal since there had been a failure to consider specific provisions in the Partition Law in respect of non-substitution in the room of the deceased parties in partition actions."

Per Chitrasiri, J.

In the circumstances, this Court is entitled in law to consider the said decision in *Karunawathie Vs. Piyasena* was given per incuriam and accordingly to consider it as an exception to the application of the doctrine of *starre decisis.* This is absolutely, because the case law cannot overrule statutory provisions laid down by an enactment of the legislature".

APPEAL from the judgment of the District Court of Horana. - On an application to have the case remitted back to the District Court.

Cases referred to:

(1) *Gamaralage Karunawathie Vs. Godayalage Piyasena* – SC 9A/2010 – SCM 5. 12.2011 – [not followed] -2012-BLR – 81

(2) *V. P. Wiliam Singho Vs. I. V. Japin Perera and others* – SCCALA 145/2011 – SCM 8'6'2012 [not followed]

(3) *Young Vs. Briston Aeroplane Company Ltd* – 1944. 2 All ER 293 at 300

(4) *Government of A. P. and another Vs. B.Sathyanarayan Rao [deceased] Vs. L.R.S. Samad and others* – 2000 4 SCC 262.

(5) *Alasupillai Vs. Yavetpillai* – 1949 39 CLW 107, 108

(6) *Industrial Properties Ltd Vs. Associated Electrical Industries Ltd* – 1977 QB 580

(7) *Ramanathan Chettiar Vs. Wickramaaratchi and others* – 1978 – 79 – [2] Sri LR 395 at 410.

(8) *Kurunegala Estate Ltd Vs. The District Land Officer* – BE/3528/ML 47 – SC 4 of 1976 – CAM 1.4.1977

(9) *Pathiwille Vs. The Acquiring Officer* – BR/3325/CL-835 – SC 1/75 –SCM 1.5.1977

Dr. Jayantha Pathirana with *D.D.P. Dassanayake* for 15th – 24th defendant – appellants.

J.A.J. Udawatte with *Sanjaya Kannangara* for substituted plaintiff-respondent.

Cur.adv.vult.

July 25, 2013

CHITRASIRI, J.

These two appeals have been preferred consequent upon the delivery of judgment in the action bearing No. 231/P filed in the District Court of Horana. It is an action filed to have the land called Delgahawatta which is morefully described in the schedule to the plaint, partitioned. learned District Judge, after a protracted trial made order to partition the said land having allocated shares to the parties, as specified in his judgment.

When the appeal was taken up for hearing in this Court, learned Counsel for the appellants made an application to have this case remitted back to the District Court for re-trial submitting that it is not correct to permit the impugned judgment to stand since it had been delivered without substituting the heirs in place of the 8th, 10th, 16th, 19th and 20th defendants who had died whilst the case was pending in the lower Court. He substantiated this application citing a Supreme Court decision made in the case of *Gamaralage Karunawathie Vs. Godayalage Piyasena*(1) This decision has been followed in the case of *V. P. William Singho Vs. I. V. Japin Perera and others*(2) as well.

However, learned Counsel for the plaintiff-respondent submitted that the Court of Appeal is not bound to follow these two decisions since those have been given *per incuriam* as the Supreme Court had failed to consider Section 81(9) of the Partition Law No. 21 of 1979 as amended by Act No. 17 of 1997 on the question of substitution of heirs in place of the deceased parties to the action.

In the said judgment in *Karunawathie Vs. Piyasena, (supra)* it was held that:

> *"When a party to a case had died during the pendency of that case, it would not be possible for the Court to proceed with that matter without bringing in the legal representatives of the deceased in his place."*

The Supreme Court, on this question of non-substitution and its effects on a judgment, has further stated [at 84] that;

> *"In the present appeal, as clearly stated earlier, prior to the judgment of the District Court dated 20.05.2005, the 15th respondent who was the 16A Respondent as well had died on 30.05.2004. No steps were taken for substitution of parties.*
>
> *Thereafter, an appeal was taken before the High Court and its judgment was delivered on 13.10.2009. However, the 2nd Respondent had died prior to that on 06.09.2007.*
>
> *Accordingly, it is evident that both of those judgments are ineffective and therefore each judgment would be rejected as a nullity".*

Admittedly, no substitution had been effected by the trial judge to substitute the heirs in the room of the deceased 8th,

10th, 16th, 19th and 20th defendants though they have died while the case was pending before him or in other words before the impugned judgment was pronounced. In the circumstances, it is necessary to examine the principle governing the decisions given *per incuriam* and its application to the doctrine of *starre decisis*.

Halsbury's Laws of England describes the rule of *per incuriam* as follows:

> *"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords Decision, in which case it must follow that decision' or* ***when the decision is given in ignorance of the terms of a statute or rule having statutory force."***

[Halsbury's Laws of England, 4th Edition Volume 26 Para 578 at pages 297 and 298]

Professor Rupert Cross in his Book "Precedent in English Law" [3rd Edition – 1977] explains the rule at pages 143 & 144 as follows:

> *"The principle appears to be that a decision can only be said to have been given per incuriam if it is possible to point to a step in the reasoning and show that it was faulty because of* ***a failure to mention a statute,*** *a rule having statutory effect or an authoritative case which might have made the decision different from what it was."*

In the case of *Young Vs. Briston Aeroplane Company Ltd* [3] Lord Green M. R. at 300 held thus:

"But where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this Court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.

Furthermore, in the Indian Case of *Government of A. P. and Another V. B. Sathyanarayan Rao (dead) by L.R. S. and others*[4]. It was held as follows:

"The rule of per incuriam can be applied where the court omits to consider a binding precedent of the same court or a Superior Court rendered on the same issue or ***where the court omits to consider any statute*** *while deciding the same issue."*

Basnayake J (as he then was) in the case of *Alasupillai Vs. Yavetpillai*[5] gave the following definition:

"A decision per incuriam is one given when a case or statute has not been brought to the attention of the Court and ***it has given the decision in ignorance or forgetfulness of the existence of that case or that statute."***

Having set out the manner in which the rule *per incuriam* is defined, I shall now proceed to discuss the question of the

application of a decision given *per incuriam* on the doctrine of *starre decisis*. This doctrine of *starre decisis* is considered as an indispensable foundation upon which the law and its application to individual cases are determined. The effect of a decision given *per incuriam* on the said important doctrine is discussed in Halsbury's Laws of England in the following manner:

> *"578. The decisions of the Court of Appeal..... are binding. There are, however, three, and only three, exceptions to this rule;*
>
> *(1) .....*
>
> *(2) .....*
>
> *(3)* ***The Court of Appeal is not bound to follow a decision of its own if given per incuriam.*** *[Industrial Properties Ltd. Vs. Associated Electrical Industries Ltd][6] Unlike the House of Lords, the Court of Appeal does not have liberty to review its own earlier decisions."*
>
> **(Halsbury's Laws of England, 4th Edition Volume 26 Para 578 at pages 297 and 298)**

In Professor Rupert Cross' Book titled "Precedent in English Law: [3rd Edition – 1977]. at page 150, it is further explained in its concluding paragraph and it reads thus:

7. CONCLUSION

Summary of exceptions to starre decisis in appellate courts: It will be convenient to conclude this chapter with a summary of all the exceptions to starre decisis in appellate courts. Even

if such a court would be bound by a particular decision of its own in the ordinary way, that decision need not be followed.

i. .....

ii. .....

iii. .....

iv. if it was reached per incuriam by the same court

v. .....

vi. .....

vii. .....

viii. (perhaps) if it conflicts with a previous decision of a higher court. ..

In *Ramanathan Chettiar Vs. Wickramarachchi and others*[7] at 410 and 411] **Soza J with Tambiah H agreeing.** sitting in the Court of Appeal observed thus:

"The doctrine of starre decisis is no doubt an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Certainty in the law is no doubt very desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into.

Further there is also the especial need for certainty as to the criminal law. While the greatest weight must be given

to these considerations, certainty must not be achieved by perpetuating error or by insulating the law against the currents of social change ..... However ..... a decision given per incuriam by the former Supreme Court is if I may say so respectfully, not absolutely binding on the present Court of Appeal."

By the decision referred to above, the Court of Appeal had declined to follow the decisions made by the Supreme Court in the cases of *Kurunegala Estate Limited Vs. The District Land Officer*[8] *and Pathiwille Vs. The Acquiring Officer.*[9] It was so decided on the basis that those decisions had been given *per incuriam*.

Accordingly, I will now turn to consider whether or not, the decision in *Karunawathie Vs. Piyasena (supra)* would amount to a decision given *per incuriam* and if so, the effect it has on the doctrine of *starre decisis*. Learned counsel for the respondent brought to the notice of this Court that the Supreme Court has not examined the provisions contained in the Partition Law No. 21 of 1977 as amended by Act No. 17 of 1997.

I have perused the judgment in *Karunawathie Vs. Piyasena (supra)* carefully and could not find any reference therein to the provisions of Section 81 of the Partition Law No. 21 of 1977 as amended by the Act No. 17 of 1977. In that decision the provisions in the Civil Procedure Code as well as the Supreme Court Rules had been much elaborated with reference to Indian authorities.

I will now look at the provisions in the Partition law on the issue of non-substitution of legal representatives in place of the deceased parties. At the outset, it is important to re-

fer to Section 48(1) of the Partition Law No. 21 of 1977 in which final and conclusive nature of Interlocutory and Final Decrees is set out. In that Section, failure to substitute the legal representatives in place of the deceased parties has been made equated with an omission or defect in procedure. Section 48(1) in the Partition Law reads thus:

> *48. (1) Save as provided in subsection (5) of the section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree subject also to the provisions of subjection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.*

It is to be noted that omission or defect of procedure includes a failure to substitute heirs to legal representative of a party who dies pending the determination of the action or to appoint a person to represent the estate of the deceased party. Furthermore, sub section (6) of section 48 stipulates that a right, share or interest awarded in a partition decree will deemed to be a decree in favour of the representatives of a party who is dead by the time the decree is entered even

without a substitution being effected in place of a deceased party.

Therefore, it is clear that Section 48 of the Partition Law No. 21 of 1977 as amended by the Act No. 17 of 1997 is drafted to ensure the final and conclusive nature of a decree in a partition action even if no substitution has been effected to represent a deceased party in such an action.

It must also be mentioned that by the Partition (Amendment) Act No. 17 of 1997, a new Section was substituted in place of Section 81 of the Partition Law No. 21 of 1977 whereby a new process had been introduced for the appointment of legal representatives to represent the parties in a partition action upon their death. Under Section 81(1) to Section 81(8) of the said Act, it has been made mandatory to file a memorandum by every party to a partition action or any other person, nominating at least one person [but not exceeding 3] to be his legal representative in the event of his death pending the determination of the partition action. The manner in which the parties are added as a party in such an instance is described in Section 69 of the Partition Law as amended by the Act No. 17 of 1997.

More importantly, it is Section 81(9) which is directly relevant on the question of failure to substitute a legal representative to the place of a deceased party. It is significant that Section 81(9) starts with the failure to file a memorandum to nominate a person in terms of Section 81 and it specifically deals with the question of failure to appoint a legal representative. It reads thus:

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

Therefore, with the introduction of new Section 81 by the Partition (Amendment) Act No. 17 of 1977, it is crystal clear that a judgment shall be deemed to be valid and effective and in conformity with the provisions of the Law and shall bind the legal heirs and representatives of such deceased party or person, despite the non appointment of a legal representative in place of a deceased party.

In the circumstances, this Court is entitled in law to consider the said decision in *Karunawathie Vs. Piyasena (supra)* was given in *per incuriam* and accordingly to consider it as an exception to the application of the doctrine of *starre decisis.* This is absolutely because the case law cannot overrule statutory provisions laid down by an enactment of the Legislature.

In the circumstances, if I may say so respectfully, that the decision in Karunawathie Vs. Piyasena is not absolutely binding the Court of Appeal since there had

been failure to consider specific provisions in the partition law in respect of non-substitution, in the room of deceased parties in partition actions.

In the light of the above material, I am of the view that failure to effect substitution in the room of the deceased 8th, 10th, 16th, 19th and 20th defendants by the learned District Judge in this instance would not make the judgment invalid.

For the aforesaid reasons, I disallow the application to have this case remitted back to the District Court for re-trial.

Application to have the case remitted back to the District Court disallowed.

WEERASINGHE VS. COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY OR CORRUPTION

COURT OF APPEAL
RANJIT SILVA, J.
LECAMVASAM, J.
CA 316/2007
HC COLOMBO 1456/2004
JULY 27, 2011
OCTOBER 14, 2011

Bribery Act – Section 19 [c], Section 20 [6] [vi] – Criminal Procedure Code – Section 279 – When to pronounce a verdict – judgment – Paucity of evidence – Should a retrial be ordered? Criteria?

After trial the accused was acquitted on counts 1 and 5 and convicted on the rest of the charges. Judgment was pronounced on 5.1.2007. On that day Court has found the accused – appellant guilty of all charges – charges 1 – 8.

Held:

[1] The judgment is not in keeping with the provisions of the Criminal Procedure Code and is repugnant and contrary to law.

Per Ranjit Silva, J.

"There is no evidence led to prove any of the charges."

Per Ranjit Silva J.

"The reasons why a retrial is not ordered are [1] offence was committed about 10 years ago. [2] the conviction was in 2007 [3] this Court will not provide an opportunity to the prosecution to cover up their gaps [4] retrial will only provide the opportunity of leading evidence of the 2nd witness whose evidence the prosecution has deliberately refrained from leading. [5] retrial should not be

ordered when the Court finds that it would be superfluous for the reason that the evidence relied on by the prosecution will never be able to prove the charges beyond reasonable doubt".

Per Ranjit Silva, J.

"As a rule police agents are unreliable witnesses. It is always in their interest to secure a conviction in the hope of getting a reward. Such evidence ought therefore to be received with great caution and should be closely scrutinized, particularly when that evidence is the only corroborating evidence of the accomplice."

APPEAL from the judgment of the High Court of Colombo.

Rienzie Arsakularatne PC for 1st accused-appellant

Thusith Mudalige SSC for complainant –respondent.

October 14, 2011

RANJITH SILVA J.

The accused- appellant is present in Court on bail.

Heard both Counsel for and against this appeal. The accused was charged under the Bribery Act for having accepted a bribe which is an offence under Section 20(b)(V) and Section 19 (C) of the Bribery Act. After trial the accused was acquitted on counts No. 1 and 5 and convicted for the rest of the charges. The judgment was pronounced on 05.01.2007 according to the Journal Entry. On that day the learned Judge had found the accused-appellant guilty of all the charges, i.e. charges 1 to 8 and had ordered to obtain the finger prints of the accused-appellant for the purpose of passing sentence. Now I refer to Section 279 of the Criminal Procedure Code which enumerates how the judgment should

be pronounced in the High Court as distinct from a judgment in the Magistrate's Court. According to that section the Judge must either pass the verdict then and there and immediately thereafter pronounce the judgment. This is to provide for a situation where a Judge must either pass the verdict then and there and immediately thereafter pronounce the judgment that, he could make a bench order or pronounce a judgment with which he had come ready. According to the 2nd limb of this section a Judge can pronounce a judgment within ten days of the conclusion of the trial and the second limb does not speak of a separate verdict. It speaks of a full judgment. In this case according to the journal entry of 05.01.2007 it appears that the learned Judge has pronounced the verdict and the judgment because a verdict has not been pronounced before that.

According to the journal entry the verdict and judgment has come simultaneously. But this judgment is not found in the record. Even if one takes this as only a verdict, what is recorded in the journal entry of 05.01.2007 is only the verdict. A judgment based on that verdict is not found in the record. But there is another judgment dated the same day which talks of a verdict that has been pronounced in court and that particular judgment which is at page 102 of the brief speaks of another judgment, a pre-existing judgment wherein the learned Judge had made a mistake admittedly with regard to the respective counts on which the accused-appellant was convicted. In that second judgment she corrects herself and withdraws the convictions in respect of the 1st and the 5th charges. But even that judgment does not speak separately of the counts for which the accused-appellant was convicted. It, in a general manner, states that she is find-

ing him guilty for the rest of the counts. But there too we find that she has convicted the accused on the rest of the counts only for the reason that there was evidence that Rs. 25,000/= was handed over to the accused-appellant by the deceased complainant in the presence of 3rd witness Arosha Malkumari. Therefore it is inconceivable on this particular piece of evidence how the judge could convict him on the 2nd count of solicitation. Therefore once again the Judge has repeated the same mistake. Although there is no 3rd judgment rectifying that, there is another repetition of the same mistake. This judgment, it appears to me, is not in keeping with the provisions of the Criminal Procedure Code and is repugnant and contrary to the law.

On the evidence, after hearing both parties I find that there is not sufficient evidence to prove even the charge of accepting a bribe. (3rd and 4th charges). Although 3rd and 4th charges refer to the same elements I find that there isn't sufficient evidence to prove that charge either, for the reason that when one peruses the main case record one could find that the money had been handed over in the presence of the sister of the wife of the deceased namely, witness No. 2 According to the learned Judge the money had been handed over in the presence of witness No. 3 Arosha Malkumari who is the wife of the deceased complainant. Whereas the evidence categorically states that the money was handed over in the presence of witness No. 2 that is Arosha Malkumari's sister-in-Law. This evidence is found at page 47 of the brief. When the wife of the deceased Arosha Malkumari was questioned;

ප්‍ර: කවුද මුදල් දුන්නේ?

උ: ස්වාමි පුරුෂයා.

ප්‍ර: කවුරු ඉදිරිපිටද දුන්නේ?

උ: මහත්මයාගේ නංගි ඉදිරිපිට.

ප්‍ර: කවුද දුන්නේ?

උ: මහත්මයා දුන්නේ 25,000/- ක්.

Here she never states that she was there and that it was in her presence that the money was handed over, what she says is that the money was handed over in the presence of her sister-in-law by the husband. The prosecution had ample opportunity to question her whether she was present and she saw this transaction. There had been no such questions and no such answers. Therefore, in a serious charge of this nature it is not for the Court to provide for what is wanting. Surmise or conjecture or to add words to affect the accused-appellant adversely as the presumption of innocence is in his favour and this type of doubt should inevitably be interpreted or resolved in favour of the accused. Nowhere in the brief the prosecution has ever tried to cover up this or provide for what is wanting, especially in the light of the evidence that the money was handed over in the presence of her sister-in-law should have cautioned the prosecution and put them on guard and the prosecution should have been alert to this matter and questioned the witnesses to prove the ingredients of the charge.

This is a case where the complainant is now deceased. A retrial will only help the prosecution to cover up what is wanting. Now that it has come to light, it would be inevitable that the prosecution will ask questions to cover up what is wanting. That would be to deprive a proper exercise of the right of appeal. When one exercises his right of appeal that should not be turned against him and the prosecution should not be allowed to take undue advantage. Otherwise that will

hamper, deter, and discourage appellants from disclosing and presenting their case effectively in a Court of Law. The prosecution has failed completely to lead the evidence of the sister of the deceased, witness No. 2 when the prosecution had ample and all the opportunity of leading the evidence of that witness. Despite the fact that the evidence disclosed that the money was handed over in her presence. These are lapses and the Court should not come into the aid of those who have neglected and shown lethargy in prosecuting their case. In this case we find that the complainant was dead and there is not even corroboration. The corroboration should have come at least from the sister of the deceased witness No. 2 who is said to have been there and in whose presence the money had been handed over.

The reasons why a retrial is not ordered: firstly the offence was committed about ten years ago and the convic. tion was in 2007, now four years. Secondly this Court will not provide an opportunity to the prosecution to cover their gaps. In other words what is wanting and what they have not questioned. Thirdly a retrial will only provide the opportunity of leading the evidence of the 2nd witness whose evidence the prosecution has deliberately refrained from leading. Fourthly, in this regard, I would like to refer to **Shony 19th Edition page 4133** where the learned Author states under the heading ***'When retrial should not be ordered'*** it is chaptered as 69 - **Shony's Code of Criminal Procedure - 19th Edition in 4 volumes and this particular volume is 'VI',** I quote;

> "An order of retrial of a criminal case is made in exceptional cases and not unless the Appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that trial was vitiated by serious