BILLIMORIA v. MINISTER OF LANDS AND LAND DEVELOPMENT & MAHAWELI DEVELOPMENT AND 2 OTHERS

SUPREME COURT
SAMARAKOON, C.J., SAMERAWICKREMA, J. AND WANASUNDERA, J.
S.C. APPEAL NO. 1/79
MARCH 28, 29, 1979.

Stay of proceedings - Application for Writs of Certiorari and Prohibition in respect of acquisition proceedings - Order for stay made by Court of Appeal - Stay order set aside by another Bench of the same Court on the ground that it was made per incuriam - Appeal to Supreme Court -Interpretation Ordinance (Cap. 2) as amended by Law No. 29 of 1974, section 21.

Constitution of Sri Lanka, Article 125 - Requirement that "any question relating to the interpretation of the Constitution" should be referred to Supreme Court - When Article 125 applicable.

The petitioner was the tenant of premises which the respondents sought to acquire under the Land Acquisition Act. Two days prior to the date of taking possession of the land the petitioner made application to the Court of Appeal for orders in the nature of writs of certiorari and prohibition. A bench of two judges made order ex-parte staying all acquisition proceedings pending the hearing and disposal of the petitioner's application and issuing notice on the respondents. Another bench of two judges took up the matter of the stay order as a "matter of urgency" and set aside the stay order on the ground that it had been made *per incuriam* in derogation of the provisions of section 24 of the Interpretation Ordinance. The petitioner obtained special leave to appeal to the Supreme Court, from this order.

Held :

The stay order was made after consideration and was therefore not made *per incuriam*. Whether section 24 of the Interpretation Ordinance applied to stay orders or not was a moot point, which, even if decided wrongly would not make the order an order *per incuriam*.

A stay order is an interim order and not one which finally decides the case. This must be borne in mind when applying the principles of the *per incuriam* rule. It would not be correct to judge such orders in the same strict manner as a final order. The interests of justice required that a stay order be made as an interim measure.

Held further :

Although Article 125 of the Constitution requires any dispute as to the interpretation of the Constitution to be referred to the Supreme Court it must be construed as dealing only with cases where the interpretation of the Constitution is drawn into the actual dispute. The mere reliance on a Constitutional provision by a party need not necessarily involve the question of the interpretation of the Constitution.

Observed that while it was competent for one Bench to set aside an order made *per incuriam* by another Bench of the same Court, it has been the practice 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 error.

Cases referred to :

(1) *Weerasooriya* v. *Sellambaram Chetty. 8 C.W.R. 238*
(2) *Alasupillai* v. *Yavetpillai and another, (1949), 39 C.L.W. 107.*
(3) *Huddersfield Police Authority* v. *Watson, (1947) 2 All E.R. 193.*
(4) *Morrelle* v. *Wakeling, (1955) 2 W.L.R. 673; (1955) 1 All E.R. 708; (1955) 2 H.B. 379.*
(5) *Young* v. *Bristol Aeroplane Co. Ltd., (1944) 2 All E.R. 293, (1944) K.B. 718; 171 L.T. 113.*
(6) *Broome* v. *Cassell & Co. Ltd., (1971) 2 All E.R. 187; (1971) 2 W.L.R. 853.*

APPEAL from an order of the Court of Appeal.

H. L. de Silva with Miss M. Seneviratne, for the petitioner.

Shiva Pasupathi, Attorney-General, with *G. P. S. de Silva, Deputy Solicitor General* and *D. C. Jayasuriya, State Counsel,* for the 1st and 3rd respondents.

Mark Fernando with *R.L. Perera,* for the 2nd respondent.

Cur. adv. vult.

April 20, 1979.
SAMARAKOON, C. J.

The petitioner is the tenant of premises bearing assessment No. 27, Pedris Road, Colombo 3. These premises are subject to the provisions of the Rent Act. No. 7 of 1972. The landlord of the premises is one R. Coomaraswamy. On the 17th October, 1977, the landlord instituted action No. 2579/RE in the District Court of Colombo praying *inter alia* for the ejectment of the petitioner as he required the premises for his own use and occupation. This action is pending in the District Court. On 9th November, 1978, the 2nd respondent requested the 1st respondent to acquire the said premises "for the purpose of housing a part of the organisation coming within the purview" of his Ministry (1R1). By a notice dated 24.11.1978 in accordance with the provisions of Section 4 of the Land Acquisition Act (Cap. 460) (P3), the District Land Officer informed the petitioner that as the said land was required for a public purpose the Government intended to acquire the said land. The petitioner states that by a notice dated 12.12.78 the District Land Officer informed the petitioner that in pursuance of an order made by the 1st respondent in terms of section 38(a) of the Land Acquisition Act possession of the land would be taken on behalf of the 3rd respondent at 10.30 a.m. on 15th December, 1978. On the 13th December, 1978, the petitioner filed a petition in the Court of Appeal praying for a writ of certiorari quashing the order of possession and for a writ of prohibition against the 3rd respondent preventing him from taking possession. This application appears to

have been supported before a Bench of two Judges on the same day and that Bench made order staying all proceedings pending the hearing and disposal of the petitioner's application in the Court of Appeal. Notice was ordered on the respondents returnable on 20th December. Paragraph 8 of the petition filed in this Court sets out the facts as they occurred on that date culminating in the stay order. It is as follows:-

> "8. At the hearing before the Court of Appeal on 13th December, which was heard before the Hon. Justice Ratwatte and Honourable Justice Atukorale the Court drew attention of Counsel to section 24 of the Interpretation (Amendment) Law, No. 29 of 1974 and Counsel (Miss M. Seneviratne) who appeared for the petitioner at the stage stated that this provision of law did not apply to the application before Court. The Court then having considered the matter issued notice of the petitioner's application on the respondent returnable on 20.12.1978 and also made order staying further proceedings pending the petitioner's application for Orders in the nature of Writs of Certiorari and Prohibition."

The 1st respondent filed affidavit on the 20th December, 1978, pleading *inter alia*:-

(a) that the stay order made on 13.12.78 was "made *per incuriam* in derogation of the provisions of section 24 of the Interpretation Ordinance as amended by Act No. 18 of 1973 and Law No. 29 of 1974",

(b) that the Republic of Sri Lanka was the owner of the premises and therefore the application could not be maintained, and

(c) that "no certiorari or prohibition lie *(sic)* in respect of the impugned proceedings".

The matter was taken up for hearing by two Judges of the Court of Appeal who were not the Judges that made the stay order. These two Judges decided to hear the parties "only on the question whether (this) Court acted *per incuriam* in issuing the stay order, as a matter of urgency". Both Judges have come to the conclusion that the stay order was made *per incuriam* and therefore made order that it be quashed. Cader, J. expressed the opinion that a

stay order "is an incidental measure pending the disposal of the main matter before Court. In this case it was incidental to the granting of the two Writs of Certiorari and Prohibition". He then came to a conclusion as follows -

> "If, for instance, these two writs would be granted, substantial loss would have been caused to the petitioner if he was thrown out of the premises for a period of time until the writs were allowed. Therefore, I am of the view that it should be taken into consideration along with the main dispute, namely, whether writs should issue or not."

Thereafter he quoted the provisions of section 24 of the Interpretation Ordinance (as amended) and therefore held that no stay order could issue against the respondents. He quashed the stay order as he came to the conclusion that it had been issued *per incuriam*. This last order appears to be somewhat in conflict with his earlier conclusion. However the long and short of this reasoning is that the stay order is one made *per incuriam* because it contravenes the express provisions of section 24 of the Interpretation Ordinance. From this order the petitioner sought special leave to appeal to this Court and we granted him leave.

The only question we need decide in this appeal is whether the stay order was made *per incuriam* since the order of the Court of Appeal has reserved all other "matters involved" for further hearing. In considering this question we must bear in mind that a stay order is an incidental order made in the exercise of inherent or implied powers of Court. Without such power the court's final orders in most cases would if the petitioner is successful be rendered nugatory and the aggrieved party will be left holding an empty decree worthless of all purposes. Vide Bertram C.J. in *Weerasooriya* v. *Sedambaram Chetty* (1).

Cader, J. himself considered the stay order in this case in the same light.

The Attorney-General contended that the stay order was one made *per incuriam.* He cited the case of *Alasupillai* v. *Yavetipillai and another* (2) in which Basnayake, J. following the case of *Huddersfield Police Authority* v. *Watson* (3) stated: "A decision *per incuriam* is one given when a case or a statute has not been brought to the attention for the Court and it has given the decision

in ignorance or forgetfulness of the existence of that case or statute." This statement is by no means exhaustive. In *Morrelle Ltd.* v. *Wakeling* (4) at 686 the Court observed as follows:-

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

In *Young* v. *Bristol Aeroplane Co. Ltd.* (5) at 300, Greene, M. R. pointed particularly to two classes of decisions *per incuriam*:-

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

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

Lord Denning, M. R. was inclined to add another category of decisions - one where a long standing rule of the common law has been disregarded because the Court did not have the benefit of a full argument before it rejected the common law. *Broome* v. *Cassell & Co. Ltd.* (6) at 199. In applying these principles one must bear in mind that in this case we are dealing with an interim order and not an order which finally decided the case. It is clear from the petitioner's statement (not contradicted by the respondents) that the Court itself referred Counsel for the petitioner to the provisions of section 24 of the Interpretation Ordinance. It could not therefore be said that the stay order was made in ignorance of its existence. Counsel's position appears to have been that this provision was not applicable to the dispute before the Court. There was nothing in the section which expressly referred interim orders. It is clear therefore that the Court had to decide whether writs could issue or not and this could not be decided without notice being first

issued on the respondents and affording them an opportunity of being heard. All this would have taken considerable time. The interests of justice therefore required that a stay order be made as an interim measure. It would not be correct to judge such orders in the same strict manner as a final order. Interim orders by their very nature must depend a great deal on a Judge's opinion as to the necessity for interim action. 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. Besides, very little argument and persuasion is necessary for a stay order. 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. I am of opinion that the stay order in question was made after consideration and was not one made *per incuriam*.

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.

Counsel have invited us to make order on constitutional disputes. It appears from the order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument. Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court. What is contemplated in Article 125 is "any question relating to the interpretation of the Constitution" arising in the course of legal proceedings. This presupposes that in the determination of a real issue or controversy between the parties, in any adversary proceedings between them, there must arise the

need for an interpretation of the provisions of the Constitution. The mere reliance on a constitutional provision by a party need not necessarily involve the question of the interpretation of the Constitution. There must be a dispute on interpretation between contending parties. It would appear that Article 125 is so circumscribed that it must be construed as dealing only with cases where the interpretation of the Constitution is drawn into the actual dispute and such question is raised directly as an issue between the parties or impinges on an issue and forms part of the case of one party, opposed by the other, and which the Court must of necessity decide in resolving that issue.

No such reference has been make to this Court. As the case has now to go back to the Court of Appeal we make no order on the submissions made by Counsel on the provisions of Articles 140, 143 and 168. The order of the Court of Appeal delivered on 8.1.79 is set aside and the case will now go back for further hearing. The Appellant will be entitled to costs.

SAMERAWICKREMA, J. — I agree.
WANASUNDERA, J. — I agree.

Appeal allowed.