## COURT OF APPEAL

**Gunawardena**
**Vs.**
**Ferdinandis**

*C.A. S.C. 159/78 - D.C. Moun. Lavinia No 13/Spl.*

*Section 184 Civil Procedure Code – Judgment pronounced twice – Court's inherent powers to correct its own mistakes*

A judgment was due to be pronounced by the Judge. After a series of postponements the Judge fixed it for 2.1.78. On 2.1.78 it was again postponed for 1.2.78 but this postponement was done in chambers and not in open Court, as it was during the Court vacation. However, judgment was pronounced on 8.2.78 but on this day neither the Appellant nor his Attorney was present as they did not have notice. When the Judge learned of this mistake he noticed appellant's lawyer to be present on 10.3.78 and on this day he pronounced judgment in open court in the presence of the lawyers of both sides. The question was raised whether the judge could correct his own errors.

*Held:* that the Judge had correctly invoked court's inherent powers to correct its own mistake by pronouncing the same judgment afresh.

APPEAL from judgment of the District Court of Mount Lavinia Preliminary objection.

**Before:** Atukorale J. and L.H. de Alwis J.

**Counsel:** C. Ranganathan Q.C. with N.S.A. Goonetilleke, N. Mahindran, M.S.H. Reeza and Miss Maddagode for the Defendant - Appellant
H. W. Jayewardene Q.C. with D. R. P. Goonetilleke and Vincent Siriwardena for the plaintiff-Respondent

**Argued on:** 23.2.1982

*Cur.adv.vult.*

**Decided on:** 2.4.1982

ATUKORALE, J.

Learned counsel for the respondent raised a preliminary objection to the hearing of this appeal on the ground that the appeal has been filed out of time. Admittedly the learned District Judge (from whose

judgment the present appeal has been filed) pronounced the same judgment on two different dates in open court. The first was on 8.2.1978 and the second was on 10.3.1978. The proceedings of the latter date set out the circumstances which, according to the learned District Judge, made him to do so. He states therein that at the conclusion of the hearing before him a date was appointed for the delivery of judgment. It was not ready on that day and was on that date postponed for another day. A few more similar postponements followed and it was due to be delivered on 6.12.1977 on which date too it was put off for 2.1.1978. On 2.1.1978 it was postponed for 1.2.1978 and again for 8.2.1978 when it was finally pronounced by him. On this day neither the appellant nor his lawyers were present in court. The learned Judge goes on to state that although according to the journal entry of 2.1.1978 the words 'Judgment not ready. Same for 1.2.1978' have been recorded yet as 2.1.1978 fell during the court vacation he had not called the case in open court in making that order on 2.1.1978. Hence, as the order had not been made in open court, the parties and their lawyers have had no opportunity of knowing the next date of judgment. He further observes that on a consideration of these matters it is apparent that the appellant (the defendant in the action) or his lawyers have not been present in court on 8.2.1978 when judgment was delivered as is evidenced by the journal entry of that date. Judgment has been given against the appellant. If he intended to appeal he has been denied the opportunity of doing so owing to this reason. As it is a mistake that has been committed by court, the learned Judge states that he would proceed to duly pronounce judgment in the case and on that date (10.3.1978) he pronounced the same judgment that he had earlier pronounced on 8.2.1978 in the absence of the appellant and his lawyers. He also indicated that if the appellant wishes to appeal he has the opportunity of doing so as from that day (10.3.1978) according to the provisions of the Civil Procedure code.

Thereafter on 17.3.1978 the attorney for the appellant filed a notice of appeal against the judgment pronounced on 10.3.1978. This was accepted by court on 22.3.1978. On the same day the respondent filed a motion stating that the notice of appeal was filed out of time and that it be rejected. On 29.6.1978 the court, after a consideration of the written submissions of the parties, made order on this motion. In this order the learned Judge refers to the journal entry of 8.2.1978 wherein the appearances for the parties had been noted and the

appearance for the appellant had been scored off and initialled by him. He states that when the record was sent up to him for the signing of the decree it struck him that when on 2.1.1978 he had put off judgment for 1.2.1978 he had not done so in open court as it was during the court vacation and the parties and their lawyers would not have been present that day. The judgment that was pronounced on 8.2.1978 had not been pronounced with notice to the parties or their lawyers. This was due to his own mistake. He therefore on 7.3.1978 noticed the appellant's lawyer to be present in court on 10.3.1978 on which date, in the presence of lawyers of both parties, he pronounced judgment. He reiterates that the order made on 2.1.1978 postponing judgment for 1.2.1978 was one that the parties or their lawyers had no opportunity of knowing, being one not made in open court. Hence as in his view the judgment pronounced on 8.2.1978 was not in accordance with the provisions of the Civil Procedure Code he, in the exercise of his inherent powers, on 10.3.1978 rectified the mistake made by him. As the notice of appeal has been filed on 17.3.1978 which is within the prescribed time he states he made order accepting it.

Learned counsel for the respondent in support of his preliminary objection submitted that admittedly judgment was pronounced by the learned Judge on 8.2.1978 which was a date appointed and announced by the learned Judge in open court on 1.2.1978. He thus maintained firstly that judgment having been pronounced on 8.2.1978 the learned Judge became functus and he could not have pronounced judgment once again on a later date and secondly that even assuming the learned Judge's order on 2.1.1978 postponing judgment for 1.2.1978 was made in chambers and not in open court, yet as the case was called in court on 1.2.1978 and judgment was put off for 8.2.1978 there was due compliance with the provisions of s. 184 of the Civil Procedure Code in regard to the pronouncement of the judgment. Learned counsel submitted that the proper course for the appellant was under the circumstances to have filed an application for leave to appeal notwithstanding lapse of time. He therefore urged that the judgment having been duly pronounced on 8.2.1978 the notice of appeal filed on 17.3.1978 was out of time and the appeal should be rejected.

Learned counsel for the appellant on the other hand contended that the judgment pronounced on 8.2.1978 was contrary to the

express, clear and unambiguous terms of s. 184 of the Civil Procedure Code and was thus void, illegal and of no force or effect at all. He conceded that the parties had notice that judgment was due for delivery on 2.1.1978 but maintained that as that date fell during the court vacation there was no public sitting of court on that day. Thus when the learned Judge on that day re-fixed judgment for 8.2.1978 in chambers he did so without notice to the parties or their lawyers. This he submitted was contrary to the provisions of s. 184 which prescribes that notice of the date of judgment should be given to the parties or their registered attorneys. He urged that s. 184 was a mandatory provision of law and a non-compliance thereof would render the judgment void and of no effect. He contended that in the instant case the court itself made a mistake when it pronounced judgment on 8.2.1978 without notice to the parties or their lawyers and that as such it was open to the learned Judge to correct his own mistake.

It was not seriously disputed before us that the proceedings of 10.3.1978 and 29.6.1978 set out correctly the factual position relating to the circumstances pertaining to the delivery of the same judgment on 8.2.1978 as well as on 10.3.1978. They contain a statement of the observations of the learned Judge himself and I have no doubt that he has set out therein a true account of what happened. It seems to me to be clear on a perusal of the above proceedings that judgment was, after several postponements, refixed for 2.1.1978 which is a date that fell during the court vacation. There were no public sittings of court on that day. The learned Judge on that day again refixed judgment for 1.2.1978. This was done in chambers in the absence of the parties and their lawyers. On 1.2.1978 he, in open court, put off judgment once again for 8.2.1978 on which date he proceeded to pronounce judgment. Neither the appellant nor his registered attorney was present at that time. There is nothing on the record to show that the parties or their attorneys had notice that judgment was refixed for 1.2.1978. Nor is there anything to show that they were present in court on 1.2.1978. It therefore appears to me that judgment had been pronounced by court on 8.2.1978 without notice to the appellant or his registered attorney and in their absence.

S. 184 of the Civil Procedure Code prescribes how and when the court shall pronounce judgment in an action. In so far as the instant case is concerned the relevant portions of the section are as follows:

184. (1) The court, upon the evidence which has been duly taken..... shall ..... pronounce judgment in open court, either at once or on some future day, of which notice shall be given to the parties or their proctors at the termination of the trial.

(2) On the day so fixed, if the court is not prepared to give its judgment, a yet future day may be appointed and announced for the purpose.

The reference to 'their proctors' herein is a reference to the registered attorneys of the parties - vide s. 126 of the Civil Procedure Code (Amendment) Law, No. 20 of 1977. It will thus be seen that judgment must be pronounced in open court. It must further be pronounced either at once (i.e. at the termination of the trial) or on some future day of which notice must be given to the parties or their registered attorneys at the termination of the trial. If on the latter date the court is not ready to deliver judgment then a yet future date can be appointed and announced for that purpose. The appointment and announcement of the future date must, in my view, also be made in open court, the purpose being to give notice to the parties or their registered attorneys of the date when judgment is going to be delivered by court. In the instant case judgment was reserved at the termination of the hearing to be delivered on a date which was fixed by court at the time. There is no dispute that the delivery of judgment was postponed on several dates all of which had been appointed and announced for that purpose in open court. The last of such dates was 2.1.1978. Judgment was, however, not delivered on that date too. The learned judge on that day appointed another day, namely 1.2.1978, for the purpose. This was done in chambers in the absence of the parties and their attorneys. There was thus no announcement in open court of the next date of judgment. The parties and their attorneys had therefore no notice that the court would deliver judgment on 1.2.1978. On that date too judgment was not given and yet another day was fixed in open court. But there is nothing to indicate that the parties or their attorneys were present in court on 1.2.1978. As such they would have had no notice that judgment would be delivered on 8.2.1978. In my view there has thus been a failure of the learned Judge to comply with the provisions of s. 184 in that the appellant and his attorney did not have notice of the last two dates fixed for delivery of judgment, namely, 1.2.1978 and 8.2.1978. Hence when judgment was in fact pronounced on

8.2.1978 it was done in contravention of the provisions of s. 184. The fact that the final date (8.2.1978) was fixed by the learned Judge in open court on 1.2.1978 makes no difference since the appellant and his attorney had no notice (legal or factual) of either of the two dates. The duty of pronouncing judgment according to law was on the court itself. If as in the instant case a date fixed for judgment falls on a day on which there are no public sittings it is the duty of court to order notice to be issued on the parties to appear in court on a particular date so as to fix the next date for delivery of judgment. There is in my view no duty cast on a party to ascertain for himself the next date of judgment if such date has not been fixed in open court. As a matter of practice there is no doubt that registered attorneys of parties do ascertain the next date of judgment and take notice of judgment at the time of its delivery in court. But he is not obliged to do so in law. Nor will such a practice relieve a court of its duty to pronounce judgment on a date in accordance with law. I am unable to accept the second submission of learned counsel for the respondent that the initial mistake made by court on 2.1.1978 in fixing 1.2.1978 as the next date of judgment in chambers and not in open court has been cured by the fact that the date on which judgment was in fact delivered (8.2.1978) was fixed by the learned Judge in court on 1.2.1978.

In support of his first submission that a judge once he delivers judgment is 'functus officio' and cannot deliver judgment again in the same case, learned counsel for the respondent relied on the following desisions. *Dionis Appu v. Arlis* (23 NLR 346), *Paulusz v. Perera* (34 NLR 438) and *Kannangara v. Silva* (35 NLR 1). In the first of these cases the learned District Judge pronounced a considered judgment in open court but before the decree was drawn up he came to a different conclusion whereupon he, after the appealable period had expired, delivered a fresh judgment in a sense contrary to the original judgment which he purported to cancel. He took the view that until decree was entered it was competent for a Judge to vary any judgment pronounced by him even to the extent of entirely reversing it. In appeal it was held that there was no provision in the Civil Procedure Code authorising a Judge to reconsider or vary his judgment after delivering it in open court. In the second case, *Paulusz v. Perera* (supra), the learned District Judge dismissed a partition action on the ground, inter alia, that some of the documents tendered in evidence and marked had not been filed in the case.

After the order of dismissal was made it was brought to the Judge's notice that the documents had been tendered to the clerk in charge of the record who had omitted to send them up to the learned Judge with the record. The learned Judge, after a consideration of the documents, set aside his order of dismissal of the action, set the case down for further inquiry and thereafter entered a decree for partition. De Silva A.J. (with Akbar J. agreeing), in holding that a court had no power to set aside its own order of dismissal, stated as follows:

> "The principle of law that a court may not set aside its own order is well established and rigorously enforced. It is a very important principle as on it depends the finality of judicial decisions. If a Judge can review his own decision, there is no limit to the number of times upon which he might do so or upon which he may be invited by the parties so to do."

In the last mentioned case above, *Kannangara v. Silva*, a person who was not a party to a partition action sought to set aside the final decree and to intervene in the action. The learned Judge held that he had no power to do so. In appeal Dalton A.C.J. whilst affirming the judgment of the learned District Judge held that a court has no inherent power to vacate its own decree or order in the same proceedings except under the provisions of the Civil Procedure Code.

A consideration of the above cases show that what the learned District Judges in the first two cases did and what the learned District Judge in the last case refused to do was to set aside the judgments which had been duly delivered with a view to reviewing the same. In each case the validity of the judgment was sought to be challenged on its merits. In the instant case, however, the learned Judge, having discovered that the pronouncement of his judgment in open court had been, owing to his own mistake, without due notice to the parties as required by law, only sought to rectify his own mistake by a re-prononcement of the same judgment with notice to the parties or their registered attorneys. As such the principle of law laid down in the above cases relied on by learned counsel for the respondent have, in my view, no application to the instant case.

In *Salim v. Santhiya and others* (69 CLW 15) the Supreme Court pronounced judgment in contravention of s. 774(1) of the Civil

Procedure Code in that the judgment was not pronounced at the conclusion of the hearing nor on an appointed day nor on a day of which notice had been given to the parties or their counsel. The petitioner gave the respondent notice of his intention to make an application for conditional leave to appeal to the Privy Council. The application was presented to the Supreme Court after the expiry of the prescribed period of 14 days of the pronouncing of the judgment. There was thus a failure to comply with rule 2 of the Rules in the schedule to the Appeals (Privy Council) Ordinance (Chapter 100) which required that the notice should be given to the opposite party within 14 days of the pronouncing of the judgment. The petitioner contended that his failure to comply with this rule was because the judgment in question was not pronounced by the Supreme Court in the manner prescribed by s. 774 (1) of the Civil Procedure Code. In granting conditional leave to appeal, T.S. Fernando J. (with Sri Skanda Rajah J. agreeing) in the course of his judgment observed as follows:

> "This Court pointed out in *Sirinivasa Thero v. Sudassi Thero* (63 NLR at p.34) that it is a rule that a Court of Justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent powers to repair the injury done to a party by its act. In these circumstances it is plain that our duty is to grant conditional leave to appeal, and that leave is hereby granted on the usual terms."

In *Sirinivasa Thero v. Sudassi Thero* (63 NIR 31) the plaintiff was ejected from a room in a temple on a writ of possession obtained by the defendant on a decree on which the court had no power to issue a writ of possession. The plaintiff then moved under s. 328 of the Civil Procedure Code to have himself restored to possession of the room. In the course of his judgment Sansoni J. (with H.N.G. Fernando J. agreeing) stated at p. 34:

> "s. 328, no doubt, contemplates dispossession under decrees for possession of immovable property, but this is not a matter which we can allow to stand in the way of the plaintiff, for we must have regard to the substance rather than form. Justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position

which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act: see *Rodger v. Comptoir D'Escompte de Paris* (1871 L.R. 3 P.C. 465). The duty of the Court under these circumstances can be carried out under its inherent powers."

The provisions of s 184 of the Civil Procedure Code relating to the manner of pronouncing judgment seem to me to be of a mandatory nature. They are so designed as to ensure that the parties to an action receive due notice of the date of pronouncing judgment so that they may avail themselves of the opportunity of exercising the rights which the law confers on them on the judgment being pronounced. The facts in the instant case leave no room for doubt that the court pronounced judgment on 8.2.1978 without notice to the appellant or his attorney .As a result of this mistake the appellant was denied the opportunity of exercising the right which the law gave him of appealing against the judgment. Before long the court itself discovered the mistake it had committed. Under the circumstances, in view of the principle of law enunciated in the last two cases aformentioned, I am of the opinion that the court was entitled to and did correctly invoke its inherent powers to rectify its own mistake by pronouncing the same judgment afresh on 10.3.1978.

Learned counsel for the respondent also maintained that the appellant should have filed in this court an application for leave to appeal notwithstanding lapse of time. s. 765 of the Civil Procedure Code empowers this court to admit and entertain a petition of appeal from a decree of any original court, although the provisions of s. 754 and s. 756 have not been observed, subject to certain limitations. s. 765, in my view, presupposes that the petitioner had the opportunity of complying with the provisions of s. 754 and S. 756 but was prevented from doing so by causes beyond his control. But if, as in the instant case, a party had no notice of the date on which the judgment was pronounced and was unaware of it, what opportunity does he have of complying with the provisions of s. 754? I am therefore unable to agree with this contention of learned counsel for the respondent.

On a consideration of the above matters I am of the view that the preliminary objection should be dismissed. Costs of this hearing will abide the final hearing of the appeal. The appeal will now be set down for hearing.

L.H. de Alwis J.- I agree.

*Preliminary objection overruled.*