GUNASENA

v.

BANDARATILLEKE

SUPREME COURT
FERNANDO, J. WIJETUNGA, J. AND
GUNASEKARA, J.
S. C. APPEAL No. 52/99
S. C. SPL. L. A. NO. 231/98
C. A. NO. 819/94F
D. C. COLOMBO NO. 8032/RE
5TH MAY, 2000

Appeal - Error of court causing injustice to a party - Inherent power of court to repair the injury - Jurisdiction of the court to correct the judgment and decree entered by mistake - Actus curiae neminem gravabit.

The plaintiff instituted action in the District Court for arrears of rent and ejectment of the defendant from the premises in suit. The District Judge by his judgment dismissed the plaintiff's action. The plaintiff preferred an appeal from that judgment to the Court of Appeal. The Court of Appeal delivered its judgment on 28.05.1998. The reasoning in that judgment shows that the Court of Appeal was of the view that the defendant should have failed in the original court. However, the Court of Appeal mistakenly thought that the District Judge had entered judgment for the plaintiff and that the appeal was by the defendant. Consequently, the court dismissed the appeal with costs and entered decree. Thereafter the record was returned to the District Court, with the judgment and the decree.

The plaintiff did not appeal to the Supreme Court from the judgment of the Court of Appeal but instead brought it to the notice of the Court of Appeal that there was an error in the judgment. This was done after the record had been returned to the District Court. Whereupon, after giving due notice to the parties and counsel, the court had the record of the action recalled and set aside its judgment on the ground that it had been delivered *per incuriam* and re-fixed the matter for argument. After hearing submissions of parties the court delivered a second judgment on 02.10.1998 allowing the appeal with costs and with consequential amendments for rectifying the mistake made when the court had regarded it as an appeal by the defendant. The decree on that judgment was signed on 12.11.1998.

Held :

The Court of Appeal had inherent power to set aside the judgment dated 25.05.1998 and to repair the injury caused to the plaintiff by its own mistake, notwithstanding the fact that the said judgment had passed the decree of court. This could not have been done otherwise than by writing a fresh judgment.

Per Wijetunga, J.

> "The authorities..... clearly indicate that a court has inherent power to repair an injury caused to a party by its own mistake. Once it is recognized that a court would not allow a party to suffer by reason of its own mistake, it must follow that corrective action should be taken as expeditiously as possible, within the framework of the law, to remedy the injury caused thereby. The modalities are best left to such court, and would depend on the nature of the error."

Cases referred to :

1. *Piyaratne Unnanse v. Wahareke Sonuttara Unnanse* (1950) 51 NLR 313.
2. *Sirimivasa Thero v. Sudassi Thero* (1960) 63 NLR 31.
3. *Ranmenikhamy v. Tissera* (1962) 65 NLR 214.
4. *Seneviratne v. Abeykoon* (1986) 2 SRI LR 1.
5. *Mowjood v. Pussedeniya* (1987) 2 SRI LR 287.
6. *Sivapathalingam v. Sivasubramanian* (1990) 1 SRI LR 378.
7. *Jeyeraj Fernandopulle v. de Silva and others* (1996) 1 SRI LR 70.

APPEAL from the judgment of the Court of Appeal.

P. A. D. Samarasekara, P. C. with *Kirthi Sri Gunawardena and Ms. Kumudini Wijetunga* for appellant.

Faisz Musthapa, P. C. with *M. S. M. Suhaid and Ms. Bandaratilleke* for respondent.

Cur. adv. vult.

July 04, 2000
WIJETUNGA, J.

The Plaintiff-Appellant-Respondent ('Plaintiff') had instituted this action in the District Court of Colombo seeking a declaration of title and ejectment of the Defendant-Respondent-Appellant ('Defendant') from the premises described in the schedule to the plaint.

The learned District Judge, by his judgment dated 16.12.94, dismissed the plaintiff's action with costs. The plaintiff appealed from that judgment to the Court of Appeal.

The appeal was heard by the Court of Appeal on 25.3.98 and judgment was delivered on 22.5.98 in the presence of the parties, dismissing the appeal with costs fixed at Rs. 5250/-. The plaintiff did not seek leave to appeal to this Court from the said judgment, but instead brought to the notice of the Judges of the Court of Appeal that there was an error in the judgment. By then, decree had been entered by the Court of Appeal and order had been made for the return of the record to the District Court. The time limit for making an application under Rule 22 of the Supreme Court Rules for leave to appeal to this Court had also elapsed.

The parties were thereafter noticed to appear in Court on 15.7.98. On that day, the Court of Appeal set aside the judgment already delivered on the ground that it had been delivered *per incuriam* and refixed the matter for argument on 29.7.98. Counsel on both sides then tendered written submissions.

On 6.11.98 the Court of Appeal delivered judgment allowing the appeal of the plaintiff with costs fixed at Rs. 5250/-. It is from this judgment that the defendant had sought special leave to appeal to this Court. Special leave has been granted on the question whether the Court of Appeal was in error in

writing a new judgment after setting aside its own judgment in the same matter.

It would be appropriate at this stage to set out in some detail the sequence of events, (with reference to the Journal Entries of the case in the Court of Appeal), which culminated in the delivery of the second judgment.

On 25.3.98 the appeal had been argued, both parties being represented by counsel, and judgment was reserved for 22.5.98, on which date judgment was delivered in open Court. The appeal was dismised with costs fixed at Rs. 5250/-. The decree of the Court of Appeal had been signed on 27.5.98 and the record had been returned to the District Court with the judgment and decree of the Court of Appeal. The Journal Entry of 16.6.98 by the Judge who wrote the judgment states as follows:-

"The counsel have brought to my notice that there is an error in the judgment in relation to the parties and that consequently the appellant had been referred to as the respondent and *vice versa*. I have perused the judgment and found it to be so.

Issue notice on the appellant and the respondent and their respective Attorneys-at-Law and the Counsel for 15.7.98.

If the Record has been forwarded to the District Court, Registrar is to call for the Record and the Judgment and the Decree of this Court immediately and the District Judge to be informed to stay further proceedings forthwith."

On 15.7.98 the case had been called pursuant to the order of 16.6.98. Counsel for the appellant as well as for the respondent had been present in Court. The relevant part of the journal entry reads as follows:-

"The judgment was delivered on 22.5.98 which is the judgment entered *per incuriam* inasmuch as the Applt,

had been mistaken for the Respdt., on the reading of the judgment. However it is quite clear in his favour the judgment was entered. Since the judgment is delivered *per incuriam*, it is set aside and formally refixed for argument. Refix for argument on 29.7.98."

On that day it had again been refixed for argument on 25.9.98.

On 25.9.98 counsel for the appellant as well as for the respondent had been present and the written submissions of the respondent had been tendered to Court. Court had made order that the written submissions of the appellant be tendered on 2.10.98.

On 2.10.98 counsel for both parties had once again been present and the written submissions of the appellant had been tendered to Court and judgment had been reserved for 6.11.98 on which date judgment had been delivered in open Court. The appeal had been allowed with costs fixed at Rs. 5250/-. Decree had been signed on 12.11.98.

The caption of the original judgment correctly showed that the proceedings were an appeal by the "plaintiff-appellant" against the "defendant-respondent".

It is clear from the reasoning in that judgment that the Court of Appeal was firmly of the view that the defendant-tenant should have failed in the original Court because the arrears of rent tendered by him had not reached the plaintiff-landlord in due time. Accordingly, the "plaintiff-appellant's" appeal should have been allowed. However, the Court of Appeal mistakenly thought that the District Court had upheld the plaintiff's claim:

"The learned District Judge held that the defendant-appellant had failed to comply with the requirements of section 22(3)(c) and entered judgment for the plaintiff-respondent."

In that belief, the Court of Appeal dismissed what it mistakenly thought to be the defendant-appellant's appeal. But for that mistake - which was no more than an inadvertent mis-description - the Court of Appeal would undoubtedly have allowed the plaintiff's appeal.

By the subsequent judgment dated 6.11.98 the Court of Appeal had merely corrected that error made through oversight, inadvertence or want of care and set aside the judgment of the District Judge and entered judgment for the appellant as prayed for with costs fixed at Rs. 5250/-. The reasoning in the two judgments is substantially the same, except that consequential amendments had been made in order to rectify the error made in the judgment dated 22.5.98. What needs to be determined by this Court is whether the Court of Appeal was competent to do so.

It was the position of the appellant that once judgment was delivered by the Court of Appeal and the decree signed, that Court was *functus* and had no jurisdiction to deal with the matter again. It was submitted that in those circumstances, the only course open to the plaintiff, if she was dissatisfied with the judgment pronounced by the Court of Appeal on 22.5.98, was to have sought leave to appeal to this Court against the said judgment. Since there was no such application, that judgment had become final. The Court of Appeal, it was submitted, had no jurisdiction to set aside its own judgment and to refix the matter for argument once again inasmuch as the plaintiff had no right in law to seek a variation or setting aside of the judgment by the Court of Appeal itself.

It was further submitted that the mistake referred to in relation to the first judgment was not one which the Court was competent to correct, after delivery of judgment in open Court in the presence of the parties. The only remedy thus available to the plaintiff was to canvass the correctness of the said judgment by way of an application for special leave to appeal to this Court. The matter in issue, it was submitted, was

whether it was open to a party to invite the same Court to correct a wrong judgment and deliver a new judgment and whether the Court itself had jurisdiction to set aside its own judgment which had passed the decree of Court, even in a case where the Court had made a mistake in the judgment which it had delivered. In any event, it was contended that the mistake made in this case was not one which comes within the principles of *per incuriam*, in that it was not an order made in ignorance of or in forgetfulness of a statutory provision or a binding authority. It was further submitted that the procedure followed in our Courts does not permit the setting aside of a whole judgment and rehearing of a case even if the Court had acted *per incuriam*. If the mistake was one made *per incuriam*, then the right procedure would have been to correct it at once and bring it to the notice of the parties.

It was, therefore, submitted that all proceedings taken by the Court of Appeal after delivery of judgment on 22.5.98 and entering of decree thereon are acts done without jurisdiction and should be set aside by this Court. The relief claimed by the appellant was that this Court should restore the judgment dated 22.5.98 and the decree entered thereon.

The position of the plaintiff on the other hand was that the judgment dated 22.5.98 contained a manifest error in that the appellant was referred to as the respondent and *vice versa*. Where there is an accidental slip or omission in the judgment or where the judgment is made *per incuriam*, it was submitted that the Court which delivered the judgment has inherent power to correct such error.

What had to be corrected in this instance was not only the reference to the appellant as respondent and *vice versa*, but the consequential error too, *viz.* the dismissal of the appeal on the assumption that the appellant was the defendant. In order to correct this error, the Court of Appeal had to make an order allowing the appeal instead of dismissing it. In these circumstances, it was submitted that the most appropriate

way to correct the mistake was by writing a new judgment after setting aside the earlier judgment. The Court of Appeal, in exercising its inherent power to correct such a mistake or accidental slip, had adopted the procedure which it thought was best. It was done in the presence of the parties as counsel were present throughout the proceedings and no objection was taken to the said proceedings in open Court. It was submitted that the Court would not permit an erroneous act on its part to prejudice a party and that in these circumstances the defendant should not be permitted to take advantage of an error arising from an accidental slip made by Court, especially where the Court has taken steps to rectify such error.

It is common ground that in the judgment dated 22.5.98 the defendant who was the respondent had been referred to as the appellant, whereas in fact the plaintiff was the appellant. By reason of this mistake, the appeal, which for the reasons set out in the judgment should have been allowed, had been dismissed.

In *Piyaratana Unnanse v. Wahareke Sonuttara Unnanse*,[1] an application was made under Section 189 (1) of the Civil Procedure Code to a District Judge to amend a decree entered by his predecessor on the basis of an alleged variance between the judgment of the Court and the decree based upon it. The contention of the petitioners, who were the plaintiffs, was that the decree omitted to give them the right to certain land edged green on a plan produced in the case, whereas, according to their contention, the judgment on which such decree was based, if it was read as a whole, had conceded such right.

The Privy Council held that unless the variance between the judgment and the decree appeared upon a perusal of the judgment and the decree, the District Court had no power to amend its own decree and that a matter involving the construction of the judgment could not fall within Section 189 of the Civil Procedure Code. It was, however, stated at page 316 with reference to section 189 *inter alia* that "it merely provides

a simple and expeditious means of rectifying an obvious error."

In *Sirinivasa Thero v. Sudassi Thero,*[2] where the Court acted without jurisdiction in issuing a writ, it was held that inasmuch as the Court acted without jurisdiction in issuing the writ, the person who was dispossessed of property in consequence of the execution of the writ was entitled to be restored to possession. In such a case a Court of Justice has inherent power to repair the injury done to a party by its act.

In *Ranmenikhamy v. Tissera,*[3] where 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 and 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 held that, inasmuch as the order rejecting the appeal was made *per incuriam*, the Court had inherent jurisdiction to set aside its own order.

In *Seneviratne v. Abeykoon,*[4] where the question was whether in the absence of a decree restoring possession of the premises to the defendant-tenant, the Court still had the power to make an order that possession be restored to the defendant, it was held that since the plaintiff had taken the law into his hands and forcibly evicted the defendant, the Court could in the interests of justice resort to its inherent powers saved under Section 839 of the Civil Procedure Code and make order of restoration of possession, even though the Civil Procedure Code provided for such restoration to possession only on a decree to that end entered under Section 217 (c) of the Civil Procedure Code.

In *Mowjood v. Pussadeniya,*[5] where before execution was issued the Court should have issued notice on the tenant-judgment-debtor as provided for by Section 347 of the Civil

Procedure Code and the Court had acted without jurisdiction in issuing the writ of execution, it was held that the evicted tenants should be restored to possession.

In *Sivapathalingam v. Sivasubramaniam,*[6] where an injunction issued by the Court of Appeal brought about the dispossession of the respondent and the placing in possession of the appellant, it was held that a Court whose act has caused injury to a suitor has an inherent power to make restitution. This power is exercisable by a Court of original jurisdiction as well as by a Superior Court. It was further stated at page 392 that "if an order of the Court, which ultimately has standing behind it the coercive power of the State, causes damage without justification, it becomes the duty of the Court itself to undo that damage, if for no other reason, at least in the interest of credibility of the Courts as an institution."

In *Jeyaraj Fernandopulle v. de Silva and others,*[7] 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 or some error arising 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 incuriam*, it was stated there at page 113 *et seq.* that "Earl Jowitt in his Dictionary of English Law, (2nd Ed, 1977, 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 incuriam.*' In *Farrell v. Alexander* [(1976) 1 ALL ER 129, 145] Lord Justice Scarman in the Court of Appeal translated *'per incuriam'* as

'Homer nodded.' Others, however, have given the phrase a more restricted meaning. Lord Chief Justice Goddard in *Huddersfiled Police Authority v. Watson*, [(1947) 2 ALL ER 193, 196] said 'What is meant by giving a decision *'per incuriam'* 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 incuriam* in Lord Goddard's terms has been regarded as being too restrictive ..... There are several instances of the Court acknowledging that it had acted *per incuriam* in circumstances which might not have been accommodated within Lord Goddard's definition."

The phrase *per incuriam* has been defined in Wharton's Law Lexicon, 13th Edition at page 645 as "through want of care. An order of the Court obviously made through some mistake or under some misapprehension is said to be made *per incuriam*." Classen's Dictionary of Legal Words and Phrases, 1976 Edition defines *per incuriam* 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 acted *per incuriam* 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 incuriam*. 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 steps taken by the Court of Appeal were for the purpose of correcting the obvious error in referring to the appellant as the respondent and *vice versa*, in consequence of

which the Court dismissed the appeal, when in fact the appeal should have been allowed. This could not have been done otherwise than by writing a fresh judgment, though the reasoning and substance of both judgments were necessarily the same.

If the judgment of the Court of Appeal dated 22.5.98 is to be restored as prayed for by the defendant, this Court would then be perpetuating an obvious and manifest error which the Court of Appeal itself has corrected and would thereby cause a grave injustice to the plaintiff. The authorities referred to above clearly indicate that a Court has inherent power to repair an injury caused to a party by its own mistake. Once it is recognized that a Court would not allow a party to suffer by reason of its own mistake, it must then follow that corrective action should be taken as expeditiously as possible, within the framework of the law, to remedy the injury caused thereby. The modalities are best left to such Court, and would depend on the nature of the error.

For the reasons aforesaid, I hold that the Court of Appeal was not in error in writing a new judgment in those circumstances, after setting aside its previous judgment which contained the mistake.

The appeal is dismissed, but without costs.

FERNANDO, J. - I agree.

GUNASEKERA, J. - I agree.

Appeal dismissed.