NAVAROCH
v.
SHRIKANTHAN AND OTHERS

COURT OF APPEAL.
GUNASEKERA, J.,
ISMAIL, J.
C.A. 661/96
D.C. COLOMBO 8223/RE
OCTOBER 14, 17, 18, 1996

Civil Procedure Code Section 85 (4) – Nature of Inquiry – Judgment/Decree entered – Judge functus officio – Exceptional circumstances.

The trial against the defendant-petitioner was adjourned for 7.2.96; on this date he was absent, and on an application of the Counsel for the plaintiff-respondent the plaintiff's case was closed without further evidence being adduced. Judgement was fixed for 27.2.96, on which date it was postponed for 27.3.96 and judgment was pronounced in favour of the plaintiff respondent. On 8.2.96 the defendant-petitioner filed a motion stating that the Attorney-at-Law had mistakenly taken down the wrong date and moved that the order fixing the case for judgment for 27.2.96 be vacated. This motion was not supported and Court delivered judgment on 27.3.96, in the presence of the Attorney-at-Law for defendant petitioner and the plaintiff-respondent.

There was no appeal lodged against this order. Decree was entered on 27.5.96 and on 19.7.96 the defendant petitioner was ejected from the premises in question.

Thereafter the defendant petitioner had revoked proxy and filed a fresh proxy, and moved court to set aside the judgment delivered on 27.3.96 on the basis that it was an *ex parte* judgment and the decree was not served on the defendant-petitioner.

The learned District Judge made an interim order restraining the plaintiff respondent from causing any damage to the premises and issued Notice on the plaintiff-respondent. After hearing parties court on 8.10.96 dismissed the application holding that District Court was *functus officio* as far as the case is concerned.

The defendant-petitioner sought to revise this order.

Held:

(i) The judgment had been delivered in the presence of the Attorney-at-Law for the parties, the petitioner had not taken any steps to have the said judgment canvassed by way of an appeal. The petitioner had not indicated to court that any special circumstances exist which would invite this court to exercise its powers of

revision, since the petitioner had not availed himself of the right of appeal which was available to him.

(ii) The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the practice of the court which passed the order is *functus officio* and cannot set aside or alter the order however wrong it may appear to be – that can only be done in appeal.

APPLICATION in Revision from the order of the District Court of Colombo.

Cases referred to:

1. *W. Johanis Appuhamy v. Carlincho* – 67 NLR 144
2. *Thaiyalanayaki v. Kulanthaivelu* – 68 NLR 176
3. *Rustom v. Hapangama* – 1978/79 1 SLR 352
4. *Piyaratana Unnanse v. Wahareka Sonnutara Unnanse* 51 NLR 313 at 316

Ikram Mohamed with *Thisath Wijegunawardena* for defendant petitioner.

S. Mahenthiran with *Ms Mithrakrishnan* and *U. A. Mowjood* for plaintiff respondent.

Cur. adv. vult.

December 6, 1996.

GUNASEKERA, J.

This is an application in revision against the order dated 8th October 1996 marked K of the learned Additional District Judge dismissing the application of the defendant petitioner requiring him to hold that the Judgment was an *interpartes* judgment and that the court was not *functus officio*.

The plaintiff-respondent who were Governed by the Theswalami had Instituted Action 8223/RE against the defendant-petitioner by a plaint marked 'A' and sought amongst other reliefs.

(a) the ejectment of the defendant-petitioner her agents, servants, and all others holding under her from premises. No. 82, Jampettah Street, Colombo 13 described in the schedule to the plaint: and

(b) Judgment in a sum of Rs. 55,000/- being damages up to 1.3.94 and for continuing damages at Rs. 10,000/- from 1.3.94 till vacant possession of the premises was delivered to the plaintiff-respondent.

The defendant-respondent filed answer dated 15.6.94 marked 'B' and moved for a dismissal of the plaintiff-petitioner's action and made a claim in reconvention in a sum of Rs. 86,000/-.

The trial commenced on 11.12.95 and was adjourned for 7.2.96. On 7.2.96 the adjourned date of trial the defendant-petitioner was absent and unrepresented and on an application of the counsel for the plaintiff-respondent the plaintiff's case had been closed without further evidence being led and he had moved that judgment be entered on the evidence already led. Judgment was fixed for 27.2.96. On 27.2.96 judgment had been postponed for 27.3.96 on which day it was pronounced in favour of the plaintiff-respondent.

On 8.2.96 the Attorney-at-Law for the defendant-petitioner had filed a motion that he and the defendant were absent on 7.2.96 due to the Attorney at Law mistakenly taking down the further trial date as 8.2.96 and had moved that the order fixing the case for Judgment for 27.2.96 be vacated.

However the said motion has not been supported. Thereafter again on 22.2.1996 the Attorney-at-Law for the defendant-petitioner has filed a motion together with a petition and an affidavit stating that on 11.12.1995 that the Attorney of the defendant-petitioner had mistakenly taken down the next trial date as 8.2.1996. As a result of which the defendant-petitioner or her Attorney-at-Law was unable to be present at the further hearing of the trial on 7.2.1996 and moved that the judgment fixed on 27.2.1996 be not delivered and case be fixed for further trial. The learned District Judge had fixed the application made on behalf of the defendant-petitioner by the said motion and the petition and an affidavit be mentioned on 27.2.1996. When the case was called on 27.2.1996 the defendant-petitioner, her Attorney, or her Attorney-at-Law had not been present and the aforesaid application made on her behalf had not been supported. The case was fixed to be called in Court No. 2 on 5.3.1996. On that

day too the defendant-petitioner or her Attorney had not been present. The learned Additional District Judge had on that day fixed the delivery of the judgment for 27.3.1996. The judgment had been delivered in favour of the plaintiff-respondent on 27.3.1996 in the presence of the Attorney-at-Law for the defendant-petitioner and the plaintiff-respondent. No appeal had been preferred against the said judgment by the defendant-petitioner. Decree had been entered on 27.5.1996 and on 3.7.1996 the Attorney-at-Law for the plaintiff has applied for writ of execution which had been allowed by the learned Additional District Judge. The writ had been executed by the fiscal on 19.7.1996 and the defendant-petitioner and all those under her had been ejected from the premises in suit on 19.7.1996.

After the eviction of the defendant-petitioner and those under her, the defendant-petitioner had revoked the proxy of her Attorney-at-Law and filed a fresh proxy together with a petition and an affidavit dated 23.7.1996 had moved the learned Additional District Judge to set aside his judgment delivered on 27.3.1996 and further moved for a declaration:

(a) that the said judgment was an *ex parte* judgment and not an *interpartes* judgment.

(b) that the writ issued for evicting her from the premises in suit had been issued by mistake as a copy of the decree had not been served on the defendant-petitioner as required by section 85(4) of the Civil Procedure Code.

(c) that the eviction of the defendant-petitioner and all those under her from the premises in suit was unlawful and to restore the defendant-petitioner to possession of the premises in suit and

(d) to restrain the plaintiff-respondent-respondents their servants and agents from committing any damage to the premises in suit or from transferring the said premises to any person or persons till the inquiry into their application was determined.

The aforesaid application was supported before the Additional District Judge on 24.7.1996 without notice to the plaintiff-respondent. The learned Additional District Judge having heard learned Counsel

in support of the application had refused to grant the relief claimed, but however made an interim order restraining the plaintiff-respondent-respondents, their servants and agents from causing any damage to the premises in suit or transferring the premises in suit to any other person and directed that a copy of the petition and an affidavit to be served on the plaintiff-respondent and made an order to call the case on 16.8.1996 after notice to the plaintiff-respondent. On 16.8.1996 the plaintiff-respondent had appeared and had moved to file objections. The objections have been filed on 30.8.1996 and an inquiry into the application had been fixed for 4.9.1996. On 4.9.1996 both parties to the action had agreed to file written submissions and for the learned Additional District Judge to make an order after consideration of the written submissions. After a consideration of the written submissions tendered on behalf of the parties learned Additional District Judge by his order dated 8.10.1996 marked "K" dismissed the application holding that District Court was *functus officio* as far as the case is concerned. Further the learned Additional District Judge had also vacated the interim order made on 24.7.1996 granting interim relief restraining the plaintiff-respondent-respondents, their servants and agents. It is this order of the learned Additional District Judge dated 8.10.1996 that is sought to be impugned in this application.

The petitioner in this application in revision has prayed *inter alia* for the following relief:-

(a) to set aside the order of the learned Additional District Judge dated 8.10.1996 and to make an order that the judgment entered on 27.3.1996 by District Court is an *ex parte* judgment and or the order made to execute the Decree entered in the said case without compliance with section 85(4) of the Civil Procedure Code is *per incuriam.*

(b) to make an order to restore the defendant-petitioner to possession of the land and premises from which he was ejected in execution of the said decree and to grant and issue an interim order restraining the plaintiff-respondent-respondents, their servants and agents from causing damage to the premises in suit and from handing over possession thereof to any 3rd party.

At the hearing of this application learned Counsel for the petitioner contended that when the defendant-petitioner and her Attorney-at-Law were absent on 7.2.1996 the date fixed for further trial that the learned Additional District Judge could not have fixed the case for judgment, and in any event that the judgment delivered on 27.3.1996 should be treated to be an *ex parte* judgment. In support of this contention learned Counsel relied on the cases of *W. Johanis Appuhamy v. Carlincho*[1] and *Thaiyalanayaki v. Kulanthaivelu*[2]. In the first of the cases relied upon by learned Counsel after the plaintiff had closed his case and the defendant called a witness the case had been put off for further hearing. On the adjourned date the defendant and his proctor were absent. It was held "that in the circumstances the only course which the Court could have adopted was to enter decree nisi in favour of the plaintiff in terms of section 85 of the Civil Procedure Code. In such a case the Court cannot give judgment for the plaintiff on the basis that the defendant did not intend to lead any further evidence". The decree of the District Court was set aside and the appeal was allowed. The latter case relied upon too was decided on similar lines. For the purpose of deciding the present application before us I think it is unnecessary for us to consider the correctness or otherwise of the decisions relied upon by learned Counsel for the petitioner.

By this application the petitioner is seeking to have the order dated 8.10.1996 marked "K" set aside. By the said order the learned Additional District Judge having considered the application made by the defendant-petitioner after, a consideration of the written submissions tendered on behalf of the parties in our view quite rightly held in the circumstances set out above in this order that he was *functus officio* and had no power to set aside his own order. It is to be noted as set out above the correctness of the judgment dated 27.3.1996 should have been canvassed by way of an appeal. It is to be noted that the said judgment had been delivered in the presence of the Attorneys-at-Law for the parties. The petitioner has not taken any steps to have the said judgment canvassed by way of an appeal. After the execution of the decree and after the petitioner was ejected from the premises in suit, by her application of 24.7.1996 she has sought to invoke the jurisdiction of the learned Additional District Judge to set aside his own order which the petitioner cannot be permitted to do.

In this application before us the petitioner has failed to set out any reason as to why she did not prefer an appeal against the judgment dated 27.3.1996 and there are no averments to indicate as to why the Extraordinary Jurisdiction by way of Revision should be exercised. In the case of *Rustom v. Hapangama*[3] it was held that "The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise its powers in revision."

The appellant had not indicated to Court that any special circumstances exist which would invite this Court to exercise its powers of revision, particularly since the appellant had not availed himself of the right of appeal which was available to him".

The Privy Council in *Piyaratana Unnanse v. Wahareka Sonnutara Unnanse*[4] observed that "the general rule is clear that once an order is passed an entered or otherwise perfected in accordance with the practice of the court the Court which passed the order is *functus officio* and cannot set aside or alter the order however wrong it may appear to be that can only be done in appeal".

It is clear from the papers filed in these proceedings that the application made by the defendant-petitioners on 24.7.1996 to the learned Additional District Judge was to set aside his own judgment delivered on 27.3.1996 when he was *functus officio* and the learned District Judge in our view was right in refusing the said application. Thus we see no error in the order which is sought to be impugned in this application and for the reasons stated we refuse to issue notice and the application in revision is dismissed with costs in a sum of Rs. 2500/- payable by defendant petitioner to the plaintiff-respondent-respondents.

ISMAIL, J. – I agree.

Notice refused.