IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Appeal No. 28/2013

In the matter of an application for Leave to Appeal under Section 5C (i) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as Amended by Act No. 54 of 2006

Ambudeniyage Dona Leelawathie
No. 132/22, Ramya Place,
Matarahenwatta, Weliweriya.

PLAINTIFF

Vs.

Karuna Aratchige Ranjith Ariyaratne
No. 09, Lamp Light Way
Atwood – 3049, Victoria,
Australia.

DEFENDANT

AND

Karuna Aratchige Ariyaratne
17, Quarry Road,
Mirihana, Nugegoda.

SUBSTITUTED-PLAINTIFF-PETITIONER

Vs.

Karuna Aratchige Ranjith Ariyaratne
No. 09, Lamp Light Way
Atwood – 3049, Victoria,
Australia.

DEFENDANT

AND

Karuna Aratchige Ariyaratne
No. 17, Quarry Road,
Mirihana, Nugegoda.

SUBSTITUTED-PLAINTIFF-PETITIONER-PETITIONER

Vs.

Karuna Aratchige Ranjith Ariyaratne
No. 09, Lamp Light Way
Atwood – 3049, Victoria,
Australia.

DEFENDAN-RESPONDENT

AND NOW BETWEEN

Karuna Aratchige Ariyaratne
17, Quarry Road,
Mirihana, Nugegoda.

SUBSTITUTED-PLAINTIFF-PETITIONER-PETITIONER-PETITIONER-APPELLANT

Vs.

Karuna Aratchige Ranjith Ariyaratne
No. 09, Lamp Light Way
Atwood – 3049, Victoria,
Australia.

DEFENDANT-RESPONDENT-RESPONDENT RESPONDENT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Upaly Abeyrathne J. and
Anil Gooneratne J

COUNSEL: Ranjan Gooneratne for the Substituted-Plaintiff-Petitioner-Petitioner-Petitioner-Appellant

P. L. Gunawardena with K.W.E. Karaliadda for the Defendant-Respondent-Respondent-Respondent-Respondent

WRITTEN SUBMISSIONS OF THE APPELLANT FILED ON:

15.03.2013

WRITTEN SUBMISSIONS OF THE DEFENDANT-RESPONDENT-RESPONDENT FILED ON:

12.08.2013

ARGUED ON: 07.08.2015

DECIDED ON: 14.01.2016

GOONERATNE J.

This was an action to revoke a deed of gift on grounds of gross ingratitude. The deceased plaintiff, the mother (Donor) of the Defendant died after she gave evidence and even after the deceased's husband who was a witness gave evidence and concluded his examination in chief, before the original court. Thereafter the learned District Judge of Nugegoda dismissed the action on the basis that an action to revoke a deed of gift is an action in personam and it abates with the death of the original Plaintiff. On appeal, the Civil Appellate High Court affirmed the judgment of the learned District Judge and dismissed the leave to appeal application made to the Civil Appellate High Court by its order dated 22.08.2012.

The only short point that is involved in this appeal is whether the Petitioner has the right to be Substituted in place of the Deceased-Plaintiff to continue and prosecute the action. Petitioner is the husband of the deceased Plaintiff and heir of the deceased. The stage of litis contestatio being reached, does the cause of action survive? This court on 07.02.2013 granted leave on the question of law set out in paragraphs 12(a), (b), (c), (d) & (e) of the petition dated 18.06.2012. The questions of law as contained in para 12 reads thus:

(a) Is an action for revocation of a deed on the grounds of gross ingratitude, a personal action,

(b) if so

(i) does the action abate with the death of the original plaintiff,

(ii) has the Petitioner, the husband of the deceased Plaintiff, a legal right to be substituted in place of the deceased plaintiff, to prosecute the action.

(c) In terms of the deed marked X1, on the death Leelawathie, the donor does the heirs of the donor step into the shoes of the original donor.

(d) Is the petitioner, the husband of the deceased plaintiff a heir of the deceased.

(e) If so has the petitioner the right to be substituted in place of the deceased plaintiff, to prosecute this action.

The question posed no doubt appears to be not so complex. The provisions contained in the Civil Procedure Code, viz. Section 392, 395 & 398 and provisions on incidental proceedings Part III – Chapter XXV may provide a suitable answer, but the background to the law has a historical approach which surface from the point as to whether the cause of action survived. As such I would prefer to initially approach its origin having resorted to various views and principles which emerge from Roman Dutch Law and English Law. One should also not lose sight of the fact that both the above legal systems have some aspects borrowed from

Roman Law. English and Dutch Law on succession to actions would have some bearing to the case in hand.

The CAPE LAW JOURNAL pgs. 246 – 253 "English & Dutch Law on succession to actions – A contrast", provides some useful material to open the subject at pgs. 245 – 246.

ACTIONS OF CONTRACTS

……..

With regard to actions founded on contract, the English and Roman Dutch Law do not materially differ. The rule in both systems is that the action survives the death of either party. The representatives of a deceased person may proceed with the exercise of a right of action that has accrued to the deceased during his life-time, while they are subject to any liability to action that the deceased has incurred. The only exceptions to this rule in English Law are in the case of actions for breach of promise of marriage, and probably of actions for damages to the person caused by negligent performance of a contract; such, for example, as injury through careless performance of a medical operation. (Pollock on Torts, pp. 54 and 503) the latter species of action partaking of the nature of actions in tort. In Roman Dutch – Law I cannot find any exceptions specified. Van Leeuwen and Van der Linden, amongst other writers, lay down the rule as absolute; Grotius (Introduction III. ch. 1 S. 44) except cases "where the laws have expressly provided otherwise". Perhaps he

refers to such a case as that of partnership, where the death of a partner puts an end to the partnership. …….. Pgs. 245, 246

ACTION OF TORT. ENGLISH LAW

It has been suggested that *personalis* is a misreading of *poenalis*, and that the maxim is thus descended from the rule of Roman Law that the death of a party extinguished an action to recover a penalty (vide Cherry's Growth of Criminal Law in Ancient Communities, p. 64). To me it seems not improbable that the origin of the maxim was a false analogy between the physical world and that of legal ideas. But, whatever its origin, the maxim has been incorporated into English Law jurisprudence; and its consequences are far-reaching. In accordance therewith, it is held that the death of either party to an action founded on tort extinguishes the action. It makes no difference whether the deceased is plaintiff or defendant, whether the action has actually commended or is still potential. ……. Pg. 246

On the other hand the maxim, so far as property was concerned, was limited by the rule that where specific property had been wrongfully appropriated by the person who subsequently died, such property, or its proceeds or value, could be recovered against the estate of the deceased; the action in this case being

regarded as one to recover property, and not personal to the wrong-doer. But this principle was not extended so far as to allow the recovery of damages for wrongful

acts by which the deceased's estate was benefited otherwise than by the addition to it of specific property (Pollock on Torts, 2nd ed., p. 65). Pg. 247

To sum up the English Law as to to the effect on a right of action for tort of the death of either of the parties – the Common Law rule is that such right is thereby extinguished; by judicial decisions an action to recover specific property had been excepted from this rule; by legislation further exceptions have been made in case of injuries to the real or personal estate, and, subject to certain peculiar conditions, in the case of actions brought on account of bodily injuries resulting in death. The death of either of the parties still extinguishes an action for defamation of character, and for willful injury to the person; and it would seem the death of the defendant has the same effect in all cases of bodily injury. Pg. 248

Actions of Tort. Roman Dutch Law

…….

The general rule of Roman Law, was that rights of and liabilities to actions were inherited; the death of a party did not extinguish an action. To this rule one exception is mentioned, in the case of actions *ex contractu, viz*: those founded on the fraud of a deceased person, where the heir (the defendant) has derived no benefit from such fraud, an exception not recognized in Roman-Dutch Law (Groenewegen de Leg. Abr., C. 4, 17). In the case of actions of tort, there was a large class of exceptions to the general rule; but such exceptions were subject to the very practical limitation that the action in every case continued, if the death of the party occurred after the *litis contestatio*. Pg. 248

…….

In the case of *injuria*, the international and illegal infliction of pain, bodily or mental, the death of either party extinguished the right of action. The Roman Law, as regards this class of action, thus corresponded with the English as regards torts generally except that in Roman Law the action continued if the death had occurred *post litis contestationem*. It is easy to understand why the death of the defendant extinguished the right of action for *injuria*, such action being really the archaic substitute for a criminal prosecution. It is not, however, so intelligible on what ground the death of the plaintiff released the defendant from the consequence of his evil doing. …… Pg. 249

Coming now to the Roma-Dutch Law, we find that actions for torts were not extinguished by the death of either party, but like contractual obligations formed part of the inheritance. This rule is very distinctly laid down by Voet (Pandects 47, 1, 3), Vinnius (In Instit. 4, 12) and Groenewegen (De Leg, Abr, C. 1. 4, t. 18), and as we shall afterwards see is not subject to the large class of exceptions that existed in Roman Law. …… Pg. 250

The word 'injury' was used in a narrower sense in Dutch than in English law and corresponds to the Latin term "Injuria". It refers to wrongs against the person, property or honour of another, in which there is an element of insult *(contumelia)*; and includes such torts as malicious arrest, seduction, slander, libel. The rule as regards actions for such wrongs was that the death of either party extinguished the action, except when the death took place *post litem contestatam* (Voet's Pandects

47, 10,22) As pointed out by Vinnius (In Instit. 4, 12), the action for injury was the only one of the private penal actions of the Roman Law that had survived to his time; and the old rule has survived with it. It is however an open question whether under Dutch Law as administered in South Africa the death of a party would extinguish an action for injury in every case. Where the injury has caused special damage, as in the case of the loss of a

situation through libel or slander, it would be quite in accordance with the principles laid down by the Dutch jurists to allow the action to survive the death of one or other of the parties. …….. Pg. 251

I shall conclude by summing up the points of contrast between English and Dutch Law, on the subject of succession to actions of tort:

The rule of English law was that the death of either party extinguished such actions; but exceptions were made by statute in the case of injuries to real and personal property; and in the case of death through negligence, an action was granted for the benefit of the family of the deceased. In Dutch Law, the rule was that the action survived the death of either party. The exceptions were, (1) as regards actions for injury involving insult, in which case the death of either party extinguished the action unless it occurred *post item contestatam*, (2) as regards actions for willful or negligent killing, in which case the estate of the deceased had only a limited right of action, but the relatives of the deceased were entitled to an

action for compensation for their material loss. In other words we may say that the Dutch Law began at the stage at which the English Law has finally arrived.

Pg. 253

I observe that rules suggested and discussed above may not apply uniformly to every case but would depend on facts and circumstances of each case but there is some certainty or certainty could be fathomed in cases of slander/libel and defamation which fall into the category of personal actions and cause of actions cannot survive on the demise of either party. A variety of actions and subjects need to be considered and even in the law of contracts certain limitations are placed depending on the subject matter. I refer to the following extract from the law of contracts – Prof. C. G. Weeramantry.

Vol. II Pgs. 916 & Section 916

> In certain limited classes of contracts death brings about a termination of contractual rights and obligations by operation of law. These are contracts involving rights or duties of a purely personal character, and in these cases death operates as a mode of involuntary assignment of rights and obligations. In all other cases, all contractual rights and duties pass upon death to the representatives of a deceased person, and the obligation is therefore not extinguished, but survives in favour of or against the representative of the estate of the deceased. Examples of contracts of a purely personal nature are those dependent upon personal knowledge, skill or capacity or involving personal services. Even in these latter cases although the contract dies with the deceased, recovery would be permitted by or on behalf of the estate of all such amounts as were due to or from the deceased at the date of his death. …….

Other types of contract that are determined by death are contracts of agency and contracts of partnership. In the former case death of either principal or agent automatically brings about this result unless the contract specially provides that the personal representative of either may continue the relationship. In the latter case the partnership comes to an end both under Roman-Dutch and under English Law. This result followed whether the partnership be for a fixed term or not.

Two other categories of contract must also be observed in this connection, namely, promises of marriage and death or personal suffering resulting from breach of contract. In the case of breach of promise, if the defaulter dies while in default, damages for breach of promise can be claimed from his estate to the extent of the plaintiff's actual pecuniary loss and not more ……..

In regard to liabilities, the representative of the deceased becomes liable as such in respect of all contractual claims which may have been made against the deceased up to the moment of his death irrespective of whether the breach occurred before or after death. Liability is of course confined only to the extent of assets of the estate. In Ceylon the property of a deceased person whether testate or intestate vests immediately on death in his heirs, subject to the payment of just debts, to the extent of which the personal representative as such has a claim upon the property.

I will now consider the facts. The donor died after she gave evidence and even after the next witness for the Plaintiff gave evidence. (this position already stated). Donor Plaintiff, filed action in the District Court of Nugegoda on a deed of gift to have it revoked on grounds of ingratitude of her son, to whom she gifted the property in question by a deed of gift (XI). The deed of gift expressly

state, donor “shall where the context so requires means and include the said E. Don. Leelawathie her heirs executions and administrators”. However action for revocation of a gift is of personal nature and issue remains whether the cause of action survives on death of Plaintiff. Ordinarily on the death of a person his estate in the absence of a will passes at once by operation of law to the heirs. Per Grenier A.J. Silva Vs Silva 10 NLR 242. If there was no action filed for revocation of the deed, the donee (Defendant) would have title to the property and even on his death, property will vest in his heirs and would pass to the estate of the donee depending whether the property was alienated during the life time of the deceased donee or not.

The issue to be resolved also involves a procedural aspect. Chapter XXIII Part III of the Civil Procedure Code refer to continuation of actions after alteration of a party’s status.

Section 392 reads thus:

> The death of a plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives.

Section 395 of the Code reads thus:

> In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action.

The continuation of an action where other party dies depends on the question whether the right to sue on the cause of action survives. In the case of death of sole Plaintiff the legal representative of the deceased may apply to court to have his name entered in place of deceased to continue the action, provided the right to sue survives. In any event the right to sue need to survive as stated above, and as discussed by eminent jurists. As per Section 392, right to sue on the cause of action should survive for the legal representative to proceed and take part in an interpartes trial.

The case in hand being a case of revocation of a gift (the case proceeded well pass the close of pleadings and leading of evidence of Plaintiff the donor to a close) for ingratitude is of a personal nature alleged between donor and donee. Subject matter of the donation is immovable property. Case in the original court had proceeded a long way with donor's (Plaintiff) evidence being led and that of a witness (husband – Petitioner). No doubt the stage of litis contestatio had reached, at the point and time of death of the Plaintiff. Litis Contestatio in a partition case is marked by the filing of the contesting Defendants answer 16 NLR at 82. Samarawickrema J. in Vangadasalam Vs. Karuppiah 79 (2) NLR 150 SC, held that a personal action dies with the Plaintiff unless the stage of litis contestatio had been reached. This takes place with joinder of issues or close of pleadings.

In *Stella Perera and others Vs. Margret Silva 2002(1) SLR 169 at 175...*

> Admittedly, the 1st defendant died pending the appeal in the Court of Appeal. However, by that time he had a judgment in his favour in respect of his claim to have the donation to his wife revoked and for possession. The stage of litis contestatio having been reached, the first defendant's action did not die with him. The maxim "action personalis moritur cum persona" had no application. Cf. Fernando v. Livera; Dheerananda Thero v. Ratnasara Thero; Krishnaswamy Vengadasalam v. Adika pundagan Karuppam.

Jayasuriya Vs. Samaranayake 1982(2) SLR 460 is another case (Court of Appeal) that considered the position of a death of Plaintiff before litis contestatio in an action in personam. Facts of that case are as follows:

Pgs. 460, 461 & 462 …

> One A.P. Jayasuriya gifted on 16.3.75 a half share of premises No. 25 and 25B Wijerama Mawatha, Colombo 7 to his daughter the respondent.
>
> In this action the said A.P. Jayasuriya sought to revoke this deed alleging several acts of gross ingratitude on the part of his daughter the done.
>
> The Plaint was accepted by Court on 1.8.80 and summons was ordered to be issued, requiring the donee to appear on 24.9.80. Summons was in fact issued on 2.9.80 returnable on 17.9.80
>
> On 17.9.80 it was brought to the notice of Court that the plaintiff the said A.P. Jayasuriya had died on 29.8.80. the widow, his heir, the appellant sought to be substituted as plaintiff.

Held –

That the action for revocation of a deed of gift on the grounds of gross ingratitude was an action in personam and did not survive the plaintiff.

At pg. 462…

…….. After inquiry the learned District Judge upheld both objections and refused the appellant's application for substitution. On the first objection he held that the action was an action in personam , that summons had not been served on the respondent at the time of the plaintiff's death, that as such the action had not, at the time of the plaintiff's death, reached the stage of litis contestatio and that therefore the right to sue on the cause of action did not survive to the appellant. It is this finding of the learned Judge that has been sought to be challenged in this appeal – Appeal was dismissed.

The learned District Judge of Nugegoda in the case in hand held that the cause of action would cease with the death of the Plaintiff. On appeal to the High Court of Civil Appeal the learned High Court Judges affirmed the order of the learned District Judge and dismissed the appeal. It was the position of the High Court Judges that on the death of the Plaintiff the cause of action also becomes devoid of potentiality of prosecution. The learned High Court Judge relies on the Judgment of Dheerananda Thero Vs. Ratnasara Thero 60 NLR 7 and another case No. CA 578/82F unreported.

We also had the benefit of considering a recent case namely Mahawewa and another Vs. Mahawewa. Judgment of Thilakawardena J. with

Marsoof J. & Sripavan J. (as he then was) agreeing. It has referred to almost every case referred to in this judgment including of the judgment cited by the learned High Court Judge.

In the above Mahawewa case it was held:

(a) in terms of Section 398(1)(a) of the Civil Procedure Code, in the event of the death of a sole Defendant, an application can be made for substitution of the legal representatives of the Deceased Defendant, on the condition that the right to sue survives.

(b) the practical effect of Section 392 of the Civil Procedure Code is that the death of either the Plaintiff or the Defendant would cause the action to abate if the cause of action does not survive.

(c) donation and the revocation of gifts in Sri Lanka is governed by Roman Dutch Law, under which a gift once donated, can be revoked on grounds of gross ingratitude by the donee to the donor.

(d) the maxim 'personalis moritur cum persona' cannot be uniformly applied to each and every action which qualifies as personal in nature and whether or not the maxim applies must be determined on the fact and circumstances of the instant case.

(e) an action becomes litigious if it were 'in rem' as soon as the summons containing the cause of action is served on the defendants; if it was 'personam' on reaching of the stage of 'litis contestation'.

(f) if at the time of the original defendant's death the trial had commenced the stage of 'litis contestatio' had been reached at the time of that death.

The case in hand no doubt had reached the stage of litis contestatio. Accordingly this being an action in the nature of action in personam would survive

as the stage of litis contestatio being reached. What is underline to a case of this nature though the case is on revocation of gift, is a property gifted to the donee. The donee with the execution of a deed of gift of property in his favour, certainly acquires certain rights to the property, although a gift could be revoked on grounds of ingratitude, which is a concept that flow from Roman Dutch law. Very many actions in personam like defamation, medical negligence (subject to certain limitations) slander. Libel, and such other actions like partnership, contracts given to artists or even a contract of agency (unless provided otherwise by contract) would be determined by death. My views are fortified as I gather more support from the case of Mahawewa and others Vs. Mahawewa. The dicta from that case, which I wish to follow could be summarised as follows;

> The maxim 'personalis moritur cum persona' cannot be uniformly applied to each and every action which qualifies as personal in nature and whether or not the maxim applies must be determined on the fact and circumstances of the instant case.

Therefore I set aside both orders of the District Court, Nugegoda and the order of the learned High Court Judge. The questions of law as stated above in para 12 of the petition are answered as follows;

(a) Yes, a personal action

(b) (i) If the cause of action does not survive, action would abate,

but not in the case in hand

(ii) petitioner has a right to be substituted

(c) yes

(d) Yes

(e) Yes

We set aside both order of the District Court and the High Court, and direct the learned District Judge to substitute the Petitioner in the room of the deceased Plaintiff and proceed with the trial by adopting the evidence. Appeal allowed as above with costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare PC., J.

I agree

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree

JUDGE OF THE SUPREME COURT