

JAYASURIYA
v.
SAMARANAYAKE

COURT OF APPEAL

ATUKORALE, J., AND H.A.G. DE SILVA, J.

C.A. No. 66/81 (F) - D.C. COLOMBO No. 1901/SPL

JUNE 6, 1982.

*Gift - Revocation - Gross ingratitude - Death of plaintiff before litis contestatio
- Action in personam - Right of heir to be substituted as plaintiff.*

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 donee.

The Plaintiff 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.

APPEAL from order of the District Court of Colombo.

Hermán J.C. Perera for the appellant.

H.L. de Silva, S.A. with *Gomin Dayasiri* for the respondent

Cur. adv. vult

June 9, 1982.

ATUKORALE, J.

The original plaintiff (A.P. Jayasuriya) instituted this action on 1.8.1980 in the District Court of Colombo against the present respondent, his adopted daughter, to have the deed of gift bearing No. 3789 dated 16.3.1975 executed by him in her favour set aside. Upon this deed he gifted to her a half share of premises No. 25A and 25B, Wijerama Mawata, Colombo 7 subject to his life interest. The cause of action pleaded in the plaint was that the respondent has since the execution of the gift, committed several acts of gross ingratitude towards him (the donor) which entitled him to obtain a revocation of the gift. In the prayer to the plaint, the original plaintiff prayed for judgment revoking the said deed of gift. No relief regarding possession of the gifted premises was asked for in the plaint. The plaint was accepted by court on 1.8.1980 on which date summons was ordered to be issued on the respondent requiring her to appear in court on 24.9.1980. The summons was, however, in fact issued from court on 2.9.1980 made returnable on 17.9.1980. On 17.9.1980 it was brought to the notice of court by the plaintiff's attorney that the plaintiff was dead. Admittedly the plaintiff had died on 29.8.1980 even before summons had issued from court. On 25.9.1980 the respondent's proxy was filed in court. Thereafter on 14.11.1980 an application to have the present appellant substituted in place of the deceased plaintiff was filed in court. In her application the appellant averred that the deceased plaintiff died on 29.8.1980 leaving an estate which required no administration and as his heir his widow, the

appellant, and she prayed that she be substituted in his place as legal representative under s.393 of the Civil Procedure Code. The respondent objected to this application on two grounds, namely (i) that the plaintiff died before summons was served on her and the right to sue for the revocation of the deed of gift on the ground of gross ingratitude being a right that was personal to the plaintiff, the right did not survive on the plaintiff's death; and (ii) that in any event the plaintiff died leaving an estate of administrable value and as such the appellant, not being the executor or administrator, was not a legal representative within the meaning of s.394(2) and was not entitled to be substituted. 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.

Learned counsel for the appellant conceded before us that at the time of the plaintiff's death the stage of *litis contestatio* had not been reached in the action. Nor did he seriously challenge that the action was an action in personam and that ordinarily on the principle that a personal action dies with the death of the plaintiff, the right to sue on the cause of action would not survive. But he contended that the instant action though in its nature a personal action acquired the character of an action in rem the moment it was instituted in court. In support of this contention he relied on the following passage from Maasdorp's *Institutes of South African Law*, Vol. 111 *Law of Obligations* - (7th Edition): p 60:

"The right to claim revocation belongs to the donor alone and does not pass to his estate: so much so that the donation is not liable to be revoked even though the donee may have killed the donor, unless the donor has, between the receipt of the mortal injury and his death, expressed his intention to revoke."

Relying on this passage learned counsel for the appellant submitted that in the instant case the donor (the plaintiff) has by instituting this action during his lifetime clearly indicated his intention to revoke the gift and as such the right to sue on the cause of action passes on his death to his estate and thus the appellant as the widow is entitled to be substituted in place of the deceased donor.

I do not think that the above passage supports the contention of learned counsel for the appellant. It seems to me that what the passage means is that the right to claim a revocation vests in the donor alone and does not pass on his death to his estate. But where the donee causes the death of the donor, the right of revocation would pass to the estate only if the donor has between the receipt of the fatal injury and his death expressed his intention to revoke the gift. Thus, in my view, according to this passage the right of revocation of a deed of gift will not pass to the estate of the donor on his death, irrespective of the manner of his death. But if he dies at the hands of the donee the right will pass to his estate provided that during the said period he expressed his intention of revoking the gift. The above passage therefore has, in my opinion, no application to the instant case where the ground on which the donor has sought to revoke the gift is gross ingratitude. The contention of learned counsel for the appellant fails and accordingly the appeal is dismissed with costs.

H.A.G. DE SILVA, J. – I agree.

Appeal dismissed