

**MAHAWEWA AND ANOTHER V.  
HEMACHANDRA MAHAWEWA**

SUPREME COURT

SHIRANEE TILAKAWARDANE, J.,

MARSOOF, P.C. J., AND

SRIPAVAN, J.

S.C. APPEAL NO. 64/2008

S.C. (H.C.) C.A.L.A. NO. 25/2008

WP/HCCA/COL/131/2007 (LA)

D.C. MOUNT LAVINIA NO. 349/98/SPL

NOVEMBER 23<sup>RD</sup>, 2009

DECEMBER 18<sup>TH</sup>, 2009

*Civil Procedure Code – Section 392 – On the death of a party action does not abate if right to sue survives – Section 398(1) – Substitution of legal representative in place of deceased defendant – Personalis moritur cum persona – Litis Contestatio?*

The Supreme Court granted Special Leave to Appeal on the question of law, whether an action to revoke a deed of gift based on gross ingratitude would survive, upon the death of the original Defendant (donee) before the conclusion of the case.

In the instant case, at the time of the original Defendant's death, the trial had commenced and the Respondent had completed his evidence and closed his case. The deceased Defendant had also commenced his case but died prior to the conclusion of the cross examination of his case. Unmistakably, the stage of *Litis Contestatio* had been reached at the time Defendant's death.

**Held**

- (1) 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 facts and circumstances of the case.

- (2) The Plaintiff-Respondent-Respondent-Respondent should be permitted to continue the action for revocation of gift against the Defendant-Petitioner-Petitioner-Petitioners after due substitution.

**Held further:**

- (3) Per Shiranee Tilakawardane, J.,

“It was also incumbent upon the Trial Court to rule on the question of patent jurisdiction that was raised, instead of informing parties that it would be decided later when it was taken up at the hearing.”

**Cases referred to:**

1. *Jayasuriya v. Samaranayake* – 1982 (2) Sri L.R. 460
2. *Deeranada Thero v. Ratnasara Thero* – 60 N.L.R. 7
3. *A.G. v. Satarasinghe* – 2002 (2) Sri L.R. 113
4. *Stella Perera and others v. Margret Silva* – 2002 (1) Sri L.R. 169
5. *Muheeth v. Nadarajapillai* – 19 N.L.R. 461
6. *Vangadasalam and another v. Karuppaiah and another* – 79 (2) 150 (SC)

**APPEAL** from the decision of the Provincial High Court of Civil Appeal, Western Province

*Dr. Jayatissa de Costa* with *Amitha Rajapakse* for Defendant-Petitioner-Petitioner-Petitioners

*Ranjan Suwandarathne* with *Anil Rajakaruna* for the Plaintiff-Respondent-Respondent-Respondent.

*Cur.adv.vult.*

May 6<sup>th</sup> 2010

**SHIRANEE TILAKAWARDANE, J.**

An application for Special Leave was preferred by the Defendant-Petitioner-Petitioners-Petitioners (hereinafter referred to as the Petitioners) against the decision of the Provincial High Court of Civil Appeal of the Western Province

dated 13.02.2008. This Court granted Special Leave to Appeal on 25.07.2008 on the question of law set out in paragraph 12 (c) of the Petition, namely, whether the action to revoke a deed of gift based on gross ingratitude would survive, upon the death of the original defendant (donee) before the conclusion of the case.

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) instituted action bearing No. 349/98/SPL, in the District Court of Mount Lavinia, against the deceased Defendant praying, inter alia, that the Deed of Gift bearing No. 1909 dated 07.08.1992, made by the Respondent to the deceased Defendant be canceled, on the ground of alleged gross ingratitude by the Defendant. The deceased Defendant by his answer dated 08.03.1999, denied this claim, and moved for the dismissal of the Respondent's action.

At the trial, upon conclusion of the Respondent's case, the deceased Defendant commenced his case. However, the Defendant died on 31.01.2005, prior to the conclusion of the cross examination of his case. Thereafter, the Respondent sought to substitute the Petitioners-who are the widow and son of the deceased Defendant- by an application in terms of Section 398 of the Civil Procedure Code.

The Petitioners objected to the application for substitution on the ground that the cause of action for the case, which was based on gross ingratitude of the deceased Defendant, ceased to operate upon the death of the original Defendant. Having heard both parties, the learned Judge by order dated 29.11.2005 allowed the application for substitution, leaving the question of maintainability of the action upon the death

of the original Defendant, to be taken up in the course of the trial.

Subsequently, at trial the Petitioner raised objections to the maintainability of the action following the death of the original Defendant. By his decision dated 17.08.2007 the District Judge of Mount Lavinia rejected the objections raised by the Petitioners. Aggrieved by this decision, the Petitioners appealed to the Provincial High Court of Civil Appeal of the Western Province. The High Court dismissed the appeal by its judgment dated 13.02.2008 from which the Petitioner preferred the present application to this Court.

The only question of law to be determined in this case is whether, in an action to revoke a deed of gift based on gross ingratitude, the cause of action survives upon the death of the original Defendant, against the Petitioners.

*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.*

Moreover section 392 of the Civil Procedure Code provides that:

*“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.” The practical effect of Section 392 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.*

The law on donation and the revocation of gifts is Sri Lanka is governed by Roman Dutch Law, under which

a gift once donated, can be revoked on ground of gross ingratitude by the donee to the donor. The donor may initiate court proceedings to cancel the gift so donated. However, given that an action for revocation of gift based on ingratitude is of a personal nature, the issue remains as to whether the cause of action in such a case would survive the death of either party to the case.

Atukorale J. in *Jayasuriya v. Samaranayake*<sup>(1)</sup>, answered this question in the negative in so far as the Plaintiff donor was concerned. In this case, the original Plaintiff instituted action against the Respondent to revoke the deed of Gift executed by him in her favour on the ground of gross ingratitude towards him. However, the Plaintiff died prior to summons being issued on the case. Thereafter the Appellant, his widow, sought to be substituted in place of the original Plaintiff as his legal representative under Section 395 of the Civil Procedure Code. In this instance, Atukorale J. held that the right to claim revocation on grounds of gross ingratitude will not pass to the estate of the donor.

In light of *Jayasuriya v. Samaranayake* it is clear that in so far as the Plaintiff is concerned the cause of action would cease to exist, if the Plaintiff dies prior to the conclusion of the case. This principle is embodied in the maxim *personalis moritur cum persona*.

Counsel for the Petitioner has sought to rely on the principle as it was considered in *Deeranada Thero v. Ratnasara Thero*<sup>(2)</sup>. In this case, the Plaintiff-Respondent instituted action against the Defendant, Piyaratane Thero, alleging that the Defendant was unlawfully disputing his right to the incumbency of the temple, was disobedient and disrespectful towards the Plaintiff and obstructed him in

the lawful exercise of his rights an incumbent. The Plaintiff prayed that he be declared the incumbent and also that the defendant and his agents be ejected from the temple. The original Defendant having died before the trial could be resumed, the Plaintiff sought to substitute his successor for the purpose of prosecution. While the District Judge allowed the substitution and ejected the Defendant, the Appeal Court held that the original action was personal in nature and invalidated the substitution. The Court found that since the Plaintiff was alleging disobedience and disrespect to him by the conduct of the Defendant the question of ejecting the Defendant was merely incidental to the action.

The decision in *Deeranada Thero v. Ratnasara Thero (supra)* does not by itself support the contention that the cause of action in the instant case ceases to exist with the death of the original Defendant based on the ground that action is personal in nature. The *Deeranada Thero (supra)* Case is distinguishable on facts in issue, in that unlike in the instant case, the *Deeranada Thero Case* did not involve the revocation of a gift based on ingratitude. Rather, in *Deeranada Thero* the case turned mainly on the allegation of disobedience and disrespect leveled against the deceased Defendant. The issue of property and ejectment as pronounced in the judgment itself was only a collateral concern. Moreover, the action did not involve any issue relating to the inheritance of property. The instant case focuses clearly on the property gifted by the Plaintiff and the inheritance rights of the heirs of the deceased Defendant. The intention of the donor to revoke the gift of property on grounds of ingratitude remains of parallel importance.

Cases of slander and libel have also been cited by the Petitioner in order to highlight the relevancy of the maxim

*personalis moritur cum persona* in relation to the instant case. Undoubtedly, these cases fall into the category of personal action and therefore the cause of action would not survive with the death of either the plaintiff or defendant in such a case (Vide, *AG v. Satarasinghe*<sup>(3)</sup>). However, the maxim 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.

The Counsel for the Petitioner also cited *Perezius on Donations* (E. B. Wickramanayake translation - 1933 at page 35 and 36) to the effect that in a case where the Donor has been silent and made no complaint of the ingratitude exhibited, then his heirs and successors are not entitled after his death to sue because this is a personal action and "is prosecuted more for the sake of retribution, punishment than money; and the inquiry seems to have abated by negligence since the man, while alive, made no complaint about and injury already committed. Wherefore it follows that just as the heir is not entitled to an action for ingratitude so it is not granted against the heir of the donee."

If the purpose of an action for the revocation of gifts based on ingratitude is to seek retribution and punishment, then one must consider whether such purpose would be served by denying continuation of action in cases where the Plaintiff has complained about the alleged ingratitude. In the instant case, if the cause of action is said to have died with the death of the original Defendant, the Petitioners will be enriched to the detriment of the Respondent. The donated property runs parallel to the personal nature of this action due to the fact that such property forms part of the deceased Defendant's

estate the benefit of which accrues to his heirs. In other words, the petitioners would be unjustly enriched in the circumstances where retaining such property is not supported by adequate cause. Therefore in order to prevent unjust enrichment it is proper to substitute the Petitioners in place of the deceased Defendant in order to continue the action instituted by the Respondent for the revocation of the gift.

In support of this conclusion, the Respondent also submits that at the time of death of the deceased Defendant, the stage of *litis contestatio* had been reached and therefore, the Petitioners cannot argue against the continuation of the case by the Respondent following the death of the original Defendant. The Respondent has cited several authorities in support of this submission.

In *Stella Perera and others v. Margret Silva*<sup>(4)</sup> the first Defendant died pending the appeal in the Court of Appeal. However by that time he had a judgment in his favor in respect of his claim to have the donation to his wife revoked. Amerasinghe J. held that the stage of *Litis Contestio* having been reached, the first defendant's action did not die with him and therefore, the *maxim actio personalis moritur cum persona* did not apply. Wood Renton J in *Muheeth v. Nadarajapillai*<sup>(5)</sup> observed that 'An action become litigious, if it were in rem, as soon as the summons containing the cause of action was served on the defendants; if it was in personam on *litis contestio*, which appears to synchronize with the joinder of issues or the close of the proceedings". Again in *Vangadasalam and another v. Karuppaiah and another*<sup>(6)</sup>, Samarawickrama J. observed that a personal action dies with the plaintiff unless the stage of *Litis Contestio* has been reached.



In the instant case, at the time of the original Defendant's death the trial had commenced and the Respondent had completed his evidence and closed the case for the Plaintiff, and even the deceased Defendant had commenced his case. Clearly, the stage of *Litis Contestitio* had been reached at the time of the deceased Defendant's death.

Accordingly the Respondent should be permitted to continue the action for revocation of the gift against the Petitioners, after substitution. It must also be observed however that the reasoning given in the Judgment of the High Court of Civil Appeal in the Western Province appears to contradict the final order made therein. It was also incumbent upon the Trial Court to rule on the question of patent jurisdiction that was raised, instead of informing parties that it would be decided later when it was taken up at the hearing.

The appeal is accordingly dismissed. No Costs.

**MARSOOF, J.** – I agree.

**SRIPAVAN, J** – I agree.

*Appeal dismissed.*