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

S.C. Appeal 112/2015
S.C (HC)C.A.L.A. No. 398/2014
WP/HCCA/AV/REV: 212/11
D.C. Homagama Case No. 211/Claim

In the matter of an application for Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Sec 5C of High Court of the Provinces (Special Provisions)(Amendment) Act. No.54 of 2006.

Dissanayake Hitihamy Mudiyanselage
Sarath Kumara Dissanayake
455, Belagama Road,
Kelanimulla, Angoda.

CLAIMANT

Vs.

Kanthi Wimala Ratnayake **(DECEASED)**
62, Kothalawala,
Kaduwela.

JUDGMENT CREDITOR

And Between

Dissanayake Hitihamy Mudiyanselage
Sarath Kumara Dissanayake
455, Belagama Road,
Kelanimulla, Angoda.

CLAIMANT-PETITIONER-APPELLANT

Vs.

Kanthi Wimala Ratnayake **(DECEASED)**
62, Kothalawala,
Kaduwela.

JUDGMENT-CREDITOR-RESPONDENT

Malin Nivantha Kumarage
17/C/07, Kothalawala,
Kaduwela

SUBSTITUTED-JUDGMENT-CREDITOR-RESPONDENT

Malin Nivantha Kumarage
No. 174/C/7, Suhada Mawatha,
Kothalawala,
Kaduwela

New address

And now between

Dissanayake Hitihamy Mudiyanselage
Sarath Kumara Dissanayake
455, Belagama Road,
Kelanimulla, Angoda.

CLAIMANT-PETITIONER-PETITIONER-APPELLANT

Vs.

Malin Nivantha Kumarage
No. 174/C/7, Suhada Mawatha,
Kothalawala,
Kaduwela

New address

SUBSTITUTED-JUDGMENT-CREDITOR-RESPONDENT-RESPONDENT

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

COUNSEL: Nihal Jayamanne P.C., with Noorani Amarasinghe
For the Claimant-Petitioner-Petitioner-Appellant

Substituted-Judgment-Creditor-Respondent-Respondent
absent and unrepresented

WRITTEN SUBMISSIONS TENDERED ON:
25.01.2016 (by the Appellant – motion dated 20.01.2016)

ARGUED ON: 16.02.2016

DECIDED ON: 29.03.2016

GOONERATNE J.

In a divorce case (D.C Colombo (19129/D) alimony was awarded in favour of the wife who obtained an ex-parte judgment. It is stated that the property alleged to be owned by the Claimant-Petitioner-Petitioner-Appellant was seized in execution of the writ in the above divorce case bearing No. 19129/D, where alimony was awarded to the divorced wife who was the Judgment-Creditor in the case relevant to this appeal, arising from D.C. Homagama Case No. 211/claim. However in the above claim inquiry (211/claim)

the learned District Judge rejected the claim made by the Claimant-Petitioner-Petitioner-Appellant (hereinafter referred to as the Appellant). The order was delivered by the learned District Judge, Homagama on 18.09.2008. The facts presented to this court indicates that the Judgment-Creditor who was the divorced wife was dead prior to delivery of the said order. She died on 08.08.2008.

The Appellant appealed to the Civil Appellate High Court against the order of the learned District Judge. However, the learned District Judge had on receipt of the Petition of Appeal, made a minute that no appeal lies and sent the record to the relevant High Court. In the High Court inter alia various steps had been taken by the Appellant who attempted to prove that the learned District Judge's order was a nullity in view of the demise of the Judgment-Creditor but the High Court had after examining various positions ultimately made order on 28.03.2011 substituting the son of the deceased in the room of the deceased Judgment-Creditor. I will not discuss the pros and cons of the above High Court proceedings and the orders but would concentrate on the question of the record being defective in the circumstances of the case in hand. It is also pleaded that the Appellant had thereafter filed a revision application in the High Court to set aside the learned District Judge's order made on the claim inquiry. However the revision application filed by the Appellant on 07.07.2014 was also dismissed. I

note the following positions as stated by the learned High Court Judge in the above order.

(a) The Petitioner has no right to name a Substituted Respondent in this application.
(b) Creditor Respondent is dead. In the presence of her registered Attorney, order had been pronounced. It is a genuine mistake done by court.
(c) Pronouncement of the order is bad in law where a party is dead. The proceedings which has taken after the death of the Judgment-Creditor-Respondent are null and void.
(d) The only remedy available to the Petitioner is to make an application to the District Court to make order of substitution of the heirs of the deceased and effect substitution. "Thereafter invite court to re-pronounce the Judgment".

The Supreme Court on or about 23.06.2015 granted Leave to Appeal on the following questions of law.

1. Did the High Court Judge err in law holding,

a. that a judgment which they have declared to be void can be re pronounced by any Court even after substitution or with or without substitution.

An order for alimony granted to a divorcee in a divorce suit would not survive after her demise. Ordinarily a heir would succeed by descent to an estate of inheritance. On the death of a person his estate, in the absence of a

will passes at once by operation of law to the heirs. In the case in hand some property was to be seized in execution of a writ to recover the amounts due by way of alimony. The process that was to follow came to a grinding halt on the death of the divorcee. In these circumstances the order for alimony could not be carried out, as such no money was recovered by the divorcee during her life time.

In the instant case the person who had been substituted by the High Court never attempted to take part in the proceedings and kept away from making a claim to his deceased mother's alimony order (rightly or wrongly). There is a total indifference on a factual basis by the legal heir. On the other hand as a matter of law does the cause of action survive in a case of this nature? The alimony order is highly personal to the Judgment-Creditor the divorced wife. The order of the learned District Judge rejecting the claim of the Appellant would be a nullity as at the date order was pronounced the Judgment-Creditor was dead. I read the Judgment in Munasinghe and Another Vs. Mohamed Jabir Navaz Carim 1990(2) SLR 163, on the question of nullity and thus the record becomes defective. Though the above decided case is sound authority where the record becomes defective, in the case in hand from the question of nullity it gets on to the question of survival of the cause of action. Section 5 of the Civil Procedure Code defines cause of action, it is exhaustive in its application. This would

include a denial of a right. The cause of action in an action under Section 247 of the Civil Procedure Code is the seizure which is the violation of a right of ownership and not the disallowance of the claim 12 NLR 196.

In so far as completeness of the record and the case in hand I will also refer to Section 392, 395 of the Civil Procedure Code.

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.

In the case in hand no doubt the right to sue on the cause of action cannot survive the death of the Judgment-Creditor. If there was participation of the legal heir, in the case in hand (subject to the views expressed above) perhaps a question of a collusive action by the Appellant with the husband of the deceased Judgment Creditor, (father of the party sought to be substituted) may have surfaced. However the practical effect is that the death of the Judgment-Creditor would cause the action to abate as the cause of action does not survive. The only question of law suggested to this court is answered in favour of the Claimant-Petitioner-Appellant and the question of re-pronouncing the

Judgment of the lower court would not arise, in law. I set aside the Judgment/Order of the District Court and that of the High Court (as per sub paragraph ‘c’ and ‘d’ of the prayer to the petition dated 18.08.2014).

Appeal allowed, without costs.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT