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

SC Appeal No.199/2014
SC/HC/CALA No.528/2013
CP/HCCA/KAN/RA No.23/2012 (Rv)
D.C.Kandy Case No.18258/L

In the matter of an Appeal with Leave to Appeal obtained from this Court

K.R.SUMANAWATHIE,
Ampitiya Road, Nuwarawela,
Kandy.

PLAINTIFF

VS.

S.SEELAWATHIE,
No. 29/250B, Ampitiya Road,
Nuwarawela,
Kandy.

DEFENDANT

AND BETWEEN

S.SEELAWATHIE,
No. 29/250B, Ampitiya Road,
Nuwarawela,
Kandy.

DEFENDANT- PETITIONER

VS.

K.R.SUMANAWATHIE,
Ampitiya Road, Nuwarawela,
Kandy.

PLAINTIFF-RESPONDENT

KULATUNGA RAMANI GUNASEKERAM
No.29/250, Ampitiya Road,
Nuwarawela,
Kandy.

SUBSTITUTED PLAINTIFF-RESPONDENT

AND NOW BETWEEN

S.SEELAWATHIE,
No. 29/250B, Ampitiya Road,
Nuwarawela,
Kandy.

DEFENDANT- PETITIONER-PETITIONER/APPELLANT

VS.

K.R.SUMANAWATHIE,
Ampitiya Road, Nuwarawela,
Kandy. (Deceased)

PLAINTIFF-RESPONDENT

KULATUNGA RAMANI GUNASEKERAM
No.29/250, Ampitiya Road,
Nuwarawela,
Kandy.

SUBSTITUTED PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Sisira J. De Abrew, J.
Anil Gooneratne, J.
Prasanna Jayawardena, PC, J.

COUNSEL: Manohara de Silva, PC, with A. Wijesurendra for the Defendant-Petitioner- Petitioner/Appellant.
Samantha Ratwatte for the Substituted Plaintiff-Respondent-Respondent.

ARGUED ON: 26th September 2016

WRITTEN SUBMISSIONS FILED ON: By the Substituted Plaintiff-Respondent-Respondent on 06th March 2015 and after the argument on 26th September 2016.
By the Defendant-Petitioner-Petioner/Appellant on 11th December 2015.

DECIDED ON: 22nd June 2017

Prasanna Jayawardena PC, J

This appeal raises the question of whether this action, in which the plaintiff obtained a possessory decree entered in her favour by the District Court but subsequently died before that decree could be executed, can be continued by the legal representative of the deceased plaintiff and the decree be enforced, after the plaintiff's death.

I first will set out, as briefly as possible, the facts in this case, which has had a long history.

The Plaintiff-Respondent ["the plaintiff"] filed this action in the District Court of Kandy praying for the ejectment of the Defendant-Petitioner-Petitioner/Appellant ["the defendant"] from the allotment of land described as Lot No. 42 in Plan No. 1693, which is described in the schedule to the plaint ["the land"]. This land is situated in Ampitiya in the Kandy District. The plaintiff's case, as set out in that plaint, is that the plaintiff is entitled to the land. The plaintiff described herself as the "owner" ["අයිතිකාරිය"] of the land and also as the "allottee" ["කච්චිකාරිය"] of the land. However, the plaint does not state any further details with regard to the alleged ownership or allotment. The plaintiff pleads that the defendant has forcibly entered into wrongful and unlawful possession of a part of the land. On that basis, the plaintiff prayed for a decree ejecting the defendant from the land and placing the plaintiff to possession of the land. The plaintiff also prayed for the recovery of damages from the defendant.

The defendant filed answer denying the plaintiff's claim. The defendant pleaded that, the land is State land. The defendant stated that, Lot No. 42 which is referred to in the plaint, had been sub-divided into Lot No.s 62,64,65 and 67 by the Pradeshiya Sabhawa. The defendant further stated that she is in possession of and residing in a house she had built upon Lot No.62 while the plaintiff is in possession of and residing in Lot No.67. On that basis, the defendant prayed for the dismissal of the plaintiff's action and for an Order declaring that the defendant is entitled to possession of the entire land – *ie:* the entire land described in the schedule to the plaint and not only Lot No. 62.

A perusal of the journal entries shows that, the disputed land was surveyed upon a Commission issued by the Court. Thereafter, the Court directed that, this case be called in open Court on 22nd March 1999 to consider the plan which had been prepared. On that day, both the plaintiff and defendant were present in Court and were represented by their lawyers. It was recorded that the plaintiff and defendant were mother and daughter. The parties agreed to settle the case in the following manner: the parties agreed that the land which is the subject matter of this case is shown as the Lot No. 42 in Plan No. 1693 referred to in the plaint and described in the schedule to the plaint. The defendant agreed and undertook to hand over and deliver, to the plaintiff, within one month of 22nd March 1999, possession of the part of the land the defendant was occupying including the house the defendant was

residing in. The defendant further agreed that if she failed to do so within one month, the plaintiff was entitled to obtain a writ of ejectment against her. The plaintiff and the defendant have signed the case record to signify their assent to these terms of settlement. The Court has entered decree in terms of this settlement. The terms of settlement and the decree did not include any liability on the part of the defendant to pay damages to the plaintiff in the event the defendant failed to quit the land.

It is common ground that, the defendant did not hand over and deliver possession within the agreed period of one month. The defendant claims that, the plaintiff permitted her to remain in occupation of that part of the land and the house standing thereon, until she found alternative accommodation. However, instead of finding alternative accommodation and quitting the land, the defendant continued to reside in the house and occupy that part of the land. The defendant claims that she did so because she found out that the land was State land to which the plaintiff had not obtained any permit or license or title of any sort.

On 03rd August 2006, the plaintiff made an application to execute the decree and obtain a writ of ejectment against the defendant. Since more than one year had passed since the date of the decree and since the terms of settlement did not dispense with the need to give notice, the Court directed that notice of the application for execution of the decree be served on the defendant, in terms of section 347 of the Civil Procedure Code.

Upon receipt of notice, the defendant filed her Statement of Objections. Her position was that, the land was State land and, therefore, the decree entered on 22nd March 1999 in pursuance of the terms of settlement agreed to by the parties, could not be executed by the Court. It is significant to note that, the defendant did not dispute having agreed to the terms of settlement.

Although a final decree had been entered in pursuance of agreed terms of settlement, the District Court allowed the defendant to lead evidence to try and prove her claim that the land is State land to which neither the plaintiff nor the defendant has any entitlement by way of a permit or otherwise. The defendant then proceeded to lead the evidence of an officer of the Pradeshiya Sabhawa in her attempt to prove that the land was State land. However, his evidence was inconclusive since he failed to produce all the relevant documents.

Eventually, by an Order dated 29th October 2010, the learned District Judge held that there was no clear evidence before the Court as to whether the land was State land or not. More importantly, the learned District Judge held that, the plaintiff's action was limited to claiming the **possession** of the land and that *no* questions arose in the action with regard to title to the land or whether the land was State land. The Court held that, the terms of settlement agreed to by the parties were also limited in scope to **the plaintiff's right to possess the land** and that, the question of title to the land was *not* referred to in the terms of settlement and decree. Therefore, the

learned District Judge held that, the plaintiff was entitled to enforce the decree for **possession** and ordered that writ of execution issues against the defendant.

On 23rd December 2010, the defendant filed a petition of appeal in the High Court of Civil Appeal holden in Kandy praying that, the aforesaid Order dated 29th October 2010 of the District Court be set aside and that, the High Court declares that, the terms of settlement entered on 22nd March 1999, were unlawful and fraudulent. The plaintiff was the respondent to this appeal, which bore High Court of Civil Appeal No. CP/HCCA/KAN No. 54/2011 (FA).

While the appeal was pending in the High Court, the plaintiff died on 07th March 2011. Thereafter, the abovenamed Substituted Plaintiff-Respondent-Respondent ["the substituted plaintiff"], who is said to be another daughter of the plaintiff, filed a petition with a supporting affidavit, stating that the plaintiff had died and praying that she be substituted in place of the plaintiff, in the appeal. The plaintiff's death certificate, and the birth certificate of the substituted plaintiff [who at that stage had not been substituted], were annexed to the petition seeking substitution. These documents indicate that, the substituted plaintiff [who at that stage had not been substituted], is the daughter of the recently deceased plaintiff and that she had informed the registrar of the death of the plaintiff. Journal Entry No. 05 in the case record of the appeal in the High Court states that, notice of the application for substitution had been sent to the defendant by the attorney-at-law appearing for the substituted plaintiff [who at that stage had not been substituted]. The defendant has not filed a statement of objections opposing the proposed substitution.

Journal Entry No. 06 shows that, when the appeal was taken up before the High Court on 05th October 2011, counsel appeared for the "appellant" and the "respondent". The term "appellant" refers to the defendant. The term "respondent" has to mean the aforesaid substituted plaintiff [who at that stage had not been substituted] since the plaintiff had died seven months earlier. Further, the defendant had to know of the death of the plaintiff since she was the plaintiff's daughter and also the plaintiff's neighbor, prior to the plaintiff's death.

Counsel appearing for the substituted plaintiff [who at that stage had not been substituted] appears to have objected to the maintainability of the defendant's appeal based on a submission that the defendant did not have a right of appeal. Both counsel moved to file written submissions. Thereafter written submissions were filed by both parties. Since the defendant has not produced those written submissions, this Court is unaware of what each party submitted to the High Court.

However, Journal Entry No.08 clearly records that, the written submissions filed by both parties dealt with: (i) an objection to the application for substitution; and (ii) the aforesaid objection that the defendant had no right of appeal. Thus, it is evident that, the defendant had objected to the proposed substitution at that stage. Further, it appears that, counsel for both parties agreed that, the High Court should proceed to

make one Order deciding, upon these written submissions, *both* the application for substitution and the objection that the defendant had no right of appeal.

By Order dated 26th March 2012, the High Court first allowed the application for substitution and made Order substituting the abovenamed substituted plaintiff in place of the deceased plaintiff. In this regard, the High Court observed that, section 760A of the Civil Procedure Code permits the High Court to substitute a *"proper person"* in place of a deceased party to an appeal and went on to hold *"The petitioner who ought to be substituted in place of deceased mother appears to be proper person to be substituted. Therefore, we substitute the petitioner in place of the deceased Plaintiff for the continuation of the appeal"*. Thus, the High Court has substituted the substituted plaintiff in the place of the deceased plaintiff in the aforesaid High Court of Civil Appeal No. CP/HCCA/KAN No. 54/2011 (FA).

Next, in the same Order, the High Court held that, the defendant had no right of appeal and dismissed the defendant's appeal.

Six months later, the defendant made an application to the same High Court, by way of a petition dated 05th October 2012 and supporting affidavit, praying that, the High Court acts *in revision* and dismisses the plaintiff's action, declares that the District Court had no jurisdiction to make the aforesaid Order dated 29th October 2010 and sets aside the said Order dated 29th October 2010 of the District Court and the decree entered by the District Court in pursuance of the terms of settlement entered into on 22nd March 1999. This revision application bore High Court of Civil Appeal No. CP/HCCA/KAN/RA No.23/2012 (Rv), which is stated in the above caption.

A perusal of the defendant's aforesaid petition dated 05th October 2012 shows that, her revision application is essentially based on the same claim she made in the District Court that the land was State land and, therefore, the District Court had no jurisdiction to enter decree in pursuance of the terms of settlement reached on 22nd March 1999 or to issue writ of execution.

Further, a reading of the petition shows that, the defendant has named the substituted plaintiff as the "Substituted Plaintiff-Respondent" to the revision application and has admitted that, the High Court had made Order substituting the substituted plaintiff in place of the deceased plaintiff. However, the defendant has gone on to dispute the suitability of the substituted plaintiff to have been substituted in place of the deceased plaintiff. But, the defendant did not specifically challenge the substitution which had been made.

By Order dated 13th November 2013, the High Court dismissed the defendant's revision application holding that, the plaintiff had filed a possessory action only and that the title of the parties to the land, was not in issue. The High Court held, *"A decision in a possessory action does not have the effect of interfering with the title of the parties. Therefore, it cannot be said that the settlement entered into between the parties had any effect on the title of the state, if any."*.

The defendant made an application to this Court seeking leave to appeal from the aforesaid Order dated 13th November 2013 of the High Court in the revision application. This Court has granted leave to appeal on the following three questions of law, which are reproduced *verbatim*:

(i) The action of the deceased Plaintiff bearing No. D.C.Kandy 18259 L would come to an end upon her demise on 07.03.2011 as the said action is an *action in personam* ?

(ii) The action of the deceased Plaintiff bearing No. D.C.Kandy 18259 L is an *action in personam* and therefore no writ lies in favour of a deceased judgment creditor and/or other person ?

(iii) In any event no substitution has been effected in favour of the purported Substituted-Plaintiff-Respondent-Respondent ?

The third question of law will be considered now since the answer to it will have a bearing on the other two questions of law. This question asks whether the substituted plaintiff has been properly substituted in place of the deceased plaintiff. That has to be with regard to the appeal bearing No. CP/HCCA/KAN No. 54/2011 (FA) in which the High Court made the Order dated 26th March 2012 substituting the substituted plaintiff in place of the deceased plaintiff in that appeal.

As mentioned earlier, the plaintiff was the respondent to that appeal, which was filed by the defendant while the plaintiff was alive. When the plaintiff died during the pendency of the appeal, the substituted plaintiff, who is said to be her daughter, made an application to be substituted in place of the deceased plaintiff. Notice of that application appears to have been given to the defendant. In any event, the defendant was aware of it. The defendant has not filed a statement of objections opposing the proposed substitution. However, learned counsel appearing for the defendant has tendered written submissions, *inter alia*, opposing the proposed substitution. Parties have agreed that, the proposed substitution and the objections to the maintainability of the appeal, were to be decided by the High Court in one Order, upon written submissions which were to be tendered by the parties.

Thereafter, the High Court has made its Order dated 26th March 2012, substituting the substituted plaintiff in place of the deceased plaintiff in the pending appeal, under and in terms of section 760A of the Civil Procedure Code.

Section 760A provides that, where at any time during the pendency of an appeal, one of the parties to the appeal dies or undergoes a change of his legal status, the Court before which the appeal is pending may determine, in the manner provided in the Supreme Court Rules, *"….. who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid."*. In terms

of Rule 38 of the Supreme Court Rules, that determination has to be made upon *"sufficient material"* submitted to the Court which establishes that the person who seeks to be substituted is the "*proper person"* to be substituted in the place of the deceased party to the appeal before that Court.

Thus, the High Court, before which the appeal was pending, had the discretion to substitute, in place of the deceased plaintiff, such person whom the High Court, after examining the material submitted to it, deemed *"is the proper person to be substituted"*. As His Lordship, Justice Wimalachandra commented in HEWAVITHARANE vs. URBAN DEVELOPMENT AUTHORITY [2005 2 SLR 107 at p.110], "*Section 760(A) gives the Court of Appeal a discretion to determine, whom in the opinion of the Court, is the proper person to be substituted in place of the deceased plaintiff. The Court may exercise its discretion to determine who is the proper person to be substituted in the manner as provided in the rules made by the Supreme Court under Article 136 of the Constitution. "*.

The High Court has, after hearing the parties and examining the material submitted to it, exercised that discretion vested in the High Court by section 760A of the Civil Procedure Code and made Order, dated 26th March 2012, substituting the substituted plaintiff in place of the deceased plaintiff in appeal bearing No. CP/HCCA/KAN No. 54/2011 (FA). The High Court had the jurisdiction to do so and that was a lawful Order. The defendant has not challenged that Order by seeking leave to appeal from this Court. Therefore, that Order is final.

The defendant could not, in the later revision application No. CP/HCCA/KAN/RA No.23/2012 (Rv) filed in the same High Court, challenge the validity of the aforesaid substitution made by that same Court in the earlier appeal No.CP/HCCA/KAN No. 54/2011(FA). In fact, as mentioned earlier, in the revision application, the defendant acknowledged the validity of the substitution made previously by the same Court in the appeal and did not purport to pray for any Order setting aside the substitution.

Consequently, the defendant cannot now, in this appeal from the Order made in the revision application, challenge, for the first time, in this Court, the validity of the aforesaid substitution made on 26th March 2012, in the earlier appeal. Any challenge to the validity of that substitution, was time barred when the defendant filed her petition, dated 18th December 2013, in the appeal which is now before us.

For the aforesaid reasons, the third question of law is answered as follows: the substituted plaintiff has been validly substituted in place of the deceased plaintiff in appeal bearing No. CP/HCCA/KAN No. 54/2011(FA). That substitution cannot now be challenged in the present appeal to this Court from the subsequent revision application.

It is to be noted that, in terms of section 760A of the Civil Procedure Code, the aforesaid substitution was only for the purposes of the appeal bearing No. CP/HCCA/KAN No 54/2011(FA). As Somawansa J observed in KUSUMAWATHIE vs. KANTHI [2004 1 SLR 350 at p.354], *"The intent and purpose of section 760 of*

the Civil Procedure code as well as Rule 38 of the Supreme Court Rules is substitution for the purpose of prosecuting the appeal.".

It is to be also noted that, up to now, there has been no substitution of any person in place of the deceased plaintiff in the case in the District Court. Therefore, if the action is to be continued in the District Court and the decree be executed, an application will first have to be made in the District Court, under the appropriate provision of the Civil Procedure Code, by a person who claims that he or she is entitled to continue with the action and execute the decree.

To now turn to the first question of law, it asks whether the plaintiff's action in the District Court was an action *in personam* and, if so, whether the plaintiff's action was extinguished upon her death on 07th March 2011. This question has two aspects: firstly, whether the plaintiff's action is an *action in personam;* and, secondly, whether, in the event of the plaintiff's action being an *action in personam*, the action was extinguished upon the plaintiff's death.

Before considering this question of law, it has to be noted that, the defendant did not claim, in the revision application, that, the plaintiff's rights under the decree were extinguished upon the plaintiff's death. The contentions which form the first question of law have been made, for the first time, before this Court.

Further, it appears to me that, the issues contained in this question of law could have been, more appropriately, decided by the District Court if and when an application is made by a person who claims that he or she is entitled to execute the decree after the plaintiff's death. The question of whether the rights of the deceased plaintiff survive her death and are capable of transmission to her legal representatives or to another person, will be a central question which has to be decided by the District Court if an application is made to the District Court to continue with the action and execute the decree after the plaintiff's death. However, since the aforesaid question of law is now before us, it has to be answered by this Court. Doing so will assist the District Court to conclude the proceedings in this case, which commenced over 21 years ago.

When considering the aforesaid question of law, this Court has to first decide whether the plaintiff's action is an *action in personam.* To do so, it is necessary to identify the nature of the plaintiff's cause of action set out in her plaint. As stated earlier, the plaintiff only claims the right to eject the defendant from the land and be placed in possession. In paragraph [2] of her petition filed in this Court, the defendant has described the plaintiff's action, as a *"possessory action".* In view of this position taken by the defendant herself, I will treat the plaintiff's action as a *"possessory action"* for the purpose of deciding this appeal, without examining whether the requisites of a possessory action had been averred in the plaint.

An *action in personam* is an action to claim or enforce a `personal right' which is termed a *jus personam* in the Roman Dutch Law. Wille [Principles of South African

Law 8th ed. at p.39] describes a `personal right' [*jus personam*] as *"a right entitling a person to claim from another some thing or act, or that the other should refrain from doing that act"*. An *action in rem* is an action instituted to claim or enforce a `real right' which is termed a *jus in rem* in the Roman Dutch Law. Wille (at p. 41) describes a `real right' [*jus in rem*] as *"an exclusive interest or benefit enjoyed by a person in a thing That is, the right in the thing is binding on all other persons, and it cannot legally be contested or nullified by any other person. It follows that the holder of a real right can legally prevent anybody else from interfering with his enjoyment; and, if anybody has actually interfered with his enjoyment, the holder of the real right has adequate remedies against the offender."*. For the purposes of this appeal, the aforesaid description of a `personal right' [*jus personam*] and a `real right' [*jus in rem*] and an *action in personam* and *action in rem* will suffice.

A perusal of the plaint shows that, the plaintiff's Cause of Action is the plaintiff's claim of her right to possess the land [as against the defendant] and the plaintiff's right to recover damages from the defendant. The plaint does not make a claim that the plaintiff is exclusively entitled to the possession of the land against all persons. The reliefs prayed for in the plaint, are to eject the defendant from the land and restore the plaintiff to possession and to recover damages from the defendant. Thus, the reliefs prayed for in the plaint are claimed by the plaintiff specifically against and limited to the defendant. On an application of the principles set out above, the rights claimed by the plaintiff in the action are personal rights [*jus personam*] against the defendant only. Accordingly, the defendant has correctly described this action, as an *action in personam*.

The other aspect of the first question of law, is the defendant's contention that, the plaintiff's cause of action ended with her death and did not survive and be capable of transmission or devolution to another person, to enable that person to continue the action.

It has to be first noted here that, since the decree had been entered before the plaintiff died, the continuation of the action in the District Court after the death of the plaintiff, is limited to the execution of the decree by a person whose name may be entered on the case record in place of the deceased plaintiff, under and in terms of section 341 (3) of the Civil Procedure Code. Section 341 (3) is in Chapter XXII of the Civil Procedure Code which sets out the provisions governing the execution of decrees. Section 341 (3) states, *"If the judgment-creditor dies before the decree has been fully executed, the legal representative may apply to the Court to have his name entered on the record in place of the deceased and the Court shall thereupon enter his name on the record."*. Thus, on the face of section 341 (1), the legal representative of the plaintiff will be entitled to have his name entered in the place of the plaintiff in the case record in the District Court and proceed to execute the decree against the defendant.

But, the ability of the legal representative of the deceased plaintiff to have his name entered in the place of the plaintiff in the case record in the District Court and

proceed to execute the decree against the defendant under and in terms of section 341 (3) will be dependent on the plaintiff's rights under the decree in this case surviving her death and being capable of transmission or devolution to her legal representative. In contrast, if the plaintiff's rights under the decree in this case ended upon her death, those rights will not be capable of being transmitted to or devolving upon her legal representative and would, therefore, be extinguished by the plaintiff's death. In such an event, the legal representative of the deceased plaintiff will not be entitled to have his name entered in the place of the plaintiff in the case record in the District Court and it will not be possible to execute the decree entered against the defendant.

In the light of the position set out above, the answer to the first question of law will obviously depend on whether the plaintiff's rights under the decree entered in this case to obtain possession of the land from the defendant, survived the plaintiff's death and are capable of transmission to her legal representatives to enable them to execute the decree against the defendant.

Since, with regard to this first question of law, the defendant appears to contend that, the plaintiff's action was extinguished upon her death on 07th March 2011 *because* this is action *in personam*, it will be useful to examine whether an action *in personam* does always end upon the death of the plaintiff.

A perusal of the decided cases establishes that, the usual principle that applies in the case of *actions in personam* is that, where the plaintiff in an *action in personam* dies, the action will end if the stage of *litis contestatio* has *not* been reached at the time of the plaintiff's death. However, where the plaintiff in an *action in personam* dies *after* the stage of *litis contestatio* has been reached, the action can, usually, be continued by the deceased plaintiff's legal representatives. It should be mentioned here that, in the case of *actions in personam*, the stage of *litis contestatio* is reached when the defendant files answer.

Thus, in VANGADASALAM vs. KARUPPIAH [79 (2) NLR 150], Samerawickrame J stated (at p.152), *"A personal action dies with the plaintiff unless the stage of litis contestatio has been reached. It would appear that litis contestatio takes place with the joinder of issue or the close of pleadings (see Voet 47.10.22). In Muheeth v. Nadarajapillai, 19 N.L.R. 461 at 462, Wood Renton, C.J. said -` An action became 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 contestatio, which appears to synchronize with the joinder of issue or the close of the pleadings.'."*. It should be mentioned that, the exception to this general rule is the case of delictual actions for the recovery of patrimonial loss, where the heirs of a deceased plaintiff are entitled to continue with an action filed by the plaintiff irrespective of the stage of the action at which the plaintiff dies – *vide:* VANGADASALAM vs. KARUPPIAH (at p. 152) and FERNANDO vs. LIVERA [29 NLR 246 at p.248] where Drieberg J stated *"Where the wrongful loss has caused patrimonial loss and comes within the principles of Lex Acquilia the action does not lapse with the death of the plaintiff before litis contestatio, but enures to the benefit the heirs."*

The application of the aforesaid rule is demonstrated in the later cases of NAGARIA vs. GULAMHUSSEIN [78-79 (2) NLR 284] and JAYASURIYA vs. SAMARANAYAKE [1982 2 SLR 460]. In NAGARIA vs. GULAMHUSSEIN, the plaintiff filed action for the recovery of possession of an immovable property and damages from the defendant. This was an *action in personam*. The plaintiff died *after* the stage of *litis contestatio* and while the trial was pending. The Court of Appeal held that the widow of the deceased plaintiff was entitled to be substituted in place of the plaintiff. In contrast, in JAYASURIYA vs. SAMARANAYAKE, the plaintiff filed an action to revoke a deed of gift on the ground of gross ingratitude of the defendant, but died before the stage of *litis contestatio* was reached. The Court of Appeal held that, this was an *action in personam* and, therefore, the death of the plaintiff *before* the stage of *litis* contestatio, resulted in the action ending. Accordingly, the Court of Appeal refused to substitute the widow of the deceased plaintiff in place of the deceased plaintiff.

Then, in STELLA PERERA vs. MARGARET SILVA [2002 1 SLR 169], the plaintiff filed action against the defendant claiming a declaration of title to a property and the ejectment of the defendant from that property. The defendant filed a claim in reconvention praying that the deed of gift by which he had earlier gifted the property to the plaintiff be revoked on the ground of gross ingratitude. Thus, the defendant stood in the shoes of a plaintiff in respect of the claim in reconvention, which was an *action in personam*. The District Court entered judgment in reconvention in the defendant's favour. The plaintiff appealed. The defendant died while the appeal was pending. Amerasinghe J held (at p.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 actio personalis moritur cum persona had no application."* .

In the present case, the defendant had filed answer and the trial had been concluded long prior to the death of the plaintiff. Therefore, the stage of *litis contestatio* had been reached long before the plaintiff died. Accordingly, upon an application of the principle enunciated in the aforesaid decisions, the mere fact that this is an *action in personam*, does not cause this action to end upon the plaintiff's death.

It should be mentioned here that, despite the aforesaid general rule, there are some types of *actions in personam* where plaintiff's death will terminate the action even though the stage of *litis contestatio* has been passed. Those are cases where the character of the plaintiff's cause of action makes it incapable of transmission or devolution to his legal representatives. An example would be where a plaintiff's cause of action is a claim to a particular office, employment, title or benefit by virtue of his personal status, qualifications or ability, if those entitlements end upon his death and are incapable of transmission or devolution to his legal representative. Thus, in the Indian case of Sham Chand Giri vs. Bhayaram Panday [1894 22 Cal. 92] , which was cited by T.S.Fernando J in DEERANANDA THERO vs.

RATNASARA THERO [60 NLR 7 at p.9], the plaintiff filed action seeking a declaration that he was entitled to the office of *Mohant* of a shrine. That was an *action in personam*. The Calcutta High Court held that, the death of the plaintiff caused the action to end. Sale J stated (at p.9-10), "*the suit was of a personal character in as much as its object is to establish, a right to a personal office, and for that reason it appears to me that the right to sue does not survive. The result is that the action abates".* In the same vein, in DHAMMANANDA THERO vs. SADDANANDA THERO [79 1 NLR 289 at p.299], Pathirana J observed, *" ….. if the action is pure and simple a personal action like an action for seduction under the Roman Dutch Law, then the death of the plaintiff or the defendant will abate the action as the right to sue cannot survive. There are no interests in the action which can devolve on any other person. I agree that an action to be declared entitled to an office likewise is generally a personal action and cannot survive in the event of the death of the plaintiff or the defendant as with his death the holder of the office ceases to hold office.".*

However, it is clear that, the facts and circumstances of the present case do not fall within the aforesaid type of *actions in personam* where the death of the plaintiff results in the end of the action despite the stage *litis contestatio* having been reached. That is because, the plaintiff's cause of action, which is to recover possession of the land from the defendant and be placed in possession of the land, is undoubtedly capable of transmission or devolution to the plaintiff's legal representative and can be exercised by her legal representative after the plaintiff's death. Therefore, the present action can be continued after the plaintiff's death by her legal representative since the stage of *litis contestatio* has been passed.

The decision in the aforesaid case of NAGARIA vs. GULAMHUSSEIN supports this conclusion. The facts in that case are similar to the present case since, there too, the plaintiff instituted a possessory action claiming the recovery of possession of an immovable property and died after the stage of *litis contestatio* was reached. Rodrigo J with Ranasinghe J agreeing, both learned Judges then in the Court of Appeal, held (at p. 286), with regard to the character of the action filed by the plaintiff, ***" He is seeking restoration of possession of the premises*** *alleged to have been in his occupation or possession at the material time and* ***was seeking to establish his rights as against the defendants to the possession of the property****.* ***This kind of action survives the death of a plaintiff."***. [emphasis added].

Learned President's Counsel appearing for the defendant has cited the aforesaid case of DEERANANDA THERO vs. RATNASARA THERO in support of the defendant's contention that the plaintiff's cause of action does not survive the plaintiff's death. In that case, the plaintiff *thero* filed action against the defendant *thero* claiming that the defendant was unlawfully disputing the plaintiff's right to the chief incumbency of the temple and being disobedient to the plaintiff and prayed for a declaration that the plaintiff was the chief incumbent of a temple. The defendant died during the pendency of the action and the District Court substituted the defendant's successor in place of the deceased defendant. T.S.Fernando J held

that, the plaintiff's cause of action was the alleged wrongful acts of the defendant and that, therefore, the defendant's death resulted in the abatement of the action with the maxim *actio personalis moritur cum persona* applying. I do not think the rationale applied in DEERANANDA THERO vs. RATNASARA THERO with regard to the effect of the death of the *defendant* in that particular *action in personam* with the facts peculiar to that case, can be applied to the present case which deals with the effect of the death of the *plaintiff* during an *action in personam* where the cause of action clearly survives the death of the plaintiff. In fact, in the later case of DHAMMANANDA THERO vs. SADDANANDA THERO, Pathirana J stated (at p.307) with regard to decision in DEERANANDA THERO vs. RATNASARA THERO, *"The most that can be said of the three Bench decision in Deerananda Thero's case is that the principle laid down in that case must be confined to the facts of that case and cannot be applied as a general proposition of law.".* In DHAMMANANDA THERO vs. SADDANANADA THERO, this Court held (at p. 302) that, in an action for declaration of title to the office of Viharadipathi of a temple, on the death of the plaintiff or the defendant (if he too claims to be Viharadipathi) the action can be continued by or against the successor-in-title under section 404 of the Civil Procedure Code and that the maxim *actio personalis moritur cum persona* will not apply in such a case to abate the action. It was held that, the action, though, in form, an action for a status or an office, is, in substance, an action for the temple and the temporalities, which, by operation of law, belong to the Viharadipathi of the temple.

Further, in DEERANANDA THERO vs. RATNASARA THERO, T.S.Fernando J cited the Indian case of RAMSARUP DAS vs. RAMESHWAR DAS [1950 AIR Patna 184], where, Sinha J in the Patna High Court stated (at p.189), *"If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal."*. It is apparent that, Sinha J's aforesaid observation, which, in fact, was cited by T.S.Fernando J in DEERANANDA THERO's case (at p.10), lends support to the conclusion that, in the present case, the plaintiff's cause of action survives the death of the plaintiff.

Learned President's Counsel has also cited the decision in LEELAWATHIE vs. RATNAYAKE [1998 3 SLR 349]. That case concerned the issue of a writ of *Certiorari*. That decision turned on whether or not an application made by a tenant, under section 13 of the Ceiling on Housing Property Law No. 1 of 1973, to purchase the house let to her, could be continued by another person after the death of the tenant. G.P.S. De Silva CJ held that, under and in terms of section 13, that application could not be maintained after the death of the applicant. In these circumstances, I do not think a parallel can be drawn between LEELAWATHIE vs. RATNAYAKE and the case that is now before us. The other two cases cited on behalf of the defendant - PODISINGHO vs. JAYATU [30 NLR 169] and FERNANDO AND THE AG vs. SATARASINGHE [2002 2 SLR 113] – also do not assist the defendant. In the first case, Drieberg J observed (at p.171) that, *"Under the Roman-Dutch law, in the case of delicts of this sort which fell under the Lex Aquilia* ***the right***

of action - does not, as in the case of the action of injury, lapse on the death of the person injured before litis contestatio but enures to the benefit of his heirs, *and they can sue the wrongdoer to recover what is known as `patrimonial loss'…."* In the second case, Dissanayake J held (at p.118) *"Therefore, on the above principles it is clear that, in an action for defamation on the death of the defendant the cause of action does not survive.* ***In the case of the death of the plaintiff after litis contestatio, however, the action would continue in favour of the heirs of the plaintiff as part of the plaintiff's property.****"*. *[emphasis added].* Thus, both decisions recognise instances where an *action in personam* can be continued after the death of the plaintiff.

Since the maxim *actio personalis moritur cum persona* - a personal right of action dies with the person - has been referred to in some of the decisions cited earlier, it will be useful to set out here, the pertinent observation made by Tilakawardane J in MAHAWEWA vs. MAHAWEWA [2010 1 SLR 270 at p.276) that, *"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 validity and force of Her Ladyship's aforesaid observation, is illustrated by the decisions cited earlier. It is also relevant to mention here, Pathirana J's examination, in DHAMMANANDA THERO vs. SADDANANADA THERO, of the infirmities of the maxim *actio personalis moritur cum persona* and his Lordship's trenchant criticism of the indiscriminate manner in which it is often sought to apply the maxim. If I may add, it has to be kept in mind that, the incantation *"actio personalis moritur cum persona"* cannot be chanted as the death knell of all *actions in personam* where a party dies during the pendency of the action. The fate of the action will depend on the nature of the cause of action and the stage of case. Each case has to be decided on its own facts.

For the reasons set out earlier, the first question of law is answered in the following manner: the plaintiff's action was an action *in personam* in which the plaintiff's cause of action survives and continues after her death since the stage of *litis contestatio* had been reached.

The second question of law asks whether the decree entered in favour of the plaintiff can be executed after the death of the plaintiff. Since the answer to the first question of law is that, the plaintiff's cause of action survives the plaintiff's death and the action can be continued, the answer to the second question of law will also be: the decree can be executed after the death of the plaintiff.

As mentioned earlier, section 341 (3) of the Civil Procedure Code will apply with regard to the manner in which the decree may be executed after the plaintiff's death. The legal representative of the deceased plaintiff will be entitled to make an application to the District Court, under section 341 (3) of the Civil Procedure Code, to have his or her name entered on the record in place of the deceased plaintiff so that the legal representative can proceed with the execution of the decree.

In this connection, as stated earlier, the substitution of the substituted plaintiff in the High Court in appeal No. CP/HCCA/KAN No 54/2011(F) was only for the purposes of the maintenance of that appeal. It does not necessarily mean that, the substituted plaintiff is entitled to have her name entered or substituted in the record in the District Court in the place of the deceased plaintiff. Instead, the identity of the person who is the legal representative of the deceased plaintiff and who is, therefore, entitled to have his or her name entered in the record in the place of the deceased plaintiff for the purpose of executing the decree, will have to be decided by the District Court if and when an application is made under section 341(3) of the Civil Procedure Code.

The appeal is dismissed with costs in a sum of Rs.25,000/- payable by the defendant to the substituted plaintiff.

Judge of the Supreme Court

I agree
Sisira J. De Abrew, J.

Judge of the Supreme Court

I agree
Anil Gooneratne, J.

Judge of the Supreme Court