

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for leave to appeal under and in terms of Article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5c of the High Court of Provinces (Special Provision) Act No. 54 of 2006.

W. L. M. N. De Alwis,  
No 2A, Abeywickrema Avenue,  
Mount Lavinia.

Plaintiff

WP/HCCA/COL/38/2010 (F)

DC Colombo Case No. 39717/MR

SC/HCCA/LA No. 47/16

Vs

1. Malwatte Valley Plantations Limited,  
No. 280. Dam Street, Colombo 12.

2. L. R. Anthony Perera,  
Royal Gardens,  
No. 288/12, Sri Jayawardenapura  
Mawatha, Kotte.

Defendants

And

W. L. M. N. De Alwis,  
No 2A, Abeywickrema Avenue,  
Mount Lavinia.

Plaintiff-Appellant

Vs

1. Malwatte Valley Plantations Limited,  
No. 280, Dam Street, Colombo 12.
2. L. R. Anthony Perera,  
Royal Gardens,  
No. 288/12, Sri Jayawardenapura  
Mawatha, Kotte.

**Defendant-Respondents**

**Now (By and between)**

W. L. M. N. De Alwis,  
No 2A, Abeywickrema Avenue,  
Mount Lavinia.

**Plaintiff-Appellant-Petitioner**

**Vs**

1. Malwatte Valley Plantations Limited,  
No. 280. Dam Street, Colombo 12.
2. L. R. Anthony Perera,  
Royal Gardens,  
No. 288/12, Sri Jayawardenapura  
Mawatha, Kotte.

**Defendant-Respondent-Respondents**

**And Now Between**

In the matter of an Application for  
substitution of the heirs of  
W. L. M. N. De Alwis (Deceased),

No 2A, Abeywickrema Avenue,  
Mount Lavinia.

**Plaintiff-Appellant-Petitioner**

- a. Usha Amala De Alwis
- b. W. Ravini Padmangi De Alwis  
Karunaratne
- c. W. Sanjaya Ruwan De Alwis

All of No.2B, Abeywickrama  
Avenue  
Mt-Lavinia

**Petitioners**

Vs

1. Malwatte Valley Plantations Limited,  
No. 280. Dam Street, Colombo 12.
2. L. R. Anthony Perera,  
Royal Gardens,  
No. 288/12, Sri Jayawardenapura  
Mawatha, Kotte.

**Defendant-Respondent-Respondent-Respondents**

**Before:** Buwaneka Aluwihare PC. J  
L.T.B. Dehideniya J  
S. Thurairaja PC J

**Counsel:** Suren De Silva for the Plaintiff-Appellant-Petitioner.  
Palitha Kumarasinghe PC with Asanka Ranawake  
for the 1<sup>st</sup> Defendant-Respondent.  
Kushan De Alwis PC with Prasanna de Silva and  
Hiran Jayasuriya for the 2<sup>nd</sup> Defendant-Respondent-  
Respondent.

**Written Submissions:** By the Petitioners on 06. 12. 2016  
By the 2<sup>nd</sup> Respondent on 17. 10. 2016

**Order reserved on:** 28.02.2019

**Decided on:** 21.06.2019

**Aluwihare PC J.**

This order pertains to the issue as to whether the cause of action for malicious prosecution, following the death of the Plaintiff abates or whether it is permissible for the Plaintiff's heirs to be substituted in his room and place.

The Plaintiff-Appellant-Petitioner (hereinafter referred to as the 'Plaintiff'), filed action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant-Respondent-Respondent-Respondents (hereinafter referred to as the 'Respondents') seeking damages for pain of mind,

loss of reputation and harassment caused by malicious prosecution, before the District Court. The case was dismissed by the learned Additional District Judge by his judgment dated 25<sup>th</sup> January 2010.

Being aggrieved by the said decision the Plaintiff filed an appeal in the High Court of Civil Appeal. The said appeal to the High Court was also dismissed. Thereafter, seeking to set aside the said judgement, the Plaintiff filed the present Leave to Appeal Application in the Supreme Court.

On 02<sup>nd</sup> March 2016, while the said Application was pending before this Court, the Plaintiff passed away. The heirs of the Plaintiff, the Petitioners abovenamed, filed a Petition seeking permission to substitute themselves in room and place of the Plaintiff, in order to prosecute the Leave to Appeal Application. The learned President's Counsel for the 2<sup>nd</sup> Respondent objected to the substitution and raised a preliminary objection on the basis that the cause of action, being an action based on personal nature, cannot survive after the death of the Plaintiff.

Counsel representing all parties agreed that the order on the preliminary objections could be decided on the written submissions filed by the respective parties.

**Positions taken by the respective parties:**

It is common ground that no judgment *in favour* of the Plaintiff has been entered at any point and it has not been disputed that the Petitioners are the lawful heirs of the deceased Plaintiff.

It is the position of the 2<sup>nd</sup> Respondent that, the Petitioners would have been bestowed with the right to be substituted in place of the deceased Plaintiff as his legal representatives, **only** had there been a judgement in favour of the Plaintiff at the time of his death, since the action of the Plaintiff is an action *in personam* i.e. a personal action.

On the other hand, the Counsel for the Petitioners has submitted that the action- even though of a personal nature- survives as the stage of *litis contestatio* has been reached. In support of this contention, the decision in **Malalage v Weerakoon, Inspector of Police, Anuradhapura Police Station (SC FR Application No. 278/2008)** which followed the precedent set in **Atapattu v People's Bank (1997 1 SLR 208, 218, 219)** has been cited. In **Atapattu v People's Bank** it has been held that the *rule against* substitution in personal actions is subject to the qualification that there has not been *litis contestatio* before the death. In the said judgment Fernando J. cited 'Law of Delict' by McKerron where it is stated that *"for the effect of litis contestatio, which in modern law is deemed to take place at the moment the pleadings are closed, is to freeze the Plaintiff's rights as at that moment, and thus, in the event of his dying before the action is heard, to confer upon his executor all the rights which he himself would have had if he had lived."* (Mc Kerron, law of Delict, 6<sup>th</sup> Edition pg.132)

It has also been pointed out on behalf of the Petitioners that, the stage at which *litis contestatio* is achieved is at the closure of pleadings rather than at the time of entering a judgment. The decision in **Muheeth v Nadarajapillai (19 NLR 461 at 462)** lucidly draws the distinction; the point at which *litis contestatio* is reached in action in *rem* vis a vis action in *personam*. The court held;

*"An action became litigious, if it was 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"*

The above rational was also followed in the **Malalage** judgment (*supra*).

On the strength of this position, the Counsel for the Petitioners contended that the absence of a judgment in favor of the deceased is immaterial for the question of 'substitution' as the pleadings have already been concluded at the trial stage in the District Court. The case having reached *litis contestatio*, there is no ambiguity with

regard to the parties' respective rights and therefore there is no bar against the Petitioners from claiming those rights.

The 2<sup>nd</sup> Respondent, however, contests this position relying on the decision of **Stella Perera and Others v Margaret Silva (2002 1 Sri LR 169)**. In the said case the Plaintiff who had been gifted the property in suit by her husband, gifted the same to two of her nephews. Then she sought to evict her husband, (the 1<sup>st</sup> Defendant) and her adopted daughter and the daughter's husband, (the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively), from the said premises by an action filed in the District Court. The 1<sup>st</sup> Defendant in turn sought the revocation of his gift of the property to the Plaintiff on the ground of ingratitude and a declaration that the gift made to the nephews were null and void. The learned District Judge dismissed the Plaintiff's action and allowed the revocation of the deed of gift by the 1<sup>st</sup> Defendant to the Plaintiff. The Court of Appeal however, set aside the orders of the District Judge. While the case was before the Court of Appeal, the 1<sup>st</sup> Defendant passed away. Their Lordships of the Supreme Court held that, "*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.*" and that the maxim *actio personalis moritur cum persona* or 'personal right of action dies with the person' was not applicable to the case and that the action was not extinguished by the death of the 1<sup>st</sup> Defendant for the reason that the stage of *litis contestatio* had been reached. However, in the particular case 'litis contestatio' was taken to be the point at which the Judgment was given in favor of the 1<sup>st</sup> Defendant at the time of his death.

Consequently, the 2<sup>nd</sup> Respondent has argued that as "*very many actions in personam like defamation, medical negligence (subject to certain limitations), slander, libel... would be determined by death*" (**Ariyaratne v Ariyaratne in SC Appeal No. 28/2013**), the Plaintiff's action too would not survive beyond his death

given that an action for malicious prosecution is an action *in personam* and that in the present case it has not reached the point of *litis contestatio*.

### **The survival of an Action for Malicious Prosecution**

In terms of Section 392 of the Code of Civil Procedure, “*the death of the plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives.*” In order to decide whether the Petitioners can be substituted in the room and place of the Plaintiff it has to be first determined whether or not the action in question is extinguished by the death of the original Plaintiff. Substitution can take place only if the action survives the death of the Plaintiff.

For this purpose, it is pertinent to advert to the law relating to the survival of an action for malicious prosecution.

“*Injuria*, is used in the sense of *contumelia*, that is, damage to reputation, honour and good name and the appropriate action for an *injuria* is *actio injuriarum*” (A Modern Treatise on The Law of Delict, U. L. Abdul Majeed, p 65). It is trite law that the action for malicious prosecution is based on *actio injuriarum*.

An action for malicious prosecution is a personal action or an action *in personam*. A personal action can be defined as “*an action in which the cause of action or complain or injury is one affecting solely a person and the cause of action, which is personal in nature, dies with the death of the person... the right to sue and the liability to be sued is personal to the deceased and is not transmitted to or against his estate after his death*” (A Modern Treatise on The Law of Delict, Abdul Majeed, p 331).

Under the Roman Dutch Law, Aquilian actions do not lapse by the death of either party. In contrast, however, in cases of *actio injuriarum* the action, being personal,



does not survive the death of the Plaintiff or the Defendant. In the common law, by the application of the maxim *actio personalis moritur cum persona*, a personal action does not survive the death of the person whom it is attached to.

However, an exception is made to this rule if the action has reached the stage of *litis contestatio* prior to the death. This position has been illustrated in the South African case of **Gillespie vs Toplis (1951 (1) SA 290 at 293)** where *inter alia* the Plaintiff, filed an action for personal satisfaction (for the hurt to his feelings and dignity) against the Defendant, for violating a grave by removing the tombstone over the grave with the railing around it, situated on a land. The Defendant passed away before summons was issued and the plaintiff issued summons against the Defendant's estate. Since *actio injuriarum* encompassed actions for personal satisfaction, it was considered non-transmissible against the estate of the wrongdoer nor in favour of the estate of the person wronged, unless *litis contestatio* had been reached. The court held that;

*“the unlawful conduct alleged grounded no action in law against the deceased P's (the defendant) estate and that on P's death before **litis contestatio**, the claim against P had become extinguished.”*

The Sri Lankan appellate courts have accepted and followed this *litis contestatio* exception. (**Atapattu v People's Bank, Muheeth v Nadarajapillai** as well as in **Associated Newspapers of Ceylon v Felicia Kariyakarawana 2006 2 Sri LR 361, John Fernando and Attorney General v Satarasinghe 2002 (2) SLR 113.**) It is worthy of mention that the *litis contestatio* exception applies to situations of insult, libel and slander which are focused on seeking reparation for sentimental hurt, rather than the recovery of patrimonial losses.

The **Stella Perera and Others v Margaret Silva (Supra)** case which has been cited by the 2<sup>nd</sup> Respondent to support the position that *litis contestatio* can be considered to have been reached only if there is a judgment in favour of the Plaintiff, intrinsically fortifies the view that where *litis contestatio* has been

reached, even an action of a personal nature may survive the death of the parties. Furthermore, perusal of the said **Stella Perera** case reveals that their Lordships of the Supreme Court **have not** stated that *litis contestatio* can **only** be reached when there is a judgment in favour of the Plaintiff. Therefore, it is an overtly narrow interpretation of the said judgment to assume that a personal action can survive only if there is a previous judgment entered in favour of the Plaintiff.

In this backdrop, the submissions made by the respective parties must be appreciated. The crux of the submission of the Petitioners was that, a personal action in respect of which *litis contestatio* has taken place is not barred from being substituted in favour of the original litigant's representative, and that *litis contestatio* takes place upon the conclusion of pleadings. The 2<sup>nd</sup> Respondent's argument was that the substitution is not permissible due to the lack of a judgment in favour of the plaintiff.

The development of jurisprudence over the years has been to the effect that *litis contestatio* is considered to take place at the moment when pleadings are closed. (**Milne v Shield Insurance Co. Ltd 1969 (3) SA (AD)352 at 358-359**) This view has been followed locally as well in cases such as **Muheeth v Nadarajapillai (19 NLR 79)** and **Atapattu v People's Bank (supra)** which have been referred to in the submissions of the Petitioners. In **Banda et al. v Cader (16 NLR 79)** pleadings were deemed to conclude after filing of the defendant's answer.

The law as it stands today and the rationale of the judgements referred to above, clearly points to the proposition that the exceptional circumstances under which substitution in a personal action, after the death of the Plaintiff takes place, can be permitted at the conclusion of pleadings rather than at the delivery of a judgment. The reason for the point of conclusion of pleadings to be considered as the point at which *litis contestatio* is reached is to ensure that the positions of the respective parties have been set out by them at this point and there can be no further amendments. The practical considerations behind the point of *litis contestatio*

being the conclusion of pleadings, were illustrated in the Court of Appeal's decision in **Ariyadasa v Weerasinghe, (Western) Provincial Housing Commissioner by His Lordship Justice U. De Z. Gunawardena** as follows;

*“It is evident that the very ratio leges or the rationale of the rule that rights of parties are frozen or fixed, at the latest, as at the point of time of *litis contestatio*, is to prevent the parties from shifting or moving from one position to another.”*

Therefore, if the rationale behind this rule is to be maintained, the conclusion of the pleadings that should be considered in the present case for the purpose of ascertaining whether *litis contestatio* has in fact been reached, would be the pleadings that were concluded at the District Court. If I were to quote further from Justice Gunawardena's decision in **Ariyadasa v Weerasinghe (Supra)** *“...the rights of parties, in particular those of the Plaintiff, must be examined usually with reference to the point of time at which the action was commenced, if not, at the point of time that the stage of *litis contestatio* was reached which stage was marked by the filing of the Defendant's answer as had been held in **Banda v Cader** 16 NLR 79 as well.”*

The Petitioners' contention that *litis contestatio* regarding the present action for malicious prosecution took place at the conclusion of the pleadings more than ten years ago is the correct position to be upheld. As far as the proceedings before the Supreme Court is concerned, at the time of the Plaintiff's death, apart from the issuing of notices to the Respondents, no further pleadings had taken place in the present Leave to Appeal Application. Therefore, the pleadings that have to be considered for the present purposes, are those that took place at the District Court. There is no repugnance in such construction as it is common ground that an Appeal is not an independent action severed from the original action. As clearly set out by Chief Justice Sharvananda in **Sudharman De Silva v Attorney General (1986) 1 Sri LR 9**, at Page 13 *“An appeal is not a fresh suit but is only a*

*continuation of the original proceedings and a stage in that suit itself.”*  
Accordingly, the pleadings that are relevant are the original proceedings that took place at the District Court.

As the exceptional circumstance of *litis contestatio* has been reached by the conclusion of the pleadings at the District Court, there is no impediment to the survival of the action. Therefore, the right to sue on the cause of action survives, and as such I hold that the substitution of the deceased Plaintiff Appellant-Petitioner is permissible.

*The preliminary objection is overruled.*

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA PC

I agree

JUDGE OF THE SUPREME COURT