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

Vijayavani Gunaratnam,
(Duly appointed Executrix of the Estate of the late Mrs. Kamala Gunaratnam)
No. 7, 1/1, Barnes Place Residencies,
Barnes Place, Colombo 7.
Petitioner-Appellant

SC/APPEAL/81/2025
HC (CIVIL) 32/2020/CO

Vs.

1. Cinemas (Private) Limited,
   No. 545, Sri Sangaraja Mawatha,
   Colombo 10.
2. Gunaratnam Rabindranath Pathmaraj,
   No. 67/2, Gregory's Road,
   Colombo 7.
   (deceased)
3. Sanjayaraj Randheer Pathmaraj,
   No. 67/2, Gregory's Road,
   Colombo 7.
4. Assignment (Private) Limited,
   No. 69/1, Kynsey Road,
   Colombo 8.
5. Secretarial Advisory Services (Private) Limited,
   No. 545, Sri Sangaraja Mawatha,
   Colombo 10.

Respondents-Respondents

Before: Hon. Justice Mahinda Samayawardhena
Hon. Justice Dr. Sobhitha Rajakaruna
Hon. Justice Menaka Wijesundera

Counsel: M.U.M. Ali Sabry, P.C., with Ruwantha Cooray and Naamiq Nafath for the Petitioner-Appellant.

Dr. Romesh De Silva, P.C., with N.R. Sivendran for the 1st Respondent-Respondent.

S.A. Parathalingam, P.C., with Nishkan Parathalingam for the 3rd Respondent-Respondent.

Neranjan Arulpragasam for the 5th Respondent-Respondent.

Argued on: 27.02.2026

Written submissions:

by the Petitioner-Appellant on 14.09.2025 and 28.04.2026

by the 1st Respondent-Respondent on 25.08.2025 and 19.03.2026

by the 3rd Respondent-Respondent on 25.08.2025 and 19.03.2026

by the 5th Respondent-Respondent on 26.08.2025 and 19.03.2026

Decided on: 02.09.2026

Samayawardhena, J.

The original Petitioner, Kamala Gunaratnam, instituted this action in the Commercial High Court on 22.09.2020 under section 128 of the Companies Act, No. 7 of 2007 against five Respondents seeking the rectification of the Share Register of the 1st Respondent Company.

The Petitioner's case, in summary, was as follows. At the time of instituting the action, she was 96 years of age and was a director and shareholder of the 1st Respondent Company. The 2nd Respondent is her son and a director and shareholder of the Company, whilst the 3rd Respondent is her grandson and the son of the 2nd Respondent.

The Petitioner's late husband, Kanagasabai Gunaratnam, who had managed the affairs of the 1st Respondent Company, died in 1989. At the time of his death, he held 32,678 shares in the Company. By his last will, he devised and bequeathed 9,381 of those shares to the Petitioner. The testamentary proceedings relating to his estate were then pending before the District Court of Colombo.

The Petitioner averred that, upon examining the records maintained by the Registrar General of Companies, she discovered that, on or about 03.11.2014, two sets of shares had been transferred to the 2nd Respondent. The first comprised the 2,376 shares already held by her in her own right. The second comprised the 9,381 shares bequeathed to her by her late husband.

According to the Petitioner, both transfers were fraudulent and unlawful. In relation to the 2,376 shares, she maintained that she had never intended to transfer those shares to the 2nd Respondent, that no consideration had passed for the purported transfer, and that she had neither knowingly nor willingly signed any share transfer form. She further alleged that, in or about 2015, the 2nd Respondent had fraudulently procured her signatures on several documents, including a deed of transfer relating to valuable immovable property, by representing that those documents were required for the early conclusion of the testamentary proceedings.

With regard to the 9,381 shares bequeathed to her by her late husband under the last will, the Petitioner contended that the testamentary proceedings had not been concluded and that those shares had therefore not yet vested in her. Consequently, neither the shares bequeathed to her nor those bequeathed to the other beneficiaries had been entered in the Share Register in their respective names. She maintained that she neither intended nor had the legal capacity to transfer those shares to the 2nd Respondent before they had vested in her, and that no consideration had passed for any such transfer. She accordingly asserted that the purported transfer of those shares to the 2nd Respondent was void *ab initio* and of no force or avail in law.

The Petitioner further alleged that the 2nd to 5th Respondents subsequently amended the Articles of Association of the 1st Respondent Company without proper notice of the General Meeting, and caused further shares to be issued to the 2nd and 3rd Respondents in a manner oppressive to the shareholders and prejudicial to the interests of the Company.

The Petitioner accordingly sought, *inter alia*, the following reliefs:

1. an order under section 128 of the Companies Act rectifying the Share Register by removing the name of the 2nd Respondent in respect of the 2,376 shares purportedly transferred to him on or about 03.11.2014 and restoring the Petitioner's name in respect of those shares;

2. an order rectifying the Share Register by removing the name of the 2nd Respondent in respect of the 9,381 shares purportedly transferred to him on or about 03.11.2014 and entering the name of the estate of the late Kanagasabai Gunaratnam in respect of those shares; and

3. such other and further relief as to Court may seem meet.

Pending the determination of the action, the 2nd Respondent died. Thereafter, the original Petitioner also died. Consequently, Vijayavani Gunaratnam, the daughter of the original Petitioner and the executrix named in her last will, filed two applications dated 30.06.2022. By the first, she sought to be substituted in place of the original Petitioner under section 398 of the Civil Procedure Code. By the second, she sought the substitution of the 3rd Respondent, the son of the deceased 2nd Respondent, who had obtained limited letters of administration to his estate, in place of the deceased 2nd Respondent under section 394 of the Civil Procedure Code. Subsequently, Vijayavani Gunaratnam also obtained limited probate of the last will of the original Petitioner.

The Respondents opposed both applications. By order dated 28.08.2024, the learned Judge of the Commercial High Court dismissed both applications with costs. The inevitable consequence of that order was that the action stood abated. Aggrieved thereby, Vijayavani Gunaratnam (hereinafter referred to as the Appellant) obtained leave to appeal to this Court.

The learned Judge dismissed the applications for substitution on the following grounds:

1. the Appellant had not obtained probate at the time she made the applications for substitution;

2. the alleged fraudulent transfer of shares by the 2nd Respondent constituted a purely criminal act and, accordingly, the original Petitioner's action was a personal action which did not survive her death;

3. the application to substitute the 3rd Respondent in place of the deceased 2nd Respondent was premature, as the Court had not first substituted the Appellant in place of the deceased original Petitioner; and

4. in terms of section 394 of the Civil Procedure Code, an application for substitution could be made only by a party to the action and, since the Appellant was not a party to the action, she lacked the requisite standing to invoke that provision.

The finding of the learned Judge of the Commercial High Court that the alleged fraudulent transfer of shares by the 2nd Respondent constituted a purely criminal act and that, consequently, the original Petitioner's action was a personal action which did not survive her death, is clearly misconceived in law.

Section 128 establishes a self-contained statutory mechanism for the rectification of a company's Share Register. It enables an aggrieved person, the company or any shareholder to apply to Court where a person's name has been entered in or omitted from the Share Register without sufficient cause, or where there has been a default or unnecessary delay in recording the fact that a person has ceased to be a shareholder. The Court is empowered not only to order rectification of the Share Register and award damages but also to determine all questions relating to title and any other question necessary or expedient for the effective rectification of the register. The jurisdiction conferred by section 128 is therefore plainly civil in character.

The circumstance that the same facts may also constitute a criminal offence does not exclude or supersede the civil remedy expressly created by section 128. It is well established that the same transaction may give rise to both civil and criminal consequences, each serving a distinct purpose and governed by different principles of law. By way of illustration, where title to land is alleged to have been fraudulently transferred by means of a forged deed, the forgery may constitute a criminal offence. Nevertheless, the true owner is also entitled to maintain a civil action to vindicate his title. The same principle applies to the alleged fraudulent transfer of shares.

The 1st Respondent, in the post-argument written submissions, contends that, upon the death of the original Petitioner, the right to sue did not survive and, consequently, no substitution could take place. The 1st Respondent submits that the shares or other property of the deceased vested in her heirs upon his death, and that their remedy was to apply to have themselves registered in the Share Register. Accordingly, the 1st Respondent maintains that the action cannot be continued, nor can the Share Register be rectified by substituting the Appellant in place of the deceased original Petitioner and that the Appellant and other heirs may, if they wish, institute fresh proceedings.

I am unable to accept that argument. In the present case, the cause of action is not founded upon a purely personal right peculiar to the deceased original Petitioner. It concerns the ownership of shares, the correctness of the Share Register and the proprietary rights arising therefrom. To the extent that the application seeks to vindicate those proprietary rights, the cause of action survives the death of the original Petitioner, and the proceedings can be continued by her legal representatives upon substitution.

If the Respondent's contention were accepted, every action involving proprietary rights, whether relating to movable or immovable property, would become incapable of continuation upon the death of the plaintiff, as the rights of the deceased devolve upon the heirs, notwithstanding that the underlying cause of action survives. The heirs or legal representatives would then be compelled to institute fresh proceedings, resulting in unnecessary multiplicity of actions, increased costs, avoidable delay and the duplication of judicial proceedings. Such a result is wholly inconsistent with the legislative purpose underlying the substitution provisions contained in Chapter XXV of the Civil Procedure Code, which are designed precisely to enable proceedings to continue where the cause of action survives notwithstanding the death of a party.

The finding of the learned Judge that the application to substitute the 3rd Respondent in place of the deceased 2nd Respondent was premature, on the ground that the Appellant had not first been substituted in place of the deceased original Petitioner, is equally untenable. There was no legal or procedural impediment to both applications being filed simultaneously. If the Court was first satisfied that the Appellant was entitled to be substituted in place of the deceased original Petitioner, it could thereafter proceed to consider the application to substitute the 3rd Respondent in place of the deceased 2nd Respondent. There was therefore no basis for dismissing the second application as premature.

The first ground upon which the learned Judge dismissed the Appellant's application was that she had not obtained probate at the time she sought substitution. The fourth was that, in terms of section 394 of the Civil Procedure Code, only a party to the action could apply for substitution and that the Appellant, not being a party to the action, lacked the requisite standing to invoke that provision. These findings are closely interconnected and require a careful examination of the statutory scheme governing substitution introduced by the Civil Procedure Code (Amendment) Act, No. 8 of 2017.

The Civil Procedure Code (Amendment) Act, No. 8 of 2017 fundamentally restructured the law governing substitution upon the death of a party. It repealed the former sections 393 to 398 of the Civil Procedure Code, enacted a new statutory scheme in their place and amended section 27 accordingly. One of the principal innovations introduced by section 393 was the mandatory requirement that every party file a memorandum nominating not less than one and not more than three persons to act as his or her legal representatives for the purpose of continuing the action in the event of his or her death before its final determination.

Prior to the amendment, substitution was founded upon the legal status of the person seeking substitution as the executor, administrator or, where applicable, the next of kin who had adiated the inheritance of the deceased party. Under the amended scheme, the person nominated need not be an executor, administrator, heir, beneficiary or next of kin of the deceased party. A party is at liberty to nominate any person to act as his or her legal representative for the purpose of continuing the proceedings.

Section 27(2) complements the scheme embodied in section 393. It requires that where a party appointing a registered Attorney-at-Law is a natural person, the registered Attorney-at-Law shall, when tendering the proxy, also tender a memorandum nominating a legal representative for the purpose of the legal proceedings in the event of the death of such party before the final determination of the proceedings. Section 27(2)(c) further provides that the provisions of section 393 shall apply in relation to the nomination of such legal representatives and the filing of the memorandum.

The proviso to section 393(1) casts a corresponding duty upon the Court to ensure compliance with the statutory requirement relating to the filing of the memorandum of nomination. Where no such memorandum has been filed, the Court may, either on its own motion or upon an application made by any party, require the defaulting party or any person eligible under the Civil Procedure Code to file the memorandum on or before a date fixed by Court. In the event of non-compliance with such direction, the Court is empowered to impose appropriate costs upon the defaulting party. The fact that the Court may act on its own motion underscores the importance attached by the legislature to the filing of the memorandum and the Court's supervisory responsibility to ensure compliance with this mandatory statutory requirement.

The statutory scheme is therefore clear. It requires the nomination of a legal representative at the earliest possible stage of the proceedings through the combined responsibilities imposed upon the litigant, the registered Attorney-at-Law and the Court. The legislative objective is to minimise delay and facilitate the seamless continuation of proceedings in the event of the death of a party.

Where a memorandum has been duly filed, the nominee becomes the "legal representative" of the deceased party for the purposes of the action. The legislative intention is that the substitution of such nominee should follow as a matter of course, provided the right to sue survives.

It is significant to note that, although the filing of a memorandum under section 393 is mandatory, the legislature did not intend that failure to comply with that requirement, whether through omission, inadvertence, negligence or otherwise, should result in the forfeiture of the right to continue the proceedings. Accordingly, section 394 provides an alternative mechanism for substitution where no memorandum has been filed under section 393.

Section 394 permits <u>any party to the action</u>, by *ex parte* petition supported by affidavit, to apply to Court for an order substituting the executor or administrator of the deceased party or, where the estate is below the administrable value, the next of kin who has adiated the inheritance, in place of the deceased party. These are the very categories of persons who were recognised as "legal representatives" prior to the amendment introduced by Act No. 8 of 2017.

Substitution under section 394 does not follow as a matter of course. Before making an appointment under that section, the Court shall be satisfied that the appointment is necessary and that the cause of action survives the death of the party.

Once substitution is effected, the substituted party is bound by all prior proceedings, subject to the statutory right to object that he or she is not the proper representative of the deceased or to raise any defence appropriate to his or her character as such representative.

It is common ground that the original Petitioner, who was the sole Petitioner, had not filed a memorandum under section 393 before her death. Section 394 permits any party to the action to make an application for substitution. None of the Respondents sought to invoke section 394 to substitute the original Petitioner. Instead, the Appellant made an application under section 398 of the Civil Procedure Code to be substituted in place of the original Petitioner. Section 398 provides as follows:

> *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 substituted on the record in place of the deceased plaintiff and the court shall thereupon cause an entry to that effect to be made on the record and proceed with the action.*

The contention advanced on behalf of the Appellant is that section 398 expressly authorises “the legal representative of the deceased” to apply for substitution and that, being the executrix named in the last will of the original Petitioner and having subsequently obtained limited probate, the Appellant is entitled to invoke that provision notwithstanding that she was not a party to the action.

Learned President’s Counsel for the 3rd Respondent, however, contends in the post-argument written submissions that, following the amendment introduced by Act No. 8 of 2017, the Appellant does not fall within the statutory definition of “legal representative” contained in Chapter XXV of the Civil Procedure Code and, therefore, was not entitled to make an application under section 398. There is great force in that contention. However, for the reasons set out below, I arrive at a different conclusion.

The resolution of the said competing contentions depends upon the meaning of the expression “legal representative” in Chapter XXV of the Civil Procedure Code. Although I have referred to this issue earlier in this judgment, it is necessary to examine it in greater detail.

Prior to the enactment of the Civil Procedure Code (Amendment) Act, No. 8 of 2017, section 394(2) defined “legal representative” as follows:

> *For the purposes of this Chapter ‘legal representative’ means an executor or administrator, or in the case of an estate below the value of five hundred thousand rupees, the next of kin who have adiated the inheritance.*

Following the 2017 amendment, however, section 395(2) now provides:

> *<u>For the purposes of this Chapter</u> 'legal representative' means a person who represents the estate of a deceased party or person, for the purposes of the action, by virtue of a nomination made in a memorandum filed under subsection (1).*

The change is significant. Under the amended definition, a "legal representative" for the purposes of Chapter XXV is no longer the executor, administrator or the next of kin of the deceased. Rather, it is confined to the person nominated in the memorandum filed under section 393(1).

This conclusion is reinforced by sections 398A and 398B. Section 398A contemplates an application for substitution by the nominated legal representative within six months of the plaintiff's death and, in default, empowers the Court, upon the application of the defendant, to appoint such legal representative in order to enable the action to proceed to final determination. Likewise, section 398B provides for the substitution of the nominated legal representative upon the death of a defendant. These provisions consistently proceed on the footing that the expression "legal representative" refers to the person nominated under section 393.

The expression "legal representative" is defined in section 395(2) for the purposes of Chapter XXV and, accordingly, that definition applies to every provision in that Chapter, including section 398. Significantly, the definition is not qualified by words such as "unless the context otherwise requires". Consequently, the literal meaning of section 398 suggests that, where no memorandum has been filed, an executor, administrator or, where applicable, the next of kin who has adiated the inheritance, although representing the estate of the deceased in law, does not fall within the statutory definition of "legal representative".

The amended provisions disclose an apparent drafting anomaly. The present case illustrates the anomaly. Although the Appellant is the executrix of the deceased original Petitioner, represents her estate in law, and is desirous of continuing the action, she is not a "legal representative" within the meaning of Chapter XXV and is therefore not entitled to apply for substitution. On the other hand, the Respondents have elected not to invoke section 394 to seek the substitution of the deceased original Petitioner. The result is that, notwithstanding that the cause of action survives, the action becomes incapable of continuation.

Parliament cannot have intended such a result. The object of the Civil Procedure Code (Amendment) Act, No. 8 of 2017 was to expedite, rather than impede, the continuation of proceedings following the death of a party. Although the filing of a memorandum was made mandatory, Parliament nevertheless retained section 394 to ensure that proceedings could continue where no memorandum had been filed. It could not have been the legislative intention that, where the deceased was the sole plaintiff, the continuation of the action should depend entirely upon whether the defendant chose to invoke section 394 to substitute the deceased plaintiff. Such a construction would frustrate, rather than advance, the object of the amendment, impede the administration of justice and produce an unjust and irrational result. A litigant should not be non-suited by reason of an apparent procedural lacuna. Procedure is the handmaid of justice, not its mistress. It exists to facilitate the adjudication of substantive rights, not to defeat them.

The principle underlying the maxim *ubi jus ibi remedium* — where there is a right, there is a remedy — lends further support to this conclusion. In *Ashby v. White* (1703) 92 ER 126 at 136, Holt CJ observed that "*if the plaintiff has a right, he must of necessity have a means to vindicate and maintain it*". The maxim does not empower a Court to disregard an express statutory provision or to create a jurisdiction which the legislature has withheld. It is nevertheless relevant where, as here, the substantive right survives but an apparent procedural lacuna, if literally applied, would leave no means by which that right could be pursued.

It is in precisely such exceptional circumstances that the inherent jurisdiction preserved by section 839 assumes significance. The Court is not creating a substantive right where none exists. Rather, it is supplying a procedural mechanism necessary to enable an existing cause of action, which survives the death of the original Petitioner, to be adjudicated on its merits.

Section 839 of the Civil Procedure Code provides:

> *Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

In *Ittapana v. Hemawathi* [1981] 1 Sri LR 476 at 485, Sharvananda J. (as he then was) observed that:

> *The inherent power [under section 839] is exercised ex debito justitiae to do that real and substantial justice for the administration of which alone Courts exist.*

It is well established that the inherent jurisdiction recognised by section 839 cannot be invoked to override an express provision of the Civil Procedure Code. Equally, however, where a contingency has not been contemplated by the legislature and the Code makes no express provision to deal with it, the Court may invoke its inherent jurisdiction to adopt such procedure as is necessary to secure the ends of justice and prevent an abuse of its process. The present case is one such instance.

Accordingly, I hold that where no memorandum has been filed by the sole plaintiff under section 393 and no party to the action invokes section 394, the executor or administrator of the deceased party or, where applicable, the next of kin who has adiated the inheritance may apply under section 394(1) to be substituted, provided the Court is satisfied that such appointment is necessary and the cause of action survives the death of the deceased party. Such an interpretation preserves the legislative scheme introduced by the Civil Procedure Code (Amendment)

Act, No. 8 of 2017, whilst preventing the abatement of an action solely because of an apparent drafting anomaly.

To avoid any ambiguity, I suggest that Parliament may consider inserting a new subsection immediately after section 394(1), in substantially the following terms:

> *(1A) Where no application is made under subsection (1), the executor or administrator of the deceased party or, where the estate is below the administrable value, the next of kin who has adiated the inheritance may apply to court by petition supported by affidavit to be substituted in place of the deceased party.*

The conclusion reached above also finds persuasive support in the English authorities. In *Goodman v. Goodman* [2014] Ch 186, the Court reaffirmed the long-established principle that an executor derives title from the will itself upon the death of the testator, the grant of probate serving as the formal authentication of that title. Furthermore, in *Kings Court Trust Ltd. v. Lancashire Cleaning Services Ltd.* [2017] EWHC 1094 (Ch), subsequently applied in *Williams v. Russell Price Farm Services Ltd.* [2020] EWHC 1088 (Ch), the High Court, in exceptional circumstances, exercised its statutory jurisdiction to grant relief before probate had been obtained where this was necessary to enable the company to continue functioning. Although those decisions were rendered in the context of the English rectification jurisdiction and turned on their own exceptional facts, they nevertheless demonstrate that the absence of a grant of probate is not, in every case, an absolute bar to the making of appropriate procedural orders where the interests of justice so require.

I would also add that, having regard to the object of substitution, namely, the seamless continuation of proceedings where the cause of action survives, an executor named in the deceased party's will, or, where there is no will, the next of kin who has adiated the inheritance, may properly be substituted pending the grant of probate or letters of administration, subject to the Court being satisfied that the applicant is entitled to represent the estate. I find support for this view in *Jayasinghe v. Pedris* [2005] 1 Sri LR 290.

I also wish to make a brief observation regarding the conduct of the 5th Respondent, the Company Secretary of the 1st Respondent Company. The 5th Respondent opposed the applications for substitution on several grounds, including the contention that the main action had not reached *litis contestatio*. That submission is wholly misconceived. The doctrine of *litis contestatio* is generally invoked in determining the survival of purely a personal cause of action and has no application to the present proceedings, which are not of that nature. There is no basis for the Company Secretary to either support or oppose the applications for substitution. The Company Secretary is neither a member of the Board of Directors nor a shareholder of the Company. As an officer of the Company performing statutory and administrative functions under the direction of the Board of Directors, the Company Secretary is expected to maintain neutrality in disputes between shareholders and should not align with one faction against another.

Before parting with this judgment, I wish to emphasise the importance of strict compliance with the amendments introduced by the Civil Procedure Code (Amendment) Act, No. 8 of 2017. The filing of the memorandum contemplated by sections 27 and 393 is not a mere procedural formality. It is a mandatory statutory requirement designed to facilitate the seamless continuation of proceedings upon the death of a party and thereby minimise delay in the administration of justice. Delay occasioned by applications for substitution following the death of litigants has long been one of the contributing factors to protracted civil litigation. The statutory scheme places corresponding responsibilities upon litigants, Attorneys-at-Law and the Court to ensure that the memorandum is filed at the commencement of the proceedings. Faithful compliance with those obligations will significantly reduce avoidable delay and promote the expeditious disposal of civil actions.

For the foregoing reasons, the appeal is allowed with costs. The order of the Commercial High Court dated 28.08.2024 is set aside. The two applications for substitution are allowed, and the learned Judge is directed to proceed with the action according to law, expeditiously.

For the avoidance of doubt, nothing stated in this judgment should be understood as expressing any view on the truth or otherwise of the allegations made by the original Petitioner or on the merits of the main application under section 128 of the Companies Act. The only questions determined by this Court relate to the substitution of parties and the continuation of the proceedings following the death of the original Petitioner and the 2nd Respondent. All questions relating to the merits of the dispute remain open for determination by the Commercial High Court.

Judge of the Supreme Court

Dr. Sobhitha Rajakaruna, J.
I agree.

Judge of the Supreme Court

Menaka Wijesundera, J.
I agree.

Judge of the Supreme Court