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

S.C. Appeal 189/2015

SC/HCCA/LA/52/2015

WP/HCCA/MT/38/2012/LA

D.C Nugegoda L 270/09

Kariyawasam Majuwanage Gnanaratna
No. 22, Dambugaha Watte,
Thalahena,
Malabe.

Plaintiff (Deceased)

Vs.

1. Bandara Kalu Thanthrige
   Dona Mala Kanthi Perera
   No. 401/2, E. W. Perera Mawatha, Pitakotte

2. Suriyarachchige Bineshika
   Anuranjitha Perera
   No. 401/2, E. W. Perera Mawatha, Pitakotte

   Presently of
   No. 5301 Spring Lake Pkwy, Apt. 506,
   Haltom City,
   TX 76117, USA

Defendants

AND

In the matter of an application under Chapter XXV, Section 395 of the Civil Procedure Code

Kariyawasam Majuwanage Prabath
Chaminda Perera
No. 431/11, Bodhiya Road,
Thalahena,
Malabe

Petitioner

Vs.

1. Bandara Kalu Thanthrige
   Dona Mala Kanthi Perera
   No. 401/2, E. W. Perera Mawatha,
   Pitakotte

2. Suriyarachchige Bineshika
   Anuranjitha Perera
   No. 401/2, E. W. Perera Mawatha,
   Pitakotte

   Presently of
   No. 5301 Spring Lake Pkwy, Apt. 506,
   Haltom City,
   TX 76117, USA

Defendants-Respondents

AND BETWEEN

In the matter of an Application for Leave to Appeal in terms of section 754(2) of the Civil Procedure Code read together with section 757 thereof and section 5A(1) and (2) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 as amended

Kariyawasam Majuwanage
Prabath Chaminda Perera
No. 431/11, Bodhiya Road,
Thalahena,
Malabe

Petitioner-Petitioner

Vs.

1. Bandara Kalu Thanthrige
   Dona Mala Kanthi Perera
   No. 401/2, E. W. Perera Mawatha,
   Pitakotte

2. Suriyarachchige Bineshika
   Anuranjitha Perera
   No. 401/2, E. W. Perera Mawatha,
   Pitakotte

   Presently of
   No. 5301 Spring Lake Pkwy, Apt. 506,
   Haltom City,
   TX 76117, USA

Defendants-Respondents-Respondents

AND NOW BETWEEN

Kariyawasam Majuwanage Prabath
Chaminda Perera
No. 431/11, Bodhiya Road
Thalahena,
Malabe

Petitioner - Petitioner -Appellant

Vs.

1. Bandara Kalu Thanthrige
   Dona Mala Kanthi Perera
   No. 401/2, E. W. Perera Mawatha, Pitakotte

2. Suriyarachchige Bineshika
   Anuranjitha Perera
   No. 401/2, E. W. Perera Mawatha, Pitakotte

   Presently of
   No. 5301 Spring Lake Pkwy, Apt. 506,
   Haltom City,
   TX 76117, USA

Defendants - Respondents- Respondents

Before: S. Thurairaja, PC, J.

Sobhitha Rajakaruna J.

Menaka Wijesundera J.

Counsel: Manohara de Silva, PC with Amrit Rajapaksa for the Petitioner-Petitioner-Appellant.

Shiraz Hassan for the Defendants-Respondents-Respondents.

Argued on: 28.02.2025

Decided on: 24.10.2025

Sobhitha Rajakaruna J.

One Kariyawasam Majuwanage Gnanaratna ('Plaintiff') gifted his property in suit to his wife ('1st Defendant'), subject to his life interest, by way of the Deed of Gift No. 135 attested by K.A.P. Gunathilaka, Notary Public, on 28.07.1998. The 1st Defendant, thereafter, gifted the said property to her daughter ('2nd Defendant') from her first marriage, by way of the Deed of Gift No. 195 attested by K.A.P. Gunathilaka, Notary Public, on 23.02.2005. The Plaintiff instituted the action bearing No. L/270/09 in the District Court of Nugegoda ('District Court') against the said 1st and 2nd Defendants, praying *inter alia* that the said Deed of Gift No. 135 be revoked on the ground of alleged gross ingratitude by the 1st Defendant. Additionally, the Plaintiff prayed that the said Deed No. 195 also be revoked on the basis that it had been attested fraudulently in favour of the 2nd Defendant, while the Plaintiff was still in possession of the subject premises.

The Plaintiff passed away on 01.02.2011, after the 1st and 2nd Defendants had filed their Answers but before the initial Trial date in the District Court. Consequently, the Petitioner-Petitioner-Appellant ('Appellant') filed a Petition dated 28.11.2011 in the District Court, under Section 395 of the Civil Procedure Code ('CPC'), to be substituted in place of the said Plaintiff. The Appellant is the son of the deceased Plaintiff from his first marriage. The learned District Judge on 06.08.2012 rejected the said application, stating that the case came to an end with the death of the Plaintiff, as it was an action *in personam*.

The Appellant filed a Leave to Appeal Application in the Provincial High Court of Western Province, holden in Mount Lavinia ('High Court'), challenging the said order of the learned District Judge. The learned High Court Judge decided that the said District Court case was an action *in personam* and that the Appellant could not rely on the principle of *litis contestatio.* Accordingly, the High Court dismissed the application of the Appellant by its order dated 17.12.2024. The instant Application is filed in this Court impugning the said order of the High Court.

Questions of Law

This Court granted Leave to Appeal on the questions of law outlined in sub-paragraphs (i) to (v) of paragraph 19 of the Petition dated 28.01.2015. However, when this matter was taken up for hearing, the learned Counsel for the Appellant agreed that he would be satisfied if the Court answered the following questions described in paragraphs 19 (ii), (iii), (iv) of the same Petition:

(i) Has the Civil Appellate High Court of Mount Lavinia erred in law in holding that the original Plaintiff had died before the stage of *litis contestatio*, which the Court equated with the stage of raising of issues?

(ii) Has the Civil Appellate High Court of Mount Lavinia erred in law in holding that the rule of *litis contestatio* does not apply to actions based on gross ingratitude?

(iii) Has the Civil Appellate High Court of Mount Lavinia erred in law by failing to consider that *litis contestatio* coincides with the closing of pleadings?

Survivability of the Cause of Action vis-à-vis Action In Personam

It is noteworthy that the impugned orders in the District Court and the High Court arise from proceedings initiated through the Appellant's Petition dated 28.11.2011 filed in the District Court under Section 395 of the Civil Procedure Code ('CPC'). Section 395 has been amended pursuant to the Civil Procedure Code Amendment Act No. 08 of 2017, which incorporated a mechanism enabling parties to an action to nominate their nominees to be substituted in the event of their death before the conclusion of the case. Sections 393 to 398 (both inclusive) of the principal enactment were repealed, and new sections were substituted. As such, the following provisions of Section 395, as they stood in November 2011, will apply to the instant Case:

> "In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action".

Accordingly, the District Court, upon an application made by the legal representative of the sole plaintiff who was deceased, should enter his name and proceed with the action provided the right to sue survives. Thus, the vital issue that needs to be addressed in the instant matter is whether the right to sue survives beyond the death of the Plaintiff of this Case. In terms of Section 392 of the CPC, the death of a plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives.

Nevertheless, the Defendants-Respondents-Respondents ('Defendants') argue that the case is an action *in personam* and that, accordingly, the cause of action did not survive upon the death of the Plaintiff on the grounds that the case in the District Court has not reached the stage of *litis contestatio,* as issues had not been framed in the District Court. The contention of the Appellant is that he should be substituted in place of the Plaintiff and permitted to continue the District Court proceedings, since parties had already lodged their pleadings before the Plaintiff's death. The Appellant asserts that the case has reached the stage of *litis contestatio* and that the optimal point for attaining this phase is completion of filing pleadings, not the stage of framing issues.

It is observed that Section 392 of the CPC, which deals with continuation of action upon the death of a party, makes it conditional that if the right to sue on the cause of action survives only, such action can be continued. The general test for evaluating whether the cause of action survives upon the death of a party, known as the 'survivability of action', depends on whether the cause of action is purely personal to the deceased, in which case it ceases to exist. The precedent enunciated in numerous judgments is that if the plaintiff in an action *in personam* passes away before attaining the *litis contestatio* stage, the proceedings will come to an end. In contrast, causes of action that relate to property, contracts, or other financial interests can be continued by the deceased's legal representative. When examining whether the right to sue survives, it is vital to consider whether the action is one *in personam,* that is, a lawsuit directed at a specific individual or entity to determine their personal rights and obligations. The maxim *actio personalis moritur cum persona* applies to it. An *in personam* action is distinct from an *in rem* action, which directs the lawsuit at a specific piece of property rather than a person.

The Supreme Court in ***S. Seelawathie v K.R. Sumanawathie*** (SC Appeal No. 199/2014, S.C. minutes of 22.06.2017) observed that:

> *"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."*

Correspondingly, in Roman Dutch Law, an action *in personam* enforces a personal right (*jus personam*), defined in *Wille's Principles of South African Law* (25 De Jure 524 [1992] 8th edition by Dale Hutchison- general editor) as a claim against another person for something, an act, or to refrain from an act. Conversely, an action *in rem* enforces a real right (*jus in rem*), described in the said textbook as an exclusive interest in a thing that binds all others, allowing the holder to prevent interference and seek remedies against violators.

Dissanayake J., in ***John Fernando and Attorney General v Satarasinghe*** [2002] 2 Sri LR 11, states that Fraser in his book *'Libel and Slander'* (7th edition, at page 181, Article 45, under the heading of "Death of Plaintiff or Defendant"), has observed as follows : "the maxim *'actio personalis moritur cum persona'*, applies to every action for libel or slander and therefore, where a libel or slander has been published by any person and such person dies, no cause of action survives either for or against his personal representative; on the other hand, a cause of action for the publication of false and malicious words causing damage to any person survives for the personal representative of such person". The Court of Appeal in the same judgement further states that, *Odgers on Libel and Slander* (6th edition, at page 467), dealing with the English Law Principles, under the heading 'Executors and Administrators' has observed as follows: "the maxim *'action personalis moritur cum persona'* applies to all actions of Libel and Slander. If, therefore, either party dies before the verdict, the action is at an end".

The Supreme Court in ***Karuna Aratchige Ariyaratne v. Karuna Aratchige Ranjith Ariyaratne*** [2016] 1 Sri LR 203, considering material on Roman Law, English Law and Dutch Law

on succession to actions, has concluded by summing up the points of contrast between English and Dutch Law on the subject of succession to actions as follows:

> *"The rule of English law was that the death of either party extinguished such actions; but exceptions were made by statute in the case of injuries to real and personal property; and in the case of death through negligence, an action was granted for the benefit of the family of the deceased. In Dutch Law, the rule was that the action survived the death of either party. The exceptions were, (1) as regards actions for injury involving insult, in which case the death of either party extinguished the action unless it occurred post item contestatam, (2) as regards actions for willful or negligent killing, in which case the estate of the deceased had only a limited right of action, but the relatives of the deceased were entitled to an action for compensation for their material loss. In other words we may say that the Dutch Law began at the stage at which the English Law has finally arrived."*

Hence, the survivability of an action hinges on whether the cause of action is purely personal to the deceased (*in personam*), in which case it ceases to exist under the maxim *actio personalis moritur cum persona*. Non-personal causes (e.g., those involving property, contracts, or financial interests) survive and can be pursued by the legal representative. Overall, the precedents emphasize that actions *in personam* abate upon death unless the case has reached the *litis contestatio* stage.

Now, I need to examine whether the Plaintiff's action in the District Court of Nugegoda is an action *in personam* and, accordingly, if those proceedings were terminated by his death on 01.02.2011. Upon perusal of the prayer of the Plaint filed in the District Court, it is observed that the Plaintiff sought *inter alia,* (i) an order revoking the Deed of Gift No. 135 (ii) an order revoking the Deed of Gift No. 195 (iii) a declaration that the Plaintiff is the lawful owner of the subject property (iv) an enjoining order, an interim order and an injunction restraining the 1st and 2nd Defendants from obstructing the Plaintiff's possession of the subject land. In the main body of the Plaint, the Plaintiff states that he sought revocation of the Deed of Gift No. 135 owing to the ingratitude of the donee (the 1st Defendant), his wife.

In the said ***Karuna Aratchige Ariyaratne v. Karuna Aratchige Ranjith Ariyaratne***, Anil Gooneratne J. approached this issue by considering whether a claim to revoke a deed of gift due to gross ingratitude, despite being an *in personam* action, would cease upon the

donor's death. Both the District Court and the Civil Appellate High Court had dismissed the respective action on that basis, invoking the maxim *actio personalis moritur cum persona*. However, Gooneratne J., declaring that an action for revocation of a deed on the grounds of gross ingratitude is in the nature of an action *in personam,* determined that the husband of the deceased plaintiff, who was the heir of the deceased, has the right to be substituted in place of the deceased plaintiff to prosecute the said action since the said case reached the stage of *litis contestatio*. Nonetheless, the Supreme Court in the said matter observed that 'rules suggested and discussed in the case may not apply uniformly to every case, but would depend on facts and circumstances of each case, but there is some certainty or certainty could be fathomed in cases of slander/libel and defamation which fall into the category of personal actions and cause of actions cannot survive on the demise of either party'. 'A variety of actions and subjects need to be considered, and even in the law of contracts, certain limitations are placed depending on the subject matter.'

Gooneratne J. in the above judgement placed significant reliance on the judgement of Shiranee Tilakawardane J. in ***Mahawewa and Another v. Hemachandra Mahawewa*** [2010] 1 Sri LR 270. It was also a matter where a party objected to the application for substitution on the ground that the cause of action of the case, which was based on gross ingratitude of the deceased defendant, ceased to operate upon the death of the original defendant. Tilakawardane J. in the said case, allowing the substitution, held that,

> *"If the purpose of an action for the revocation of gifts based on ingratitude is to seek retribution and punishment, then one must consider whether such purpose would be served by denying continuation of action in cases where the Plaintiff has complained about the alleged ingratitude. In the instant case, if the cause of action is said to have died with the death of the original Defendant, the Petitioners will be enriched to the detriment of the Respondent. The donated property runs parallel to the personal nature of this action due to the fact that such property forms part of the deceased Defendant's estate the benefit of which accrues to his heirs. In other words, the petitioners would be unjustly enriched in the circumstances where retaining such property is not supported by adequate cause. Therefore, in order to prevent unjust enrichment it is proper to substitute the Petitioners in place of the deceased Defendant in order to continue the action instituted by the Respondent for the revocation of the gift."*

In light of the above, even if the Plaintiff's suit is deemed to rest on ingratitude and thus qualifies as *in personam*, the precedents cited earlier establish that an application to revoke

a deed of gift for ingratitude may be pursued after the original plaintiff's passing, contingent upon adherence to the principle *of litis contestatio.* When determining whether an action is *in personam*, it is insufficient to rely solely on a single term such as 'ingratitude'; rather, it must be assessed based on the specific facts and circumstances of each case.

Upon a careful perusal of the pleadings of the parties of the District Court action, I'm not inclined to brand the action filed by the Plaintiff exclusively as an action *in personam.* I have arrived at such a decision based on the prayer of the Plaintiff by which the Plaintiff *inter alia* seeks a declaration of title and also an order revoking the Deed of Gift No. 195 through which his wife (1st Defendant) purportedly gifted the subject property to the 2nd Defendant, without his awareness. This was in addition to his prayer to get the Deed of Gift No. 135 revoked on the basis of ingratitude. Although the Defendants claim that the Plaintiff placed his signature on the Deed No. 195, the Plaintiff insists that the said Deed No. 195 was made fraudulently, and thus, it is void. Consequently, all such matters were to be resolved at the Trial stage. Moreover, the appellant sought to deposit the Last Will of the deceased Plaintiff. One may argue that the Plaintiff's case is extremely weak; still, the pertinent issues need to be examined by the Trial Judge based on the evidence presented to the Court.

Litis Contestatio

Litis Contestatio is a legal concept rooted in Roman law and used in some civil law systems. It denotes the stage in a legal proceeding where a case can be proceeded with for further adjudication. The general perception is that once the case reaches the *litis contestatio* stage, the parties are bound by the positions taken in their pleadings, whereas the death of the plaintiff prior to this point results in the termination of the action *in personam*.

The Defendants state that the origin of the concept of *litis contestatio* is the formulary procedure of Roman Law in which the litigants appeared before the praetor, who formulated the issues that the judge had to decide: once the issues had been formulated, the stage of *litis contestatio* was reached. The Defendants rely on the recent South African case of ***Natal Join Municipal Pension Fund v Endumeni Municipality,*** (920/2010), [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) 16 March 2012). The said Judgement has given reference to *Textbook on the Roman Law,* (by J.A.C. Thomas, Chapter

VII on the formulary process) and *An Introduction to the Principles of Roman Civil Law* (by P. van Warmelo, at 278, para 733).

Applicability of 'Litis Contestatio' to our Legal Framework

As mentioned above, the Defendants contend that the *litis contestatio* is the formulary procedure of Roman law, whereas the Appellant maintains that the said doctrine stems from our Common law, namely, Roman-Dutch law. In this context, key questions arise: What constitutes common law, and what precisely is the common law of Sri Lanka? I have taken the view in ***Timex Garments (Private) Limited v. The Commissioner General of Labour and Others*** (CA/WRIT/486/2021, decided on 08.02.2024) that with the current socio-economic trends and developments in the country, including the laws made by the legislature and the judges, the traditional definitions given to the phrase common law (which are distinct from each other) should be constructively redefined.

In this backdrop, I have heeded the observations of L.J.M. Cooray in his work '*An Introduction to the legal System of Sri Lanka'* (Stanford Lake 2003 - 3rd print, p.101), where he has taken the view that the case of ***Kodeeswaran v. The Attorney General*** 72 N.L.R. 337 is a pointer which could enable the legal fraternity in Sri Lanka to move away from the old formulation of the Roman-Dutch law as the common law, and to think in terms not of Roman-Dutch or English law and of the antithesis between Roman-Dutch law and English law in our legal system and to recognize that there is a body of law, in the decisions of our courts, a body of law not English nor Roman-Dutch but which is the creation of our courts and which in Lord Diplock's words in the ***Kodeeswaran*** case may be called 'the indigenous common law' of Sri Lanka. It is paramount to note that Lord Diplock has recognized in the said ***Kodeeswaran*** case the power of the Courts to develop the law to suit changing circumstances and also give effect to a local practice without abruptly applying the Roman-Dutch or English rules.

H. R. Hahlo and Ellison Kahn ('*The Union of South Africa. The Development of Its Laws and Constitutions*', 1960 Stevens & Sons Ltd., pp.47,50-51) have drawn a relationship between the Roman Dutch Law and the English Law (which are considered as composites of the modern South African Law) stating that, "*....And it can confidently be expected that as our own body of jurisprudence grows, reference to the old writers will become less and less necessary. It has*

been rightly said that the law of any country can be found in the last thirty years of its law reports. This stage of certainty has not as yet been reached in South Africa, but the time is undoubtedly approaching when reference to the old writers will be the exception rather than the rule." (Vide- the said ***Timex Garments (Private) Limited*** Case).

Likewise, the common law of any jurisdiction, or its foundational principles, cannot impose constraints on that jurisdiction's legislative power. I take the view that the common law principles or concepts of Roman-Dutch law should be utilised in a case to adjudicate the rights of the parties when they have no conflicts with the existing legislation passed by the Parliament, and only if the provisions of such legislation are not adequate to resolve the question under such laws or construing prevailing laws. It is often seen that some parties of cases scrupulously gather up from every remote corner, the most obsolete decisions or principles and present them as embedded in our common law. A jurisprudence that disregards explicit and unequivocal statutory mandates in favour of such remnants, without adducing any reasons, proves detrimental to the legal framework. Such an exercise occasionally undermines some dazzling principles of the Roman-Dutch law, which need to be made use of in adjudicating disputes as exigencies demand.

When examining the legal framework in Sri Lanka, it is observed that the provisions of Section 392 of the CPC should be considered as the direct law that applies to the principal issues of the case in hand. The primary mandate of Section 392 of the CPC entails assessing whether the cause of action survives, thereby determining if the proceedings abate upon the demise of the plaintiff or defendant. In a parallel vein, the CPC, in its Section 760A, governs circumstances arising from the death or change of status of a party to an appeal. Moreover, Section 347 of the CPC declares that in cases where there is no respondent named in the petition of application for execution, if more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the Judgment-debtor, and shall proceed thereon as if he were originally named respondent therein. The administrator of a deceased plaintiff's estate, whose death occurred after the judgment in the proceedings, must seek substitution as plaintiff under Section 339 of the CPC.

It is paramount to note that Section 392 of the CPC imposes just one limitation on a party who applies for substitution, and that is to satisfy the court that the cause of action survives even after the death of the original party. This prompts a reasonable query whether it is

justifiable to invoke a Roman-Dutch law or common law principle like *litis contestatio,* thereby restricting the rights of a party seeking substitution?

The precedence from key judicial decisions establishes that in an action *in personam*, the death of the plaintiff following the commencement of the action results in the extinction of the proceedings. However, the courts have accepted that the actions *in rem* differ from the earlier scenario, as such action continues against the property, with the deceased plaintiff's interest passing to their estate. Both of the above judgements in ***Karuna Aratchige Ariyaratne v. Karuna Aratchige Ranjith Ariyaratne*** and ***Mahawewa and Another v. Hemachandra Mahawewa,*** the Court allowed substitution upon the death of the party who filed the case, which is in the nature of an action *in personam*, taking into consideration the principle of *litis contestatio.* In each instance, the Supreme Court held that such an action may proceed despite the party's death, on the condition that the proceedings have advanced to the *litis contestatio* phase.

In these circumstances, I take the view that the principle of *litis contestatio* should be integrated in actions *in personam* amidst the provisions of Section 392 of the CPC, which is our statutory law, for the following reasons: a). it aligns without contradicting Section 392; b). it enables them to construe effectively the condition embodied in Section 392 (survival of cause of action), thereby providing meaningful advantages to the deceased plaintiff's successors. In this context, I am deeply persuaded by the reasoning of Shiranee Tilakawardane J. in ***Mahawewa and Another v. Hemachandra Mahawewa***. In that case, the court decided that, to avert unjust enrichment, it is proper to substitute the petitioners in place of the deceased party, thereby allowing to continue the action instituted by the deceased party for the revocation of the gift, which includes the property that forms part of the deceased's estate.

Pinpointing the Ideal Trigger: When Litis Contestatio Takes Hold in Trial

The contention of the Appellant is that the comparative jurisprudence reflects different points at which *litis contestatio* is reached. The Appellant refers to several comparative authorities to reinforce the proposition that although some jurisdictions speak of "lodging defences" or "joining issues," the consistent thread is that *litis contestatio* coincides with the point at which pleadings are closed. Accordingly, it is incumbent upon me at this juncture

to ascertain what is the most appropriate stage during an action *in personam* to employ the principle of *litis contestatio* consistent with prevailing statutory frameworks and modern-day judicial activism in Sri Lanka.

In ***Argyllshire Weavers Ltd v. A. Macaulay (Tweeds) Ltd*** [1962] S.C. 388, the Scottish Court favoured the stand that the date of *litis contestatio* is the date of lodging defences, i.e., when issues are joined. In ***Afrika v. Cape plc*** [2000] C.L.C. 45, the English Court of Appeal (applying Roman-Dutch principles) held that damages for pain and suffering do not pass to the estate unless the action had reached the stage of *litis contestatio*, which under South African law corresponds to the close of pleadings.

Middleton J. in ***Perera v. Silva*** 13 N.L.R. 81 observed that *litis contestatio* occurs "on the closing of the pleadings." In ***Muheeth v. Nadarajapillai*** (1917) 19 N.L.R. 461, Wood Renton C.J. noted that an action *in personam* reaches *litis contestatio*, with the joinder of issue or the close of pleadings. The Supreme Court in ***Krishnasamy Vangudasalam Vengudan v. Adika Pundayan Kuruppan*** (1978) 79 (II) N.L.R. 150, held that a personal action would not abate with the death of the plaintiff if *litis contestatio* had been reached, and expressly identified the stage of *litis contestatio* with the joinder of issue or close of pleadings.

Anyhow, in ***Jayasuriya v. Samaranayake*** [1982] 2 Sri LR 460, Court of Appeal decided the respective action *in personam* had not reached the stage of *litis contestatio* as the summons had not been served at the time of the death of the plaintiff.

Mark Fernando J. in ***Peter Atapattu v. Peoples Bank*** [1997] 1 Sri LR 208 also took the view that *litis contestatio,* which in the modern law is deemed to take place at the moment the pleadings are closed. The Court of Appeal in ***Associated Newspapers of Ceylon v. Felicia Kariyakarawana*** [2006] 2 Sri LR 359 also followed this approach, holding that *litis contestatio* is reached "when pleadings are closed and matters are at issue between the parties." In the case of ***S. Seelawathie v K.R. Sumanawathie,*** in which the *jus personam* and *jus in rem* were discussed as mentioned above, Prasanna Jayawardane, PC, J. has indicated that in the case of actions *in personam*, the stage of *litis contestatio* is reached when the Defendants filed their answers.

Having carefully perused all the respective case law, I found myself perplexed as to how the judges chose the stage of the trial that they deemed most suitable for applying the principle of *litis contestatio*. I could not find any judicial explanations given by our courts justifying why either the conclusion of pleadings or the formulation of issues represents the ideal point for invoking this principle under Sri Lanka's present-day legal system.

Roman private law was closely connected with the law of civil procedure, otherwise recognised as the law relating to actions. As the evolution of Roman private law was greatly influenced by the development of legal procedure, the study of procedural law can illuminate the framework that cultivated substantive private law. (Vide- Mousourakis, G. [2012] *The Law of Actions. In: Fundamentals of Roman Private Law*, Springer, Berlin, Heidelberg. https://doi.org/10.1007/978-3-642-29311-5 6). I take the view that determining the precise moment, in Sri Lanka, for applying *litis contestatio* within a trial demands careful alignment with the provisions of the CPC. Multiple jurisdictions identify the prime juncture as the phase when parties initially disclose their positions to one another. Accordingly, the close of all pleadings emerges as the critical threshold, where claims and defences are fully articulated, enabling the court to proceed with framing issues.

After the issues are settled and the judge conducting the pre-trial conference is satisfied that the case is ready for trial, a date for the trial will be fixed under Section 80(2) of the CPC. Before the amendment to Section 80 (by Section 7 of Amendment Act No. 29 of 2023), issues were usually framed on the first date of trial. Such a first date is for the commencement of the trial proper, typically when the court begins hearing evidence. It signifies the shift from preparatory stages to substantive adjudication, emphasising the reach of finality efficiently and speedily. Section 93 of the CPC indeed restricts amendments to pleadings after the "day first fixed for pre-trial," allowing them only in exceptional cases to prevent grave injustice and undue delay (laches). This also underscores the court's preparedness to proceed to trial once pleadings are completed. Following the defendant's answer, the plaintiff may submit a replication as warranted by Section 79 of the CPC. Delivering interrogatories upon leave of court is also another optional step under Section 94(1) before the hearing, and it is in addition to the filing of a list of witnesses and documents within the stipulated period of time.

Considering the overall circumstances, I hold that the *litis contestatio* should be triggered, in line with the CPC, at the point when the court is ready to frame issues based on the pleadings. In other words, the trial court should assess whether the case has progressed far enough to crystallise the dispute, thereby enabling substitution of parties. It can even be the date of completing the pleadings or the first date of trial/ pre-trial. Nonetheless, the trial court should have the discretion, following the provisions of CPC, to pinpoint the precise moment within the interval from the close of pleadings to the first date of Trial/pre-trial, based on the circumstances of each case.

Conclusion

Accordingly, I conclude that the proceedings in the District Court of Nugegoda had advanced to the *litis contestatio* phase, given that the Defendants had submitted their answer and the Plaintiff had even filed a replication prior to his passing. Moreover, the Trial Judge had rendered a decision concluding the interim injunction inquiry and had reviewed the extensive written submissions from both sides. Based on these developments, I am satisfied that the District Court was ready to commence the proper Trial by framing issues, well before the death of the Plaintiff. Therefore, the District Court must, upon an application under the original Section 395 of the CPC, enter the name of the legal representative of the deceased Plaintiff in the place of the said Plaintiff and proceed with the action on merits. The District Court should consider the application already filed by the Appellant for substitution according to law.

For the reasons given above, I proceed to answer all three questions of law upon which this Court granted Leave to Appeal, as follows:

(i) Yes

(ii) Yes

(iii) Yes — but subject to the above conclusions upon the precise stage during an action *in personam* to invoke the principle of *litis contestatio.*

I set aside the Judgement dated 17.12.2014 of the High Court and the Order dated 06.08.2012 of the District Court, and accordingly, the instant appeal is allowed without cost.

Judge of the Supreme Court

S. Thurairaja, PC, J.

I agree.

Judge of the Supreme Court

Menaka Wijesundera, J.

I agree.

Judge of the Supreme Court