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

In the matter of an application under Article 127 and 128 of the Constitution read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006, for Leave to Appeal against the judgment dated 01/08/2019 of the Civil Appellate High Court of the Western Province holden in Gampaha.

SC/Appeal No. 0051/2024
SC HC/CALA/363/2019
WP/HCCA/GAM/ 16/2015(REV)
D.C. GAMPAHA Case No. 28585/P

Abdul Gaffoor Lebbe Mohamadu Ali
Debahera,
Nittambuwa.

PLAINTIFF

vs

1. Inunl Unisa (Deceased)

1a. Mohamed Jabir Mohamed Azmi of 388/2,
Dulmala,
Thihariya.

2. Siththy Maimuna

3. Mohamed Ariff

4. Mohamed Faiz

5. Sithy Nasira

6. Mohamed Muzni

7. Sithy Fareena
   All of Bulugahawatta,
   Thihariya.

8. Abdul Gafoor Lebbe Izzadeen
   Debahera, Nittambuwa.

9. Abdul Gaffoor Lebbe Muthumma
   Wadakade, Polgahawela.

10. Mohammadu Naseem Mohamed Nazeer

11. Mohamadu Naseem Mohamed Sapurdeen

12. Abdul Cader
    No. 391, Dunuela, Thihariya.

13. Mohammadu Salman
    No. 411/1, Dunuela, Thihariya

14. Mohammadu Saleehan
    No. 396/2, Dunuela, Thihariya

15. S. Salfa Umma
    No. 483, Hijra Mawatha, Thihariya

16. S. Ameena Umma
    No. 483, Hijra Mawatha, Thihariya

17. S. Lebbe Pathuma
    No.482/1 Hijra Mawatha, Thihariya.

18. Mohomed Yoosuf Ainul Inaya
    No. 389/1, Dunuela, Thihariya

19. Abdul Hameed Siththy Fareeda
    No. 24A, Kaththota, Nittambuwa.

20. Abdul Majeed Zeenathul Fahira
    No. 481, Hijra Mawatha, Thihariya.

21. Abdul Hameed Abdul Gaffar
    No. 24A, Kaththota, Nittambuwa.

22. Omardeen Mohommadu Abdul Hassen
    No. 389/1, Dunuela, Thihariya.

23. Mohomed Ismail Mohomed Ghoouse
    No. 390, Dunuela, Thihariya.

DEFENDANTS

AND BETWEEN

4. Mohamed Faiz

5. Siththy Nazeera (Deceased)

5a. Lafir Madani Rahmathun Nazara
No. 395/2, Dunuela, Thihariya.

6. Mohamed Muzni
Bulugahawatta, Thihariya.

4th, 5th and 6th DEFENDANTS -

PETITIONERS

vs

Abdul Gaffoor Lebber Mohamed Ali,
Debahera, Nittambuwa.

PLAINTIFF - RESPONDENT

1. Inunl Unisa (Deceased)

1a. Mohamed Jabir Mohamed Azmi of 388/2,
Dulmala,
Thihariya.

2. Siththy Maimuna (Deceased)

2a. Mohamed Reshard Mohamed Faiz
No. 395/2, Dunuela, Thihariya.

3. Mohamed Ariff

4. Sithy Fareena
All of Bulugahawatta,
Thihariya.

5. Abdul Gafoor Lebbe Izzadeen
Debahera, Nittambuwa.

6. Abdul Gaffoor Lebbe Muthumma
Wadakade, Polgahawela.

7. Mohammadu Naseem Mohamed Nazeer

8. Mohamadu Naseem Mohamed Sapurdeen

9. Abdul Cader (Deceased)
No. 391, Dunuela, Thihariya.

12a. Yoosuf Izzadeen Daulath Ameen No. 391, Dunuela, Thihariya.

10. Mohammadu Salman (Deceased)

13a. Mohamed Salman Siththy Hamza
No. 411/1, Dunuela, Thihariya

14. Mohammade Salihan (Deceased)
No. 396/2, Dunuela, Thihariya.

15. S. Salfa Umma (Deceased)

15a. S. Lareefa
No. 483, Hijra Mawatha, Thihariya.

16. A. Ammena Umma (Deceased)

16a. S. Misiriya
No. 483, Hijra Mawatha, Thihariya.

17. S. Lebbe Pathuma (Deceased)

17a. Shareen Amith Nona Rushana (Substituted)
No. 482/1, Hijra Mawatha, Thihariya.

18. Mohomed Yoosuf Ainul Inaya (Deceased)

18a. Abdul Majeed Zeenathul Fahira
No. 389/1, Dunuela, Thihariya.

19. Abdul Hameed Siththy Fareeda (Deceased)

19a. M. Ameer
No. 24A, Kaththota, Nittambuwa.

20. Abdul Majeed Zeenathul Fahira (Deceased)

20a. M. Ramsy
No. 481, Hijra Mawatha, Thihariya.

21. Abdul Hameed Abdul Gaffar
No. 24A, Kaththota, Nittambuwa.

22. Omardeen Mohomadu Abdul Hassen
(Deceased)

22a. Siththy Fasmila
No. 389/1 Dunuela, Thihariya.

23. Mohomed Ismail Mohomed Ghouse
(Deceased)

23a. Mohomed Ghouse Mohomed Rafeek
Praja Mawatha, Periyamull,
Negombo.

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Abdul Gaffoor Lebbe Mohamadu Ali
(Deceased)
Debahera, Nittambuwa,

PLAINTIFF- RESPONDENT-PETITIONER

Mohamed Ali Mohamed Mufassal
No. 247/1, Debahera,
Nittambuwa.

SUBSTITUTED PLAINTIFF-RESPONDENT - APPELLANT

vs

4. Mohamed Faiz
   Malkaduwawa, Kurunegala

5. Siththy Nazeera (Deceased)

5a. Lafir Madhani Rahmathun Nizara
   No. 395/2, Dunuela, Thihariya

4th and 5th DEFENDANTS – PETITIONERS -RESPONDENTS

6. Mohamed Muzni (Deceased)
   Bulugahawatta, Thihariya.

6a. Abdullah Subaida Umma

6b. Mohamed Mijad

6c. Safeek Ahamed

6d. Mohamed Muzni Fathima Nasra
   All of No.395/02/A, Dunuela,
   Thihariya, Nittambuwa.

ADDED 6th DEFENDANTS – PETITIONERS-RESPONDENTS

1. Inul Yunisa (Deceased)

1a. Mohamed Jabir Mohamed Azmi
388/2, Dulmala, Thihariya

2. Siththy Maimuna (Deceased)

2a. Mohamed Reshard Mohamed Faiz
No. 395/2, Dunuela, Thihariya.

3. Mohamed Ariff

7. Siththy Fareena
both of Bulugahawatta, Thihariya.

8. Abdul Gaffoor Lebbe Izzadeen
Debahera, Nittambuwa.

9. Abdul Gaffoor Lebbe Muthumma
Wadakada, Polgahawela.

10. Mohammadu Naseem Mohamed Nazeer

11. Mohamadu Naseem Mohamed Sapurdeen
Both of No. 409, Dunuela, Thihariya.

12. Abdul Cader (Deceased)

12a. Yusoof Izzadeen Daulath Ameen
No. 391, Dunuela, Thihariya.

13. Mohammadu Salman (Deceased)

13a. Mohamed Salman Siththy Hamza
No. 411/1, Dunuela, Thihariya.

14. Mohamed Saleehan (Deceased)

14a. Mohamed Salee Mumthas Begam
No. 396/2, Dunuela, Thihariya.

15. S. Salfa Umma (Deceased)

15a. S.Lareefa
No. 438, Hijra Mawatha, Thihariya.

16. A. Ameena Umma (Deceased)

16a. S. Misiriya
No. 483, Hijra Mawatha, Thihariya.

17. S. Lebbe Pathuma (Deceased)

17a. Shareen Amith Nona Rushana

18. Mohomed Usoof Ainul Inaya (Deceased)

18a. Abdul Majeed Zeenathul Fahira
No. 389/1 Dunuela, Thihariya.

19. Abdul Majeed Zeenathul Fareeda (Deceased)

19a. M. Ameer
No. 24A, Kaththota, Nittambuwa.

20. Abdul Majeed Zeenathul Fahira (Deceased)

20a. M. Ramsy
No. 481, Hijra Mawatha, Thihariya

21. Abdul Hameed Abdul Gaffar
No. 24A, Kaththota, Nittambuwa.

22. Omardeen Mohomadu Abdul Haseen (Deceased)

22a. Siththy Fasmila
No. 389/1 Dunuela. Thihariya.

23. Mohamed Ismail Mohomed Ghouse (Deceased)

22a. Mohomed Ghouse Mohomed Rafeek,
Negombo.

DEFENDANTS – RESPONDENTS -
RESPONDENTS- RESPONDENT

BEFORE : S. Thurairaja, P.C., J.
Kumudini Wickremasinghe, J &
M. Sampath K. B. Wijeratne J.

COUNSEL : W. Dayaratne, P.C. with Ranjika Jayawardene for the Plaintiff -Respondent – Appellant.

M.R.M. Fazeen for the 1a Defendant – Respondent-Respondent.

Sumedha Mahawanniarachchi with Binara Silva for the 5a, 6a, 6b, & 6c Substituted Defendant-Petitioner-Respondents.

S.N. Vijith Singh for the Substituted 12a Defendant-Respondent-Respondent.

ARGUED ON : 24.06.2025

DECIDED ON : 13.11.2025

M. Sampath K. B. Wijeratne J.

Background

The Plaintiff–Respondent–Petitioner–Appellant (hereinafter referred to as the Plaintiff–Appellant) instituted this action in the District Court seeking to partition the land known as *"Bulugahawatta."* After taking the preliminary steps, including the registration of *lis pendens* and the service of summons, a commission was issued to Mr. U. R. Edirisinghe, Licensed Surveyor, for the preparation of the preliminary plan. Upon executing the commission, the Commissioner tendered Plan No. 242 (marked **'X'**) together with the corresponding report (marked **'X1'**).

Upon service of summons, the 1st Defendant–Respondent–Respondent–Respondent (hereinafter referred to as the 1st Defendant–Respondent) and the 15th to 21st Defendants–Respondents–Respondents–Respondents (hereinafter referred to as the 15th to 21st Defendants–Respondents) appeared in Court and filed their respective statements of claim. On 6th June 1988, the 22nd and 23rd Defendants–Respondents were added as parties to the action, and they thereafter filed their statements of claim.

The 2nd and 3rd Defendants–Respondents–Respondents–Respondents (hereinafter referred to as the **2nd and 3rd Defendants–Respondents**), the 4th to 6th Defendants–Petitioners–Respondents–Respondents (hereinafter referred to as the **4th to 6th Defendants–Respondents**), and the 7th Defendant–Respondent–Respondent–Respondent (hereinafter referred to as the **7th Defendant–Respondent**) were served with summons and Journal Entry No. 10 dated 22nd October 1986 records that Mr. Gafoor, Attorney-at-Law, had

tendered a proxy on behalf of all of them. Upon tendering the proxy, Mr. Gafoor moved to file statements of claim after the return of the commission. However, a subsequent report of the Registrar of the District Court reveals that the 2nd, 3rd, and 7th Defendants–Respondents had not filed any proxy.

The 12th to 23rd Defendants–Respondents–Respondents–Respondents (hereinafter referred to as the 12th to 23rd Defendants–Respondents) subsequently intervened in the action.

After the preliminary plan and its corresponding report were received, and upon completion of other preliminary steps, the case was fixed for trial. The trial was postponed on several occasions, and when the case was eventually taken up for trial, only the Plaintiff–Appellant and the 22nd Defendant–Respondent were present. The evidence of the Plaintiff–Appellant was led, and thereafter, the learned District Judge delivered judgment on 20th February 2002, based solely on the evidence of the Plaintiff–Appellant.

In his judgment, the learned District Judge allotted a 1/12 share to the Plaintiff–Appellant and 1/12 shares each to the 8th and 9th Defendants–Respondents. Although he found that the 1st Defendant–Respondent was entitled to 2/12 shares, the 2nd to 7th Defendants–Respondents to 3/12 shares, and the 10th and 11th Defendants–Respondents to 3/12 shares, such shares were not allotted as the title deeds establishing devolution of title had not been tendered to Court. A further undivided 1/2 share remained unallotted on the basis that no evidence had been led in respect of that portion.

The interlocutory decree was tendered in the first instance, and accordingly, a commission was issued for the preparation of the final scheme. In executing the commission, it was found that the interlocutory decree did not contain a specific direction regarding the entitlement to the plantation. Consequently, the Court made a further order declaring the entitlement to the plantation in accordance with the surveyor's report attached to the preliminary plan. The interlocutory decree was thereafter amended accordingly.

The undivided 3/12 share had been left unallotted in respect of the claim of the 2nd to 7th Defendants–Respondents due to their failure to tender the title deed

bearing No. 1118. The 3rd Defendant–Respondent, who is a child of the 2nd Defendant–Respondent and a sibling of the 4th to 7th Defendants–Respondents, thereafter made an application to have that share allotted to the 2nd to 7th Defendants–Respondents, which application was allowed by Court. Accordingly, the interlocutory decree was once again amended.

Finally, the Court Commissioner tendered the final partition scheme bearing No. 1150. The 4th to 6th Defendants–Respondents thereafter made applications, stating that their Attorney-at-Law, Mr. Gafoor, had assumed office as a judicial officer, which rendered their proxy defective, and that they had not been informed of this fact. They further contended that they had been advised that the corpus had not been properly identified and that the action was likely to be dismissed. Acting on this legal advice, they had refrained from attending Court[1].

The learned District Judge, having considered the said applications, correctly dismissed them on the ground that the applicants had no *locus standi* to make such an application. The learned District Judge had rightly taken into account Sections 48(1) and 48(4) of the Partition Law and held that the 4th to 6th Defendants–Respondents could not invoke the mechanism provided under Section 48(4) of the said Law, as they had not tendered statements of claim. Accordingly, their respective applications were dismissed.

Thereafter, the 4th to 6th Defendants–Respondents sought to invoke the revisionary jurisdiction of the Provincial Civil Appellate High Court of Gampaha, seeking to set aside the entire proceedings from 12th October 1997 on the ground that they were not informed of their Attorney-at-Law, Mr. Gafoor, assuming judicial office, which rendered their proxy defective. The learned Judges of the High Court, upon revision, set aside the proceedings from the point at which Mr. Gafoor assumed judicial duties, holding that the record had thereby become defective. They further held that the case could not

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[1] *Vide* Petition dated August 23, 2015 submitted to the District Court by the 6th Defendant at Page 746 of brief of the Civil Appellate High Court

proceed without giving notice to the 4th to 7th Defendants–Respondents regarding the defective proxy.

Being aggrieved by the said decision, the Plaintiff–Appellant moved this Court seeking leave to appeal against the order of the High Court of Civil Appellate, and this Court granted leave on the following questions of law.

25. (c) Did their Lordships of the Civil Appellate High Court erroneously consider there was miscarriage of justice has been caused to 4th to 6th Defendant-Respondents as their case was not prosecuted due to their Registered Attorney ceased to practice since 1987 which is a deliberate falsehood as they who have appointed the Registered Attorney should inquire about the proceedings of the case by showing due diligence as they are living in the corpus, according to the averments in their petition?

(d) Did their Lordships of the Civil Appellate High Court totally disregard the order of the learned Additional District Judge who has clearly held that 4th to 6th Defendant-Respondents have no legal right and particularly they do not come under section 48 (4) (a) (i) and 48 (a) (iv) of the Partition Act and the Registered Attorney accepting a Judicial appointment and his failure to inform his clients his difficulty to appear for them is not a ground to challenge the interlocutory decree entered under section 48 of the Partition Act.

(e) Did their Lordships of the Civil Appellate High Court fail to consider that after the interlocutory decree is entered in a partition case the Defendants-Respondents have no legal right to move in the District Court to set aside the judgment and the interlocutory decree after 13 years and they also have no legal right to challenge the dismissal of their petition by way of revision without any exceptional circumstances and after an inordinate delay?

(f) Has a grave and irreparable injustice been caused to the Plaintiff-Petitioner and other Defendant-Respondents who did not challenge the pedigree or other steps taken in the case up to the consideration of the

final plan and as a result of this illegal and perverse order made by their Lordships' of the Civil Appellate High Court the Plaintiff-Petitioner has to proceed with this case from the preliminary steps of even calling for statements of claim?

Does a proxy become invalid upon the appointment of the Registered Attorney to a judicial office?

In addressing this issue, it is pertinent to examine the duties and responsibilities of a registered Attorney upon ceasing to practice. Rule No. 23 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules, 1988 provides that:

> *"An Attorney-at-Law in the event of his ceasing to practice his profession is under a duty to give his client or clients reasonable notice of such cessation".*

When a registered Attorney who represents a client joins the judiciary, it results in a premature termination of the professional relationship between the Attorney-at-Law and the client. Such instances also fall within the category of "cessation of profession" under Rule No. 23. In such cases, the registered Attorney ceases to represent the client before the Court upon assuming duties as a judicial officer. The duties of an Attorney-at-Law in such circumstances were aptly explained by the late Supreme Court Justice A.R.B. Amerasinghe as follows:

> *"A premature termination of the relationship may also take place if the attorney ceases to practice his profession, e. g.* ***because he accepts judicial office*** *or joins the state service or undertakes other employments, or because he is suspended (...). Where he has ceased to practice, the attorney is obliged by* ***SL Rule 23 to give reasonable notice of the cessation of the practice of his profession****(...).*
>
> *(...) No hard and fast rules can be laid down as to what will constitute reasonable notice prior to withdrawal general, an*

attorney should protect the client's interests as far as possible and should not desert the client at a critical stage of a matter when the withdrawal would put the client in a position of disadvantage or peril."[2] *[Emphasis added.]*

The learned Counsel for the 12A Defendant–Respondent and the 4th to 7th Defendants–Respondents drew our attention to another relevant provision, namely Section 27(2) of the Civil Procedure Code, which reads as follows:

"27 (1) (...)

(2) When so filed, it shall be in force until revoked with the leave of the court and after notice to the Registered Attorney by a writing signed by the client and filed in court, or until the client dies, or until the Registered Attorney dies, is removed, or suspended, or ***otherwise becomes incapable to act,*** *or until all proceedings in the action are ended and judgment satisfied so far as regards the client"*

The words "otherwise becomes incapable to act" signify an incapacity to represent a client. Therefore, a plain reading of the section indicates that an Attorney-at-Law assuming a government or judicial office amounts to being incapable of continuing to serve the client.

What occurs if a registered Attorney dies or otherwise becomes incapable of acting on behalf of a client? Section 28 of the Civil Procedure Code prescribes the procedure to be followed. It reads as follows:

28. "If any such Registered Attorney as in the last preceding section is mentioned shall die, or be removed or suspended, or otherwise become incapable to act as aforesaid, at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared until thirty days after notice to appoint another Registered

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[2]Professional Ethics and Responsibilities of Lawyers, A.R.B. Amerasinghe, at Page 468 and 469.

Attorney has been given to that party either personally or in such other manner as the court directs."

A plain reading of Section 28 of the Civil Procedure Code makes it incumbent upon the Court to serve notice on a party whose Attorney-at-Law is deceased or otherwise incapable of acting on the party's behalf. However, it is unrealistic to expect the Courts to monitor the professional status of every Attorney-at-Law or the precise time at which they cease to practice. Consequently, whenever an Attorney-at-Law reaches a stage where he is unable to continue his practice for any reason, it is his primary duty to inform his clients that he will no longer appear on their behalf.

In the instant case, as the subject Attorney has joined the judiciary, he cannot, unlike in the event of death, exempt himself from the responsibility of informing his clients of his new professional status. Thereafter, it becomes the responsibility of the parties to notify the Court regarding the cessation of their Attorney's practice. The Court cannot, in any manner, be held liable for acts or omissions caused by the parties or their respective Attorneys-at-Law. I am compelled to disagree with the view expressed by the learned High Court Judges in this regard.

Furthermore, in a partition action, every party is required to tender and register their address to receive notice of the trial. However, when a registered Attorney is appointed, the address provided in the proxy is deemed to be the registered address of that party. Section 19(3)(b) of the Partition Law specifically provides that:

19 (1)-(2) (...)

(3)(a)(...)

(3)(b) "*Where a party to a partition action appears by a Registered Attorney the address of the Registered Attorney contained in the proxy shall be deemed to be the registered address of such party. And such Registered Attorney shall on or before the date or later date referred to*

in subsection (1) of this section, tender to the Registrar stamps to cover the cost of postage by registered post of the notice under section 24."

(c)-(d) (...)"

Hence, if an Attorney-at-Law tenders a proxy for a party, and the party opts to be represented by an Attorney-at-Law, the validity of the proxy is an essential requirement for the case to proceed. The learned Counsel for the 4A, 5A, and 6A Defendants–Respondents have cited the judgments in ***Kandiah vs Vairamuttu***[3] (S.C.)**,** ***Seelawathie and Another vs Jayasinghe***[4] (C.A.), and ***Manapei Somawathie vs Buwaneswari***[5] (C.A.), where it was held that a party who has filed a proxy cannot perform an act in person without revoking or terminating the proxy. We agree with the principle laid down in these judgments.

In ***Kandiah vs Vairamuttu*** (supra), the Plaintiffs–Appellants, who were the judgment creditors, after the issuance of the writ of execution, informed the Court personally that the full amount of the decree, with interest and costs, had been received by them. However, the District Judge ordered that the Plaintiffs–Appellants must make a proper representation through their proctor. Basnayake J. observed at page 2:"*It is well established that once a proxy is given to a proctor the party himself cannot without revoking the proxy legally perform in person any act in Court*." In ***Seelawathie and Another vs Jayasinghe*** (supra), the case involved a party who, while having a registered Attorney-at-Law on record, had tendered a notice of appeal personally. The Court of Appeal dismissed the appeal on the ground that the notice of appeal was defective, having been filed by the party himself. At page 270, the Court of Appeal observed: "*When a party has an attorney at law on record, it is the attorney at law on record alone who must take steps and also whom the Court permits to take steps*."

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[3] 60 NLR 1.
[4] [1985] 2 Sri LR 266.
[5] [1990] 1 Sri LR 223.

Even Section 29(1) of the Civil Procedure Code provides that a process served at the address furnished by a registered Attorney is deemed to be served on the party. It reads as follows:

"

> *29 (1). Any process served on the registered attorney of any party or left at the office or ordinary residence of such registered attorney, relative to an action or appeal, except where the same is for the personal appearance of the party, shall be presumed to be duly communicated and made known to the party whom the registered attorney represents; and, unless the court otherwise directs, shall be as effectual for all purposes in relation to the action or appeal as if the same had been given to, or served on, the party in person.*
>
> *(2)– (3) (...)"*

It is frequently observed that partition cases continue to proceed despite the death of a party going unnoticed, particularly where the Attorneys-at-Law representing the parties are themselves unaware of the death. This situation occurs more often when a single Attorney-at-Law appears on behalf of multiple parties.

The issue then arises as to who is responsible for informing the Court of a party's death. In ***Dharmaratane Thero vs Siyadoris and Others***[6] (C.A.), the Plaintiff instituted an action for the partition of a land called *"Udukumbura"*, measuring 2 Acres, 3 Roods, and 37 Perches. The land was surveyed by the Court Commissioner on 16th January 1965. In the statement of claims, the 62nd Defendant contended that the corpus formed part of a larger land called *"Halgahawatta"*, measuring 29 Acres, 3 Roods, and 6 Perches. The larger land was surveyed and superimposed on the preliminary plan.

When the case was taken up for trial on 11th January 1978, with 275 parties on record, an application was made to register *lis pendens* in respect of the larger

[6] [1985] 2 Sri LR 245.

land. The District Court rejected the application on the ground that allowing it would effectively recommence the case after a lapse of 28 years, and it would take a further 50 years to conclude. The Court of Appeal was then confronted with Section 19(2)(b) of the Partition Law, which reads:

> *"Where any defendant seeks to have a larger land made the subject-matter of the action as provided in paragraph (a) of this subsection, the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lis pendens affecting such larger land shall be filed in court, and the estimated costs of survey of such larger land as determined by court shall be deposited in court"*

The words that came under the scrutiny of the Court of Appeal were: "…*the court shall specify the party…*," which, similar to Section 28 of the Civil Procedure Code, imposes a mandatory duty on the Court to make an order for the registration of *lis pendens* and to issue a commission. His Lordship Justice G.P.S. de Silva observed at page 247:

> *"It would appear that on a literal reading of the section, the duty is cast on the court to specify the party by whom an application for the registration of the action as a lis pendens in respect of the larger land has to be filed. But the relevant question is, at what point of time does such duty arise? It seems to me that the duty of the court arises only upon the party defendant interested in having the larger land partitioned moving the court to make the appropriate order in terms of the section. This is a matter which would normally dome up in the course of the motion roll and it was surely the duty of the Attorney-at-Law representing the petitioner to have invited the court to make the required order. How else is the court to be made aware of the need to make an order in terms of section 19 (2) (b)? The interpretation contended for on behalf of the petitioner would place an undue burden on the Court."*

The word "shall" have, on certain occasions, been interpreted to mean "may" (***Hewawasam Gamage vs Minister of Agriculture***[7], S.C.). Accordingly, the Court of Appeal in ***Dharmaratane Thero's*** case adopted a practical approach to the issue before it. How could the Court be expected to ascertain whether all parties and Attorneys-at-Law are alive or deceased? Similarly, how could the Court determine whether an Attorney-at-Law has ceased to practice? In such circumstances, should the Court be burdened with inquiring into the capability of each Attorney-at-Law to represent their client? I am of the view that the Court should not be saddled with a responsibility that cannot be practically discharged.

I am mindful that all judicial appointments are published in the Government Gazette, of which the Court may take judicial notice. However, in practical terms, such judicial notice can only be taken into account once the relevant party draws the Court's attention to the publication.

Therefore, I am of the view that the word "shall" in Section 28 should be interpreted as "may," and that it is the duty of the party or parties to inform the Court of the termination of a proxy. The Court should not be burdened with such a responsibility.

If the 4th to 6th Defendants–Respondents had any genuine interest in pursuing their claims, they should have consulted their respective Attorneys-at-Law and should not have waited, since 1987, for well over 25 years to ascertain the status of their case. The excuse advanced in the petitions of the 5th and 6th Defendants–Respondents before the District Court was that they had received legal advice regarding a defect in the identification of the *corpus* in the preliminary plan, and that, as a result, the action would be dismissed.

The commission was executed and returned to Court on 17th December 1998, as recorded in Journal Entry No. 18. If Mr. Gafoor assumed judicial office on 12th October 1997, and it was he who allegedly advised the Defendants–Respondents of the defect in the identification of the corpus, it is, in my view,

[7]76 NLR 25.

not his assumption of judicial office that left the 4th to 6th Defendants–Respondents uninformed. Furthermore, the 3rd Defendant–Respondent had made an application after the judgment to have the unallotted shares allotted to him and to all his siblings, namely the 2nd and 4th to 7th Defendants–Respondents. Accordingly, it appears that even if it is assumed that there was a defect in the record arising from the failure to notify the 4th to 6th Defendants–Respondents of their Registered Attorney's assumption of judicial office, such a defect, by itself, did not cause any prejudice to the 4th to 7th Defendants–Respondents.

In particular, Section 48(1) of the Partition Law renders an interlocutory decree final and conclusive, notwithstanding any defect in procedure. It reads as follows:

> *48(1) Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever rights title or interest they have, or claim to have to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.*
>
> *In this subsection "omission or defect of procedure " shall include an omission or failure-*
>
> *(a) to serve summons on any party; or*

(b) to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action; or

(c) to appoint a guardian ad litem of a party who is a minor or a person of unsound mind.

(2)-(7) (...)"

Therefore, I am of the view that the failure to notify the 4th to 6th Defendants–Respondents of their Registered Attorney's assumption of judicial office does not render the entire proceedings of the case defective.

Miscarriage of Justice

The complaint of the 4th, 5th, and 6th Defendants–Respondents is that a grave miscarriage of justice was occasioned by the Court's failure to inform them of their Attorney-at-Law's inability to represent them. It is well-settled law that the revisionary jurisdiction of an Appellate Court may be exercised to prevent a miscarriage of justice ***(Soysa vs Silva and Others***[8], (C.A.); ***Caroline Nona and Others vs Pedrick Singho and Others***[9]**,** **(**C.A.); and ***Attorney-General vs Gunawardena***[10]**,** (S.C.).

However, the concept of a miscarriage of justice must be considered in a relative context; it cannot be assessed solely from the perspective of the Appellant. As noted above, it does not appear to me that any serious miscarriage of justice occurred as far as the 4th to 6th Defendants–Respondents are concerned. In fact, the 3rd Defendant–Respondent, acting on their behalf,

[8][2000] 2 Sri LR 235.

[9][2005] 3 Sri LR 176.

[10][1996] 2 Sri LR 149.

applied to the Court and secured the allotment of their unallotted shares. While it is true that the 3rd Defendant–Respondent is independent of the 4th to 6th Defendants–Respondents, this fact is nonetheless relevant in evaluating their claim of a miscarriage of justice. Moreover, they had refrained from attending Court based on erroneous legal advice that the action would fail due to a failure to identify the corpus. If they acted on such advice, it is they themselves who must bear the consequences.

If the judgment and the amended interlocutory decree were set aside and the case were to recommence from the stage of filing statements of claim, the Plaintiff–Appellant and the other Defendants–Respondents who have already obtained their shares would suffer further prejudice due to the delay. In my view, such damage cannot be remedied merely by an award of costs. Moreover, the 4th to 6th Defendants–Respondents should not be granted relief arising from their own negligence. The well-known Latin maxim, *"Vigilantibus Non Dormientibus Jura Subveniunt",* that the law assists those who are vigilant, not those who sleep over their rights (***Gunasekera and Another vs Abdul Latiff***[11]*)*, (C.A.) is particularly applicable in this context.

Judgment in *Somawathie vs Madawela and Others*

Both learned Counsel have drawn attention to the judgment in ***Somawathie vs Madawela and Others***[12] (S.C.), where Soza J. took into consideration Section 48(3), which preserves the revisionary jurisdiction of the Appellate Court. However, it appears to me that the facts in ***Somawathie vs Madawela and Others*** (supra) are not applicable to the present case. It is correct that subsection (3) of Section 48 of the Partition Law specifically reserves the revisionary jurisdiction of the Appellate Court. Nevertheless, this does not mean that a party who has been entirely negligent should be permitted to invoke the Appellate Court's revisionary jurisdiction to set aside all proceedings.

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[11] [1995] (1) Sri LR 225 at page 226.
[12] [1983] 2Sri LR 15.

On the other hand, when considering the application of the 4th to 6th Defendants–Respondents, it does not appear that they have suffered any prejudice as a result of the judgment. Although they contend that the *corpus* was not properly identified, there is no allegation that the land depicted in the preliminary plan is different. The title upheld in the judgment is not disputed. Their complaint is essentially that they were deprived of a portion of the land to which they were entitled. It was open to them to file statements of objection to the scheme of partition in the District Court, rather than seeking to have the entire proceedings set aside.

The entitlement of the 4th to 6th Defendants-Respondents to invoke the procedure provided under Section 48 (4) of the Partition Law.

It was urged that the learned District Judge erred in rejecting the application made to the District Court by the 4th to 6th Defendants–Respondents. The learned District Judge based his order on the ground that the 4th to 6th Defendants–Respondents could not invoke the mechanism provided under Section 48(4) of the Partition Law, as they had failed to file statements of claim. On a plain reading of the statutory provision in Section 48(4)(a), only a Defendant who has filed a statement of claim but failed to participate at the trial is entitled to make an application to the Court. It reads as follows:

> *"(a) Whenever a party to a partition action-*
>
> *(i) has not been served with summons, or*
>
> *(ii) being a minor or a person of unsound mind, has not been duly represented by a guardian ad litem, or*
>
> *(iii) dies before judgment Is entered and no substitution of his heirs or legal representatives has been made or no person, has been appointed to represent the estate of the deceased party for the purpose of the action, or*
>
> *(iv) being a party who has duly filed his statement of clime and registered has address, fails to appeal at the trial……"*

The relevant provision in the context of this case is subsection (a) (iv), as subsections (i), (ii), and (iii) of the same section apply to situations where either summons have not been served, a guardian ad *litem* has not been appointed, or no substitution has taken place in the case of a deceased Defendant–Respondent. The mechanism in subsection (iv) can be invoked only if the Defendant has filed a valid statement of claim. Accordingly, the learned District Judge rightly dismissed the applications of the 4th to 6th Defendants–Respondents on the basis that they do not fall within the scope of the said statutory provision.

Conclusion

For the reasons set out above, all questions of law are answered in the affirmative. The judgment of the Civil Appellate High Court is accordingly set aside, and the case is remitted to the High Court of Civil Appellate of Gampaha, to be sent back to the District Court of Gampaha to enter the final decree after considering the final scheme, and thereafter to proceed with the consequential steps.

The Plaintiff–Appellant, along with the 1a and 12a Defendants–Respondents, are entitled to recover the costs of this application from the 5a, 6a, 6b, and 6c Defendants–Respondents.

JUDGE OF THE SUPREME COURT

S. Thurairaja, P.C., J.

I Agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J.

I Agree.

JUDGE OF THE SUPREME COURT