

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

In the matter of an application for leave to appeal to the Supreme Court under in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by Act No. 54 of 2006.

SC/APPEAL No. 101/2024
SC/LA/Application No.
SC/HCCA/LA/222/2016
Civil Appellate High Court of
Galle Case No.
SP/HCCA/GA/LA/23/2014
DC Balapitiya Case No. **54/P**

Walimuni Somawathi Mendis Abeysekara,
(Deceased)
No. 500, Galle Road,
Nape, Kosgoda.

PLAINTIFF

vs

1. Walimuni Richard Mendis Abeysekara,
(Deceased),
- 1A. Walimuni Thirstern Nandana Mendis
Abyesekara,
Sridhara, Nape, Kosgoda.
2. Walimuni Eladin Mendis Abeysekara,
(Deceased),
- 2A. Liliyan De Soysa Wijayarakshitha,
Nape, Kosgoda.
3. Walimini Selee Mendis Abeysekara,
Nape, Kosgoda.
4. Walimuni Misilin Mendis Abeysekara
Nape, Kosgoda.

5. Agampodi Hentry Soysa (Deceased),
- 5A. Bird De Soysa
No. 191, Elan Avenue,
Dehiwala,
6. Agampodi Oliver Soysa
7. Agampodi Francis Soysa (Deceased),
- 7A. Agampodi Mallika De Soysa
No. 32/35, Sri Sumangala Road,
Kalutara North.
08. Agampodi Edn Soysa,
near the Railway Station, Kalutara North.
09. Walimuni Kinsley Mendis Abeysekara,
near the Railway Station, Kalutara North.
10. Walimuni Viola Mendis Abeysekara,
near the Railway Station, Kalutara North.
11. Walimuni Dasni Mendis Abeysekara
12. Walimuni Premawathie Mendis Abeysekara
- 12A. Kaluhath Srimathi De Abrew Rajapaksha,
Nape, Kosgoda.
13. Walimuni Somawathie Mendis Abeysekara
14. Walimuni Eden Mendis Abeysekara
15. Walimuni Lakshan Mendis Abeysekara
16. Walimuni Milan Mendis Abeysekara
17. Walimuni Irine alias Jaslin Mendis
Abeysekara

18. Walimuni Askin Mendis Abeysekara
(deceased)
- 18A. Walimuni Wasantha Kumari Mendis
Abeysekara Pushpika, No. 43, Lauries Road,
Bambalapitiya,
Colombo 04.
19. Walimuni Wilson Mendis Abeysekara
20. Walimuni Shokman Mendis Abeysekara,
Sri Saranankara Road, Pamankada,
21. Walimuni Seetha Mendis Abeysekara,
Wijegiri, Nape, Kosgoda.
22. Walimuni Tilda Mendis Abeysekara,
Sri Saranankara Road, Pamankada,
Dehiwala.
23. Walimuni Shirley Mendis Abeysekara
24. Degiri Karunawathie De Soysa,
Sri Saranankara Road, Pamankada,
Dehiwala.
25. Rev. Kosgoda Vajiragnana,
Ganegodella Raja Maha Viharaya, Kosgoda.
- 25A. Rev. Kosgoda Chandrajothi
26. Nammuni Hena Baby Thabrew

DEFENDANTS

AND

19. Walimuni Wilson Mendis Abeysekara
Appearing by his Power of Attorney Holder
Kamalsiri Nissanka,

No. 43B, Lauries Road, Colombo 04.

19th DEFENDANT - PETITIONER

vs

Walimuni Somawathi Mendis Abeysekara
(deceased)
No. 500, Galle Road,
Nape, Kosgoda.

PLAINTIFF - RESPONDENT

And

01. Walimuni Richard Mendis Abeysekara
(deceased)
And others

DEFENDANT - RESPONDENT

AND NOW

25A. Rev. Kosgoda Chandrajothi

**25A DEFENDANT – RESPONDENT –
PETITIONER**

vs

Walimuni Somawathi Mendis Abeysekara
(deceased)
No. 500, Galle Road,
Nape, Kosgoda.

**PLAINTIFF –RESPONDENT –
RESPONDENT**

01. Walimuni Richard Mendis Abeysekara
(deceased)

- 1A. Walimuni Thirstern Nandana Mendis
Abeysekara,
Sridhara, Nape, Kosgoda.
02. Walimuni Eladin
Mendis Abeysekara
(deceased)
- 2A. Liliyan De Soysa Wijayarakshitha,
Nape, Kosgoda.
03. Walimuni Selee Mendis Abeysekara, Nape,
Kosgoda.
04. Walimuni Misilin Mendis Abeysekara, Nape,
Kosgoda.
05. Agampodi Henry Soysa (deceased)
- 5A. Bird De Soysa,
No. 191, Elan Avenue, Dehiwala.
06. Agampodi Oliver Soysa
07. Agampodi Francis Soysa (deceased)
- 7A. Agampodi Mallika De Soysa,
No. 32/35, Sri Sumangala Road,
Kalutara North.
08. Agampodi Edn Soysa, near the Railway
Station, Kalutara North.
09. Walimuni Kinsley Mendis Abesekara,
near the Railway Station, Kalutara North.
10. Walimuni Viola Mendis Abeysekara,
near the Railway Station, Kalutara North.
11. Walimuni Dasni Mendis Abeysekara

12. Walimuni Premawathie Mendis Abeysekara
- 12A. Kaluhath Srimathi De.Abrew Rajapaksha,
Nape, Kosgoda.
13. Walimuni Somawathie Mendis Abeysekara
14. Walimuni Eden Mendis Abeysekara
15. Walimuni Lakshan Mendis Abeysekara
16. Walimuni Milan Mendis Abeysekara
17. Walimuni Irine alias Jaslin Mendis
Abeysekara
18. Walimuni
Askin Mendis Abeysekara
(deceased)
- 18A. Walimuni Wasantha
Kumari Mendis
Abeysekara Pushpika, No. 43, Lauries Road,
Bambalapitiya,
Colombo 04.
19. Walimuni Wilson Mendis Abeysekara
20. Walimuni Shokman Mendis Abeysekara,
Sri Saranankara Road,
Pamankada,
Dehiwala.
21. Walimuni Seetha Mendis Abeysekara,
Wijegiri, Nape, Kosgoda.
22. Walimuni Tilda Mendis Abeysekara,
Sri Saranankara Road, Pamankada,
Dehiwala.

23. Walimuni Shirley Mendis Abeysekara

24. Degiri Karunawathie De Soysa,
Sri Saranankara Road, Pamankada,
Dehiwala.

26. Nammuni Hena Baby Thabrew,
Godagama, Kosgoda.

**DEFENDANT - RESPONDENT -
RESPONDENTS**

AND NOW BETWEEN

25A. Rev. Kosgoda Chandrajothi
Ganegodella Raja Maha Viharaya,
Kosgoda.

**25A DEFENDANT – RESPONDENT –
PETITIONER – [APPELLANT]**

vs

Walimuni Somawathi Mendis Abeysekara
(deceased)
No. 500, Galle Road,
Nape, Kosgoda.

**PLAINTIFF – RESPONDENT –
RESPONDENT - RESPONDENT**

01. Walimuni Richard Mendis Abeysekara
(deceased)

1A. Walimuni Thirstern Nandana Mendis
Abeysekara,
Sridhara, Nape, Kosgoda.

02. Walimuni Eladin Mendis Abeysekara
(deceased)

- 2A. Liliyan De Soysa Wijayarakshitha,
Nape, Kosgoda.
03. Walimuni Selee Mendis Abeysekara,
Nape, Kosgoda.
04. Walimuni Misilin Mendis Abeysekara,
Nape, Kosgoda.
05. Agampodi Henry Soysa (deceased)
- 5A. Bird De Soysa, No. 191, Elan Avenue,
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06. Agampodi Oliver Soysa
07. Agampodi Francis Soysa (deceased)
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Sumangala Road,
Kalutara North.
08. Agampodi Edn Soysa,
near the Railway Station, Kalutara North.
09. Walimuni Kinsley Mendis Abesekara,
near the Railway Station, Kalutara North.
10. Walimuni Viola Mendis Abeysekara,
near the Railway Station, Kalutara North.
11. Walimuni Dasni Mendis Abeysekara
12. Walimuni Premawathie Mendis Abeysekara
- 12A. Kaluhath Srimathi De Abrew Rajapaksha,
Nape, Kosgoda.
13. Walimuni Somawathie Mendis Abeysekara

14. Walimuni Eden Mendis Abeysekara
15. Walimuni Lakshan Mendis Abeysekara
16. Walimuni Milan Mendis Abeysekara
17. Walimuni Irine alias Jaslin Mendis
Abeysekara
18. Walimuni Askin Mendis
(deceased)
- 18A. Walimuni Wasantha Kumari Mendis
Abeysekara Pushpika,
No. 43, Lauries Road,
Bambalapitiya,
Colombo 04.
19. Walimuni Wilson Mendis Abeysekara
- 19A. Walimuni Athula Kumar Mendis Abeysekara
151, South Lane, New Malden Surrey
KT-5ES, United Kingdom.
- 19B. Walimuni Dharshaka Kumar Mendis
Abeysekara,
151, South Lane, New Malden Surrey
KT-5ES, United Kingdom.
- 19C. Walimuni Indra Mendis Abeysekara
109/12, Harvey Street,
Darwin City NT 0800, Australia.
20. Walimuni Shokman Mendis Abeysekara,
Sri Saranankara Road, Pamankada,
Dehiwala.
21. Walimuni Seetha Mendis Abeysekara,
Wijegiri, Nape, Kosgoda.
22. Walimuni Tilda Mendis Abeysekara,

Sri Saranankara Road, Pamankada,
Dehiwala.

23. Walimuni Shirley Mendis Abeyssekara

24. Degiri Karunawathie De Soysa,
Sri Saranankara Road, Pamankada,
Dehiwala.

26. Nammuni Hena Baby Thabrew,
Godagama, Kosgoda.

DEFENDANT - RESPONDENT -
RESPONDENT - RESPONDENTS

BEFORE

: Janak De Silva, J.
Menaka Wijesundera, J.
M. Sampath K. B. Wijeratne, J.

COUNSEL

: Manohara de Silva, P.C., with Hirosha
Munasinghe instructed by Nimal Hippola for
the 25A Defendant – Respondent - Petitioner.

Malin Danansuriya with Maheema Hanchapola
instructed by Nadeeka Senanayake for the 19C
Defendant – Respondent – Respondent –
Respondent.

ARGUED ON

: 03.11.2025

DECIDED ON

: 23.07.2026

M. Sampath K. B. Wijeratne J.

Introduction

This appeal arises from the order dated March 29, 2016 of the High Court of Galle (exercising civil appellate jurisdiction) (hereinafter referred to as the “Civil Appellate High Court”), whereby the 25A Defendant’s appeal seeking to set aside the order of the learned District Judge dated August 8, 2014 was dismissed.

The factual background of this case, as stated by the 25A Defendant, is as follows:

The original Plaintiff instituted the instant action against the Defendants in the District Court of Balapitiya seeking, *inter alia*, to partition the land more fully described in the schedule to the Plaint. The 25th Defendant, Thero, sought to dismiss the action on the ground that the entire land belongs to the temple. After trial, the learned District Judge, by order dated June 26, 1986, ordered that the *corpus* be partitioned in accordance with the pedigree set out in the plaint, and a decree was entered on September 03, 1986.

Being aggrieved by the judgment of the learned District Judge, the 25th Defendant preferred an appeal to the Court of Appeal, which was dismissed and communicated to the District Court. It was subsequently noted that the 25th Defendant, Thero, had passed away. Thereafter, the Plaintiff took steps to substitute the 25A Defendant, Thero, in place of the deceased 25th Defendant, and notices were issued to the 25A Defendant, Thero. Later, the Plaintiff also passed away, and the matter was ordered to be mentioned after steps were taken (“පියවර ගත් පසුව කතා කරන්න”).

For more than 19 years, no steps have been taken by any party to effect substitution in place of the deceased Plaintiff or to take steps consequent to the entering of the interlocutory decree.

After an inordinate delay, an application was filed by the power of attorney holder of the 19th Defendant by petition dated March 25, 2014, seeking to have the case called in open court, notices issued to the parties, and permission granted to take further steps in accordance with the interlocutory decree. This application was objected to by the 25A Defendant. Consequently, the learned District Judge, by order dated August 05, 2014, permitted the 19th Defendant to prosecute the action and substituted him as Plaintiff to proceed with the case in terms of section 70 of the Partition Law.

It is pertinent to note that the 19th Defendant has not filed a statement of claim when this case was originally instituted. Nonetheless, the only step remaining in the instant action is to issue a commission for the final partition and to enter the final decree accordingly. In the circumstances I am of the view that the 19th Defendant who holds rights as per the judgment of the District Court dated June 26, 1986, could make an application through the power of attorney holder, with the permission of the Court, to enter the final decree irrespective of the question whether or not he has been rendered a defaulting party by the District Judge as per section 25(2) of the Partition law.

Being aggrieved by the said order, the 25A Defendant preferred an application for leave to appeal to the Civil Appellate High Court of Galle. The High Court affirmed the order of the learned District Judge and dismissed the appeal of the 25A Defendant. Being further aggrieved by the said order, the 25A Defendant has preferred the instant appeal to this Court.

Having heard the submissions of learned Counsel for the 25A Defendant, this Court granted leave to appeal on the following questions of law: ¹

“(1) Have the learned Judges of the District Court and the learned Judges of the Provincial High Court of Civil Appeals failed to take in to consideration, whether it was within the law for the Power of Attorney holder of the 19th Defendant to

¹ 05.08.2024.

appoint a separate Instructing Attorney by the proxy dated 25/03/2014, in the presence of the Instructing Attorney already on record for the 19th Defendant?

(2) Whether the learned District Judge and the learned Judges of the Provincial High Court of Civil Appeals have failed to consider whether it was within law for the Power of Attorney holder of the 19th Defendant to make the application dated 15/03/2024 without taking steps to substitute the legal heirs of the Deceased - Plaintiff? ”

It is to be noted that the other parties, except the 25A Defendant, were absent and unrepresented when the matter was supported for leave to appeal. However, following the arguments, the 19C Defendant informed the Court that he had no objection to the relief being granted as prayed for by the 25A Defendant. However, 19A and 19B Defendants were unrepresented before this Court. It is imperative to note that the duty to prosecute and conclude the partition action lies with the District Judge.

Analysis

Question of Law No 2

Let me first deal with question of law No. 2, which in my view is the primary issue in this matter. Under section 70 of the Partition Law, No. 21 of 1977 (hereinafter referred to as the “Partition Law”), where there is a default on the part of a plaintiff, the learned District Judge is under a duty to induce the remaining parties to proceed with the action.

Section 70 of the Partition Law, No. 21 of 1977² reads as follows:

No partition action shall abate by reason of the non-prosecution thereof, but, if a partition action is not prosecuted with reasonable diligence after the court has endeavoured to compel the parties to bring the action to a termination, the court may dismiss the action;

² An identical wording can be found in section 70 (1) of the Partition Law, No.21 of 1977 as amended.

Provided, however, that in a case where a plaintiff fails or neglects to prosecute a partition action, the court may, by order, permit any defendant to prosecute that action and may substitute him as a plaintiff for the purpose and may make such order as to costs as the court may deem fit.

It is the contention of learned President's Counsel for the 25A Defendant that, since no steps have been taken to substitute the heirs of the original Plaintiff upon his death, the proviso cannot be invoked, as there is no default in taking further steps on the part of the Plaintiff in prosecuting the action.

A partition action is not an action founded upon a cause of action as defined in section 5 of the Civil Procedure Code, but an "action" that falls within the purview of section 6. Ordinary civil actions, in which the cause of action survives, do not abate upon the plaintiff's death. Rather, the plaintiff's legal representative, who succeeds to the plaintiff's rights, has the right to prosecute the action. The same principle applies with equal force to a partition action.

If steps are not taken for substitution in an ordinary civil action, the trial judge may either abate or dismiss the action. However, in the case of a partition action, the trial judge cannot abate the action.

This is not a circumstance in which the plaintiff has failed or neglected to prosecute the matter; rather, it is one in which the proceedings have come to a complete standstill owing to the plaintiff's demise.

I do concede that the death of the Plaintiff cannot be considered as a failure, neglect or default on the part of the deceased Plaintiff. However, for over 19 years, neither the legal representatives of the plaintiff nor any of the Defendants made an application to effect substitution in place of the deceased Plaintiff. Where the plaintiff has, in accordance with section 81 of the Partition Law, nominated his legal representatives before his death, the court is empowered to substitute those named representatives in place of the deceased, thereby enabling the case to continue as the law stands today. However, as it was not a requirement to nominate a legal representative when this matter was pending in the District

Court, the only option available for the District Judge is to allow the legal representative of the 19th defendant who has come forward to prosecute the action, save for ‘compelling the parties’ to terminate the action as per section 70.

In the present case, the learned District Judge has failed to discharge his duty of “compelling the parties” under section 70 for well over 19 years until the power of attorney holder of the 19th Defendant made the application to continue with the action. The learned District Judge even at this late stage rightly allowed the application. Whilst this application was pending before this Court, it was informed that the 19th Defendant had passed away. Hence in anyway power of attorney holder has no authority to represent the 19th Defendant therefrom. Accordingly, 19A, 19B, and 19C Defendants are now being substituted in place of the deceased 19th Defendant who could take further steps in this action. Nevertheless, the court should effect substitution in place of the deceased original Plaintiff before **further** proceeding, to look after the interests of the deceased original Plaintiff.

In *Peiris and Others vs Chandrasena and Others* (C.A.)³, dealing with a similar issue in interpreting section 70, it was observed as follows:

*“One must not forget the fact, as the Court had (forgotten) that section 70 makes it imperative or mandatory, before the action is dismissed, that (to quote the very words of the section): the "Court had endeavoured to compel the parties to bring the action to a termination". One could say without fear of contradiction that there would have been, at least, some, amongst the 60 odd parties, who would have been willing to go on with the case had they been "compelled" more so as there was, in fact, **very little left to be done, as the interlocutory decree itself had been entered** on 12.4.1965, ie nearly seven years prior to the date that the plaintiff had been noticed to follow up. Even after the lapse of nearly 14 years, after the notice was served on the plaintiff to which there had been no response,*

³ [1999] 3 Sri L.R. 153.

the Court had been content to let the case idle till the 4th defendant-respondent made the application, on his own, that he be permitted to continue the action.”

It is significant to note that, in the case before us, the original plaintiff had died and no steps had been taken for more than 19 years to substitute the plaintiff. In such circumstances, the power of attorney holder of the 19th Defendant, of his own volition, moved that he be permitted to prosecute the action, the learned District Judge having failed to discharge that statutory obligation. Where delay in proceedings arises from the Court’s own act or omission, no party should be made to suffer as a consequence.

Partition actions are not uncommon to remain pending for decades. However, where an action remains pending, any supervening changes affecting the parties or the *corpus* are ordinarily brought to the notice of the Court by the parties concerned, enabling the Court to take appropriate steps in the conduct of the proceedings.

The 19th Defendant filed this application to revive these proceedings after a lapse of more than nineteen years. During such an extended period, some of the parties may have passed away, fresh claimants may have emerged, and the status and condition of the *corpus* may have undergone material changes. Nonetheless, the Court of Appeal, in ***Peiris and Others vs Chandrasena and Others*** (supra), in emphatic terms, observed why a case should not be dismissed, thereby compelling the parties to institute a fresh action even after the lapse of a long period following the entry of an interlocutory decree *“To dismiss, even if it were legally possible to do so, an action which had reached the stage at which even interlocutory decree had been entered, be it noted, after the effluxion of nearly 50 years, would necessarily involve, much waste of effort, time and money, and a Court cannot be impervious to the consequences of making an order of dismissal which would be so destructive in its consequences, in the circumstances of this case. To dismiss this action at this stage is a decision or proceeding from which the mind or better judgment of any sensible man would have recoiled - let alone that of a Judge. To say, that this action had cost the*

parties an infinite deal of trouble - not to mention the "contributions" that would have been regularly levied on them - is to state the obvious."

I fully concur with the aforementioned observations of the Court of Appeal.

A partition action invariably entails considerable expense and effort on the part of the litigants. In such circumstances, it would be manifestly unjust to dismiss an action that has already proceeded to the stage of judgment and an interlocutory decree. At that stage, the principal remaining task is the partitioning of the land in accordance with the judgment and interlocutory decree and thereafter entering the final decree which concludes the case.

I am mindful that, owing to the lapse of time, various practical difficulties and ancillary issues may arise in the implementation of the partition. Nevertheless, the learned District Judge is vested with ample authority to consider such matters and to take appropriate remedial measures to ensure the effective execution of the decree.

Accordingly, the mere possibility of such difficulties cannot justify the dismissal of the action at this advanced stage of the proceedings.

It should be noted that, unless partition proceedings are brought to a conclusion, the *lis pendens* registered in respect of the property continues to remain in force, thereby impeding any subsequent transactions concerning the property. Accordingly, it is incumbent upon the Court to ensure the conclusion of such proceedings.

For the reasons state above, I answer question of law No. 2 in the negative.

Question of Law No 1

The question of validity of the power of attorney, which was raised in the District Court and determined by that court has not been raised before this Court. Therefore, I will confine myself to the question raised before this court; whether it was within the law for the Power of Attorney holder of the 19th Defendant to appoint a separate Instructing Attorney by the proxy dated March 25, 2014, in

the presence of the Instructing Attorney already on record for the 19th Defendant. Otherwise, there will be conflicting applications made by both registered attorneys if any party wishes to act through a recognized agent halfway through the action. he/ she should revoke the proxy and allow the power of attorney holder to proceed with the action after filing a fresh proxy.

When this case was first instituted, the 19th Defendant had not filed a statement of claim. Therefore, it is not clear whether there's a proxy that was already being filed by the 19th Defendant. The learned Counsel for the 25A Defendant has failed to adduce any material to the effect that there was a proxy already on record for the 19th Defendant, other than mere assertion to that effect. In such circumstances, this court is of the view that the 25A Defendant has taken a vague objection without first having all the facts before court.

Hence, this Court is of the view that 25A Defendant has failed to substantiate their objection with material. Nonetheless, this would not affect the 25A Defendant adversely as the 19th Defendant has passed away and his heirs have already been substituted in his place.

Conclusion

I answer the question of law raised in the following manner;

(1) Have the learned Judges of the District Court and the learned Judges of the Provincial High Court of Civil Appeals failed to take into consideration whether it was within the law for the Power of Attorney holder of the 19th Defendant to appoint a separate Instructing Attorney by the proxy dated 25/03/2014, in the presence of the Instructing Attorney already on record for the 19th Defendant? - No

(2) Whether the learned District Judge and the learned Judges of the Provincial High Court of Civil Appeals have failed to consider whether it was within law for the Power of Attorney holder of the 19th Defendant to make the application dated 15/03/2024 without taking steps to substitute the legal heirs of the Deceased - Plaintiff? - No

Accordingly, I affirm the order of the High Court dated March 29, 2016, and the order of the District Court dated August 05, 2014.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Janak De Silva, J.

I agree.

JUDGE OF THE SUPREME COURT

Menaka Wijesundera, J.

I agree.

JUDGE OF THE SUPREME COURT