

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

In the matter of an application for Revision.

W.A Jayasooriya Wickramasinghe

Jeewane, Dewalagama.

**Plaintiff**

**Case No: C.A. (Rev) 2172/2005**

**D.C. Kegalle Case No: 22450/P**

**Vs.**

1. W.A Premawathie Wickramasinghe
2. W.A Daya Swarnalatha Wickramasinghe
3. W.A Chandrasena Wickramasinghe
4. W.A Nalini Wickramasinghe
5. W.A Padmaraja Wickramasinghe
6. W.A Jayasena Wickramasinghe
7. W.A Thilaka Ranika Kumari  
Wickramasinghe
8. Kaluarachchige Dingiri Mahattaya  
All of Jeewane, Dewalegama.
9. W.A Punchimahattaya (Deceased)
- 9A. Mudiyansele Kamalasiri Rathnaweera  
Nawagamuwa, Dewalegama.

10. W.A Mudiyanse

Jeewane, Dewalagama

11. Mudiyanseelage Sirisena (deceased)

11A. Mudiyanseelage Kamalasiri Rthnaweera

11B. Mudiyanseelage Wijaysiri Rathnaweera

Both of Nawagamuwa, Dewalegama.

**Respondents**

**AND**

Wickramasinghe Arachchilage Mudiyanse  
Jeewane, Dewalegama.

**10<sup>th</sup> Defendant-Petitioner**

**Vs.**

W.A Jayasooriya Wickramasinghe  
Jeewane, Dewalegama.

**Plaintiff-Respondent**

1. W.A Premawathie Wickramasinghe
2. W.A Daya Swarnalatha Wickramasinghe
3. W.A Chandrasena Wickramasinghe
4. W.A Nalani Wickramasinghe
5. W.A Padmaraja Wickramasinghe

6. W.A Jayasena Wickramasinghe

7. W.A Thilaka Ranika Kumari

Wickramasinghe

8. Kaluarachchige Dingiri Mahattaya

All of Jeewane, Dewalegama.

9A. Mudiyansele Kamalasiri Rathnaweera

Nawagamuwa, Dewalegama.

11A. Mudiyansele Kamalasiri Rathnaweera

11B. Mudiyansele Wijaysiri Rathnaweera

Both of Nawagamuwa, Dewalegama.

**Defendants-Respondents**

**AND NOW BETWEEN**

Wickramasinghe Arachchilage Mudiyanse  
Jeewane, Dewalegama. (Deceased)

Wickremasinghe Arachchige Ranbanda of  
173, Dewalegama

**Substituted 10<sup>th</sup> Defendant-Petitioner-Petitioner**

**Vs.**

W.A Jayasooriya Wickramasinghe

(Deceased)

Jeewane, Dewalegama.

1A. Iroshan Eranga Prasad Wickremasinghe

1B. Samith Malinda Wickremasinghe

1C. Supun Dhananjaya Wickremasinghe

1D. Avanthika Hansaheli Wickremasinghe

All of Jeewane, Dewalegama.

**Substituted Plaintiff-Respondent-Respondent**

1. W.A Premawathie Wickramasinghe

(Deceased)

1A. Chaminda Teran Priya Heenatigala

1B. Ruklanthi Sanjeewani Sandamali

Heenatigala,

Both of Jeewane, Dewalegama.

2. W.A Daya Swarnalatha Wickramasinghe

3. W.A Chandrasena Wickramasinghe

4. W.A Nalani Wickramasinghe

5. W.A Padmaraja Wickramasinghe

6. W.A Jayasena Wickramasinghe

7. W.A Thilaka Ranika Kumari

Wickramasinghe

8. Kaluarachchige Dingiri Mahattaya

All of Jeewane, Dewalegama.

9A. Mudiyansele Kamalasiri Rathnaweera

Nawagamuwa, Dewalegama.

11A. Mudiyansele Kamalasiri Rathnaweera

11B. Mudiyansele Wijaysiri Rathnaweera

Both of Nawagamuwa, Dewalegama.

**Defendants-Respondents-Respondents**

**Before:** K.K. Wickremasinghe J.

Janak De Silva J.

**Counsel:**

Athula Perera for Substituted 10<sup>th</sup> Defendant-Petitioner-Petitioner

Anuruddha Dharmaratne with Ashan Nanayakkara the 1<sup>st</sup> to 7<sup>th</sup>, 9A, 11A and 11B Defendants-Respondents-Respondents

**Written Submissions tendered on:**

Substituted 10<sup>th</sup> Defendant-Petitioner-Petitioner on 29.05.2009 and 05.10.2018

1<sup>st</sup> to 7<sup>th</sup>, 9A, 11A and 11B Defendants-Respondents-Respondents on 29.05.2009 and 16.06.2011

**Decided on:** 19.07.2019

**Janak De Silva J.**

This is an application in revision by which the Substituted 10<sup>th</sup> Defendant-Petitioner-Petitioner has sought inter alia the following reliefs from this Court:

- (a) Set aside the judgement and interlocutory decree dated 11.05.2000,
- (b) Set aside the final decree if entered,
- (c) Set aside the order dated 12.10.2005,
- (d) Direct the learned District Judge to fix the case for trial de-novo,
- (e) Stay the proceedings in the District Court case bearing no. 22450/P until the final determination of this application,
- (f) Direct the Registrar of this court to list case no. C.A.L.A. 441/2005 together with this case.

The facts pertaining to this application is as follows. The parties to the District Court action who were present and represented on 11.05.2000 informed court that they have settled their disputes and that it is not necessary to answer the points of contest already raised. Thereafter the Plaintiff gave evidence and the learned District Judge had on the same day accepted the evidence led by the Plaintiff and delivered judgment as prayed for by the Plaintiff.

The 10<sup>th</sup> Defendant-Petitioner-Petitioner contends that he could not be present in court on 11.05.2000 as he was indisposed but had given instructions to his lawyer. However, Ms. Dayanthi Udalagama, who was on that day the registered attorney for him had informed court that she did not have instructions to appear on that day.

The 10<sup>th</sup> Defendant-Petitioner-Petitioner aggrieved by the said judgement filed papers on 24.05.2000 to vacate the settlement and judgment dated 11.05.2000. As there was no provision to make that application at that time another application was made after the return of the commission to prepare the final plan in terms of section 48(4) of the Partition Act (Act). The learned District Judge after inquiry rejected the said application on 12.10.2005 and hence this revision application.

The learned District Judge rejected the application inter alia on the basis that it did not comply with the mandatory provisions of section 48(4) of the Act inasmuch the 10<sup>th</sup> Defendant-Petitioner-Petitioner failed to comply with section 48(4) (a) (iv) of the Act which reads:

“(a) Whenever a party to a partition action-

(iv) being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial...”

The issue is whether the 10<sup>th</sup> Defendant-Petitioner-Petitioner had filed a valid statement of claim as the statement of claim filed by him was filed by Mr. C.H. Udalagama.

The learned District Judge correctly observed that there is no journal entry indicating that a proxy of Mr. C.H. Udalagama was filed on behalf of the 10<sup>th</sup> Defendant-Petitioner-Petitioner. The learned counsel for the Substituted 10<sup>th</sup> Defendant-Petitioner-Petitioner submits that this is erroneous since Ms. Dayanthi Udalagama had tendered a proxy on behalf of the 10<sup>th</sup> Defendant-Petitioner-Petitioner on 25.05.1999 (journal entry 100). The issue is not whether the proxy of Ms. Dayanthi Udalagama was filed but whether the proxy of Mr. C.H. Udalagama was filed on behalf of the 10<sup>th</sup> Defendant-Petitioner-Petitioner.

Clearly no such proxy was filed. It is trite law that the omission to file a proxy cannot be cured [*Attorney General v. M.W. Silva* (61 N.L.R. 500), *Dias v. Karawita* (1999) 1 Sri.L.R. 98]. The learned counsel for Substituted 10<sup>th</sup> Defendant-Petitioner-Petitioner relied on the decisions in *Nelson De Silva v. Casinathan* (55 N.L.R. 121) and *S.P. Gunatilake v. Sunil Ekanayake* [(2010) 2 Sri.L.R. 191]. However, the facts in those cases are different from the facts in the instant case.

In *Nelson De Silva v. Casinathan* (supra) an application for the execution of a decree was signed by a proctor in whose favour no proxy had been granted by the plaintiff. It was, however, established that he was an assistant to the proctor on record and that he had signed the application on behalf of the latter, and not as a proctor purporting to act independently on his own responsibility. Further, there was evidence of acquiescence on the part of the defendant and of ratification by the plaintiff. It was held that in the circumstances the irregularity occasioned by the absence of a proxy in favour of the proctor was cured.

In *S.P. Gunatilake v. Sunil Ekanayake* (supra) J.A.N. De Silva C.J. was of the view that the total failure to file a proxy does not in any way effect the validity of the proceedings. However, that was not a case dealing with the application of section 48(4) of the Act. The objection to the proxy not been filed was in that case taken up in appeal whereas in this case it was taken up before the District Court. Furthermore, in that case the Supreme Court considered the fact of filing a proxy belatedly which led to the court concluding that it has succeeded in ratifying the appearances and applications of the registered Attorney and thereby supplying all such acts with legal validity. In this case, it was the proxy of Ms. Dayanthi Udalagama that was filed later and not of Mr. C.H. Udalagama. Hence the question of ratification does not arise.

In fact, J.A.N. De Silva C.J. does state in *S.P. Gunatilake v. Sunil Ekanayake* (supra, at page 199) that where no proxy has been filed:

“it is not the proceedings thereunto that are **rendered a nullity, but all appearances and applications made by the proctor or the counsel as his agent.**” (emphasis added).

Clearly the Supreme Court was making a distinction between the validity of the proceedings and appearances and applications made by a registered attorney where no proxy has been filed and held that all appearances and applications made by an attorney-at-law purporting to be the registered attorney without a proxy or the counsel as his agent are a nullity.

For the foregoing reasons, I hold that the learned District Judge correctly held that the application was not valid inter alia on the basis that it did not comply with the mandatory provisions of section 48(4) (a) (iv) of the Act.

The learned District Judge also correctly concluded that the 10<sup>th</sup> Defendant-Petitioner-Petitioner had failed to comply with section 19(1) of the Act by failing to file a statement of claim setting out the nature and extent of his right, share or interest to, of or in the land to which the action relates and a pedigree showing the devolution of title.



The learned counsel for the 1<sup>st</sup> to 7<sup>th</sup>, 9A, 11A and 11B Defendants-Respondents-Respondents submitted that this application is misconceived in law inasmuch if the 10<sup>th</sup> Defendant-Petitioner-Petitioner was aggrieved by the order dated 12.10.2005 pursuant to an inquiry in terms of section 48(4) of the Act the remedy was to file a leave to appeal application. The Supreme Court in *Ranjit v. Kusumawathie and Others* [(1998) 3 Sri.L.R. 232] held that where the District Court rejected an application made by a defendant in terms of section 48(4)(a)(iv) of the Act it is an order within the meaning of section 754(2) of the Civil Procedure Code from which an appeal may be made with the leave of the Court of Appeal first had an obtained. The 10<sup>th</sup> Defendant-Petitioner-Petitioner has in fact filed a leave to appeal application bearing case no. C.A.L.A. 441/2005 which is pending in this court.

This court will not interfere by way of revision when the law has given a party an alternative remedy and when that party has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction [*Bank of Ceylon v. Kaleel and Others* (2004) 1 Sri.L.R. 284].

In terms of section 48(4)(c)(i) of the Act the 10<sup>th</sup> Defendant-Petitioner-Petitioner had to establish that he could not appear at the trial owing to accident, misfortune or other unavoidable cause. However, he failed to establish that he could not attend due to illness, which is what he averred, as the learned District Judge held that the evidence of the 10<sup>th</sup> Defendant-Petitioner-Petitioner and the ayurvedic physician summoned on his behalf were contradictory and not credible. Furthermore, it appears that on 04.12.1995, the 10<sup>th</sup> Defendant-Petitioner-Petitioner sought and obtained permission of court to lead the evidence of one W.A. Somasiri on his behalf as he was sick and not in a position to give evidence which he failed to do.

Accordingly, I am of the view that the 10<sup>th</sup> Defendant-Petitioner-Petitioner has not established any exceptional circumstances warranting the intervention of this court.

Furthermore, there is more than five years delay from the date of the interlocutory decree dated 11.05.2000 in making this revision application which is not explained. The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case [*Gnanapandithan and another v. Balanayagam and another* (1998) 1 Sri.L.R. 391]. In my view the facts and circumstances of this case shows lack of diligence on the part of the 10<sup>th</sup> Defendant-Petitioner-Petitioner and hence the delay accumulates to his detriment.

For all the foregoing reasons, I dismiss the application with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal