

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

In the matter of an application for Appeal under and 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.

1. Velayuthapillai Thayalan  
No. 17/1,  
Seenivasagnam Road,  
Jaffna.

2. Vasuki Thayalan  
No. 17/1,  
Seenivasagnam Road,  
Jaffna.

**Plaintiffs**

**SC Appeal No. 51/2021  
SC HC CA LA 104/2018  
Civil Appellate High Court  
Jaffna Case No. Rev/83/2016  
DC Jaffna Case No. L/121/2013**

**V.**

1. Ratnam Yogenthiran  
No. 44/5,  
Palam Road,  
Kantharmadam,  
Jaffna.

2. Rajini Yogenthiran  
No. 44/5,  
Palam Road,  
Kantharmadam,  
Jaffna.

2<sup>nd</sup> Defendant appears as Attorney  
of the 1<sup>st</sup> Defendant

**Defendants**

**AND BETWEEN**

Ratnam Yogenthiran  
No. 44/5,  
Palam Road,  
Kantharmadam,  
Jaffna.

Presently in Qatar  
Appearing through his Attorney,  
Yogendran Kavivarshan  
No. 44/5,  
Palam Roadm  
Kantharmadam,  
Jaffna.

**1<sup>st</sup> Defendant- Petitioner**

**V.**

1. Velayuthapillai Thayalan  
No. 17/1,  
Seenivasagnam Road,  
Jaffna.
2. Vasuki Thayalan  
No. 17/1,  
Seenivasagnam Road,  
Jaffna.

**Plaintiffs-Respondents**

Rajini Yogenthiran  
No. 44/5,  
Palam Road,  
Kantharmadam,  
Jaffna.

**2<sup>nd</sup> Defendant-Respondent**

**AND NOW BETWEEN**

1. Velayuthapillai Thayalan  
No. 17/1,  
Seenivasagnam Road,  
Jaffna.

2. Vasuki Thayalan  
No. 17/1,  
Seenivasagnam Road,  
Jaffna.

**Plaintiffs-Respondents-  
Appellants**

**V.**

Ratnam Yogenthiran  
No. 44/5,  
Palam Road,  
Kantharmadam,  
Jaffna.

Presently in Qatar,  
Appearing through his Attorney,  
Yogendran Kavivarshan  
No. 44/5,  
Palam Roadm  
Kantharmadam,  
Jaffna.

**1<sup>st</sup> Defendant- Petitioner-  
Respondent**

Rajini Yogenthiran  
No. 44/5,  
Palam Road,  
Kantharmadam,  
Jaffna.

**2<sup>nd</sup> Defendant-Respondent-**  
**Respondent**

**Before** : **P. Padman Surasena, J**  
**Achala Wengappuli, J**  
**K. Priyantha Fernando, J**

**Counsel** : N. R. Sivendran with Miss Fihama Hanifa  
instructed by A. Premalingam for the  
Plaintiff-Respondent-Appellants.

K. V. S. Ganesharajan with Vithusha  
Loganathan and Mohan Shabishanth  
instructed by Mangaleshwary Shanker and  
S. Ragul for the 1<sup>st</sup> Defendant-Petitioner-  
Respondent.

2<sup>nd</sup> Defendant-Respondent-Respondent is  
absent and unrepresented.

**Argued on** : 17.12.2024

**Decided on** : 21.05. 2025

**K. PRIYANTHA FERNANDO, J**

This appeal was preferred by the 1<sup>st</sup> and the 2<sup>nd</sup> Plaintiffs-  
Respondents-Appellants (hereinafter referred to as the Plaintiffs),  
against the judgment of the High Court of the Northern Province  
holden in *Jaffna* dated 14.03.2018.

**Facts in brief**

The 1<sup>st</sup> and the 2<sup>nd</sup> Defendants in the District Court case who are  
husband and wife, had been the original owners of the land  
described in the schedule to the plaint in the case

No.L121/2013. According to the plaint, by deed of transfer bearing No. 4739 attested by *S. Sivapadam*, Notary Public, the defendants transferred the said land and premises described in the schedule to the plaint to the 1<sup>st</sup> and the 2<sup>nd</sup> plaintiffs who are also husband and wife. The 2<sup>nd</sup> defendant who is the power of attorney holder for her husband (the 1<sup>st</sup> defendant) had signed the said deed.

There had also been an alleged oral agreement between the plaintiffs and the defendants that the defendants are entitled to pay a sum of Rupees one million and 36% interest within two years and have the said property retransferred. However, the defendants had paid only Rs. 420,000 of interest for fourteen months and failed to pay thereafter. The plaintiffs tried to settle the matter amicably yet the defendants had failed to vacate the premises. On this backdrop, the plaintiffs had instituted the case bearing No. L/121/2013 in the District Court of *Jaffna*. The plaintiffs prayed for a declaration of title to the property described in the schedule to the plaint and for the ejectment of the 1<sup>st</sup> and the 2<sup>nd</sup> defendant and for damages and costs.

The 2<sup>nd</sup> defendant had signed the proxy on behalf of both herself and the 1<sup>st</sup> defendant (her husband) acting on the aforementioned power of attorney of her husband. The registered attorney had tendered the proxy on behalf of both the 1<sup>st</sup> and the 2<sup>nd</sup> defendants and the parties have informed the Court of a settlement and according to the journal entry of the District Court dated 12.03.2014 Court had entered a consent Judgment.

In terms of the consent judgment, the defendants were to pay a sum of money to the plaintiffs within six months. Upon the satisfaction of this, the plaintiffs were to transfer the property to the defendants. However, if the defendants fail to satisfy the said condition, the plaintiffs would be entitled to execute the writ of ejectment without notice to the 1<sup>st</sup> and the 2<sup>nd</sup> defendants.

On default of the said terms by the defendants by failing to pay, the plaintiffs were entitled to a writ of execution of the decree and Court made such order on 03.11.2014. Thereafter, the plaintiffs were in possession of the property in dispute.

Following this, (after almost two years since the writ was executed) the 1<sup>st</sup> defendant filed a revision application in the High Court of Jaffna to revise and to set aside all orders made by the District Court of Jaffna in Case No. L/121/2013.

The revision application was preferred mainly on the ground that, the 1<sup>st</sup> defendant had not given a power of attorney to his wife the 2<sup>nd</sup> defendant which would enable her to appear on his behalf in the District Court case. It was the position of the 1<sup>st</sup> defendant that, it only enabled her to transfer the property and not to litigate. Therefore, it was an error by the learned District Judge to accept the 2<sup>nd</sup> defendant as the power of attorney holder of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant stated that he was unaware of the proceedings as he was residing in Qatar for the purposes of employment. It was pleaded in the revision application that, all orders made in the District Court case bearing No. L/121/2013 be set aside and that the learned District Court Judge be directed to permit the 1<sup>st</sup> defendant to file answer.

The plaintiffs filed objections emphasizing on the inordinate delay on the part of the 1<sup>st</sup> defendant in filing the revision application and the fact that the 2<sup>nd</sup> defendant had held out that she was the power of attorney holder for the 1<sup>st</sup> defendant and had voluntarily filed proxy. The plaintiffs also stated that, they had sold the property in the year 2016 and the land is no longer owned by the plaintiffs and also that no special circumstances have arisen to invoke revisionary jurisdiction by the High Court.

The learned Judges of the High Court identified the main issue to be as to whether the 2<sup>nd</sup> defendant had the authority to file proxy on behalf of her husband (1<sup>st</sup> defendant).

By judgment dated 14.03.2018, the learned Judges of the High Court allowed the revision application. The learned Judges set aside the orders made by the learned Judge of the District Court, ordered to issue notices on the 1<sup>st</sup> and the 2<sup>nd</sup> defendants and to proceed with the case from where it stood prior to filing of the proxy in the District Court and to take steps to restore the 1<sup>st</sup> and the 2<sup>nd</sup> defendants into possession of the property.

Aggrieved by the decision of the High Court in allowing the revision application, the appellants preferred the instant appeal. This Court granted leave to appeal on the questions of law set out in sub paragraphs (a), (b) and (g) of paragraph 29 of the petition dated 06.04.2018.

### **Questions of law**

*(a) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that according to the facts and circumstances of the case an application should have been made in the District Court in the first instance to set aside the Orders made in the District Court?*

*(b) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that no Revision application could have been filed in view of the facts and circumstances of this case without first invoking the jurisdiction of the original Court which made the various Orders?*

*(g) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that admittedly the 1<sup>st</sup> Defendant-Respondent had given the Power of Attorney to the 2<sup>nd</sup> Defendant-Respondent to deal with the property in issue and the 2<sup>nd</sup> Defendant-Respondent having sold the said property using the*

*said Power of Attorney, the 2<sup>nd</sup> Defendant-Respondent had the authority to appear on behalf of the 1<sup>st</sup> Defendant-Respondent?*

At the hearing of this appeal, on the request of the learned Counsel for the appellant, an additional question of law was allowed.

**Additional question of law**

*“The 2<sup>nd</sup> defendant having not challenged the settlement, was the High Court in error to set aside all orders after 12.03.2014 including the orders relating to the 2<sup>nd</sup> defendant?”*

The questions of law set out in sub paragraphs (a) and (b) in paragraph 29 of the petition will be answered together.

It was the submission of the learned Counsel for the plaintiffs that, the 1<sup>st</sup> defendant should have filed action in the District Court if he wished to challenge the settlement instead of filing a revision application in the High Court, after the lapse of two years upon the settlement. It was also submitted that, by invoking the revisionary jurisdiction of the High Court, the plaintiffs were deprived of the opportunity to cross examine the 1<sup>st</sup> defendant or to lead evidence as they are factual matters that can only be determined in the District Court.

It was also submitted that there is an obligation to file an application in the same Court to set aside an order as the position of the 1<sup>st</sup> defendant is that he had not received summons. The learned Counsel submitted the cases of **Loku Menika v. Selenduhamy 48 NLR 353**, **A.P. Dingihamy v. N.M. Don Bastian and Another 65 NLR 549** and **Andradie v. Jayasekera Perera 1985 2 SLR 204** which emphasized the importance of applying in the first instance to the Court that made the order in respect of *ex-parte* Orders. It was the position of the learned Counsel for the plaintiffs that the 1<sup>st</sup> defendant



was not entitled to invoke the revisionary jurisdiction of the High Court and therefore, the High Court was wrong in entertaining the said application.

It was also submitted by the learned Counsel for the plaintiff that, the other circumstances of this case also point out that, allowing revisionary jurisdiction is wrong due to the inordinate delay of almost 2 years in filing the revision application not being explained and the fact that there being no allegation of fraud by the 1<sup>st</sup> defendant against the 2<sup>nd</sup> defendant or the plaintiffs.

With regard to the delay not being explained, the learned Counsel for the 1<sup>st</sup> defendant submitted that, the 1<sup>st</sup> defendant in paragraph 14 of the revision application stated the reason for the delay in filing the revision application. The learned Counsel citing the case of ***Gnanapandithen and Another v. Balanayagam and Another 1998 1 SLR 391*** justified decision of the High Court in allowing the revision application as there has been a grave prejudice and a miscarriage of justice in respect of the 1<sup>st</sup> defendant.

When considering the circumstances of this case, it has been brought to the attention of this Court by the 1<sup>st</sup> and the 2<sup>nd</sup> plaintiffs that, there has been a delay in filing the revision application in the High Court and that any allegation of fraud is not present. First, I will address the aspect of delay in filing the revision application and second, I will address the absence of an allegation of fraud.

There seems to be a delay of almost 2 years on the part of the 1<sup>st</sup> defendant in filing the revision application in the High Court. Although the 1<sup>st</sup> defendant seems to have explained the reasons for delay by stating that he was residing in Quatar for employment at the time, the delay nevertheless subsists. As rightly submitted by the learned counsel for the Plaintiffs, if the 1<sup>st</sup> Defendant made an application in the same District Court to purge default, the plaintiffs could have cross examined the 1<sup>st</sup>

defendant on the delay. Further, the plaintiffs could have had the opportunity to cross examine the 1<sup>st</sup> defendant on any possible collusion on the part of the 1<sup>st</sup> and the 2<sup>nd</sup> defendants who are husband and wife. There is no evidence of any complaint by the 1<sup>st</sup> defendant against the 2<sup>nd</sup> defendant who is his wife for filing action in the District Court on his behalf using a wrong power of attorney.

When considering the aspect of the absence of an allegation of fraud, it is seen that the 1<sup>st</sup> Defendant takes the position that he had given the power of attorney to his wife, and that it only enabled her to transfer the property and not litigate. The 1<sup>st</sup> defendant also takes the position that, although his wife (2<sup>nd</sup> defendant) had litigated, he was unaware of the proceedings as he was residing in Qatar. Despite these assertions, the 1<sup>st</sup> Defendant had never alleged fraud in respect of his wife and no explanation has been made on the absence of an allegation of fraud. Further, in no instance has the 1<sup>st</sup> defendant or the 2<sup>nd</sup> defendant alleged fraud in respect of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs as the defendants admit that the property has been transferred to the 1<sup>st</sup> and the 2<sup>nd</sup> plaintiffs.

Upon considering all the circumstances of this case, it is my position that the learned Judges of the High Court in allowing the revision application have erred as the circumstances of this case show that there exists no exceptional circumstances to do so in this case.

Further, in the case of **Loku Menika v. Selenduhamy 48 NLR 353** it was stated that,

*“It is clear that the learned Commissioner of Requests held this inquiry under a rule of practice which has become deeply ingrained in our legal system-namely, that if an ex parts order has been made behind the back of any party,*

*that party should first move the Court which made that ex parte order in order to have it vacated, before moving the Supreme Court or taking any other action in the matter. If authority is needed for this proposition it is to be found in the following cases: In Habibu Lebbe v. Punchi Ettena <sup>1</sup>[(1894) 3 C. L. R. at p. 85 and see Craig V. Kanssen (1943) 1 K, B. 256.]..."*

*"In Caldera v. Santiagopulle Bertram C,J. following Weeraratne v. Secretary, D, C, Badulla (supra) said " The order was made ex parte behind the back of the defendant, and in accordance with the authorities cited in a very recent case .... a person seeking to set aside such an order must first apply to the Court which made it, which is always competent to set aside an ex parte order of this description. ..."*

In the recent judgment in case of **Rev. Omalpe Somananda Thero v. Rev Ratmale Sri Somarathna Thero, SC/Appeal/206/2012. SC Minute 14.03.2025**, His Lordship Justice Samayawardhena observed;

*"In my view, on the facts and circumstances of this case, the High Court should not have entertained the revision application mainly on two reasons.*

*If the complaint of the appellant was that the order of the District Court dated 25.11.2019 was made against him without giving him a hearing, he ought to have first made the application to the District Court which made the ex parte order. He could go before the High Court only if he was dissatisfied with that order. He could not have straight away gone before the High Court against the original ex parte order. This is settled law."*

Samayawardhena J. further referred to the Case of Andradie v. Jayasekera Perera [1985] 2 Sri LR 204 where Siva Selliah J held;

*"The practice has grown and almost hardened into a rule that where a decree has been entered ex parte in a District Court and is sought to be set aside on any ground, application must in the first instance be made to that very*

*Court and that it is only where the finding of the District Court on such application is not consistent with reason or proper exercise of the Judge's discretion or where he has misdirected himself on the facts or law that the Court of Appeal will grant the extraordinary relief by way of Revision or Restitutio in Integrum."*

According to the above case law authorities it is now settled law that in order to vacate an *ex parte* order, a person must apply to the Court which made the said order.

When considering the facts of this case, it is also an instance where the 1<sup>st</sup> Defendant who was allegedly unaware of the judgment entered in the District Court in Case No. L/121/2013 wishes to vacate the said judgment as proxy has been signed by way of a power of attorney which did not provide the power to litigate. As stated in the above case law authorities, the clear and efficacious remedy available for the 1<sup>st</sup> Defendant in the instant case was to make the application before the very District Court for vacation of the *ex parte* order.

Thus, in view of what has been discussed, the questions of law set out in paragraph 29 (a) and (b) are answered in the affirmative.

The circumstances of this case are such that, the 1<sup>st</sup> defendant who is the husband of the 2<sup>nd</sup> defendant, while asserting that he was unaware of the proceedings seeks redress in Court after 2 years claiming that the power of attorney upon which the 2<sup>nd</sup> defendant signed the proxy was not a general power of attorney but a specific power of attorney which does not give the 2<sup>nd</sup> defendant the power to litigate. Despite making this assertion, no fraud has been alleged either on the part of the 2<sup>nd</sup> defendant or the 1<sup>st</sup> and the 2<sup>nd</sup> plaintiffs. The fact of transferring the ownership of the land in question is also admitted. In this backdrop, and within these special circumstances, to not allow

this appeal would be condoning the abuse of process. This Court observes that revision should not lead to abuse of process.

In light of what has been decided, the questions of law set out in sub paragraph 29(g) of the petition and the additional question of law that was allowed by Court on the request and agreement of the Counsel need not be answered.

I set aside the judgment of the High Court of the Northern Province holden in Jaffna dated 14.03.2018. The orders made by the District Court are affirmed. The appeal is allowed.

*Appeal is allowed*

**JUDGE OF THE SUPREME COURT**

**JUSTICE P. PADMAN SURASENA**

I agree

**JUDGE OF THE SUPREME COURT**

**JUSTICE ACHALA WENGAPPULI**

I agree

**JUDGE OF THE SUPREME COURT**