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

In the matter of an appeal made in terms of Section 5 (C) of the High Court of the Provinces (Special Provisions) Act No.54 of 2006.

SC / APPEAL / 39 / 2022

SC / HCCA / LA / 65 / 2020

HCCA Jaffna / 182 / 2018

DC Jaffna: L / 240 / 2014

1. **Sinnarajah Sivakumar,**

2. **Harijah** (Wife of Sivakumar),

9749, SW 111th Terrace Miami,
Florida,
3313776,
United States of America.

Through their Power of Attorney

Nadaraja Thamilalagan,

"Malarvasa" Urumpirai North,

Urumpirai.

PLAINTIFFS

-Vs-

Ponnuthurai Gurudev,

311, Navalar Road,

Jaffna.

DEFENDANT

AND THEN BETWEEN

Ponnuthurai Gurudev,

311, Navalar Road,

Jaffna.

DEFENDANT – APPELLANT

-Vs-

1. **Sinnarajah Sivakumar,**

2. **Harijah** (Wife of Sivakumar),

9749, SW 111th Terrace Miami,
Florida,
3313776,

United States of America.

Through their Power of Attorney

Nadaraja Thamilalagan,

"Malarvasa" Urumpirai North,

Urumpirai.

PLAINTIFFS – RESPONDENTS

AND NOW BETWEEN

1. **Sinnarajah Sivakumar,**

2. **Harijah** (Wife of Sivakumar),

9749, SW 111th Terrace Miami,
Florida,
3313776,
United States of America.

Through their Power of Attorney

Nadaraja Thamilalagan,

"Malarvasa" Urumpirai North,

Urumpirai.

PLAINTIFFS – RESPONDENTS – APPELLANTS

-Vs-

Ponnuthurai Gurudev,

311, Navalar Road,

Jaffna.

DEFENDANT – APPELLANT – RESPONDENT

Before: A.H.M.D. Nawaz, J.
Kumudini Wickremasinghe, J. &
A.L. Shiran Gooneratne, J.

Counsel: Kuvera De Zoysa, PC, with N.M. Shaheid and Kevin Dias for the Plaintiffs – Respondents – Appellants.

K.V.S. Ganesharajan for the Defendant – Appellant – Respondent.

Argued on: 13.03.2024

Decided on: 23.03.2026

A.H.M.D. Nawaz, J.

1. The point that arises in this appeal is not altogether unfamiliar. It has recurred in one form or the other in those classes of cases where a defect in the institution of an action is pointed out as a vice that taints the whole proceedings that had taken place in the court *a quo*. Such an argument that proceedings in the District Court became null and void because of the absence of a power of attorney was advanced in this case in the Civil Appellate High Court in Jaffna and the learned High Court judges have dismissed the plaint in an action filed by the Plaintiffs in this case solely on the basis that the tender of the power of attorney took place long after the appeal brief had been remitted to the High Court.

2. The case instituted by the Plaintiffs - Respondents - Appellants (the Plaintiffs) was an action for declaration, wherein the Plaintiffs living in the USA had filed this action for the ejectment of the Defendant from the property situated in Navalar Road, Jaffna. As the plaint filed in the District Court of Jaffna clearly indicates, the Plaintiffs - a husband and wife who were living in Miami, Florida filed the action through their attorney in the District Court of Jaffna against the sole Defendant whom they alleged was an overholding lessee. There was also a claim for arrears of rentals and damages.

3. The special feature in this case is that the 1st Plaintiff - the husband himself traveled down from the USA and testified in the case before the District Court. I find upon a perusal of the proceedings in the District Court that the Defendant has admitted *inter alia;*

    a. *He did not have title to the property – the subject matter of the action.*

    b. *He had undertaken that he would leave the property once he constructed his own house.*

c. *He undertook to leave in 2 years.*

d. *He never paid any money to the Plaintiffs.*

4. This explains the basis of the action on the premise that the Defendant had become an overholding lessee.

5. I must state at the very outset that though the plaint and the proxy filed in the case quite clearly indicated that the Plaintiffs began their legal proceedings through their power of attorney holder, hardly any objection was ever taken by the Defendant to the absence of the power of attorney either at the commencement of the trial or in the course of it.

6. Indeed, the power of attorney had not been filed along with the plaint and I need not reiterate the long-held principle that the power of attorney could come on the record later. I would draw attention to cases such as ***Udeshi v. Mather***[1] and ***Gricilda Hewa v. Thomas Hewa***[2]. The dicta of Atukorale, J. (with Sharvananda, C.J. and L.H. De Alwis, J. concurring) is quite significant to recall;

> *"It is now settled law that the failure to file the powers or certified copies thereof in court as stipulated in S.25 (b) is only an irregularity which can be cured later by tendering them to court;* ***Aitken Spence & Co. v. Fernando***[3]*. In the instant case this omission has been cured by certified copies being filed with the motion dated 22.8.1986"*

7. In ***Aitken Spence & Co. v. Fernando*** (supra) – the case cited by Atukorale, J, Bonser C.J., after consultation with Moncrieff, J. expressed the following view at p 37;

---

[1] (1988) 1 Sri.L.R. 12
[2] (1998) 3 Sri.L.R. 43
[3] (1900) 4 N.L.R. 35

"A power of attorney or a copy of it, might under Section 25 (b), be filed at any stage of the case. It seems to me that in matters of this nature, the important thing is that the person in fact had authority to act and not whether the instrument of authorization was filed at the time of the institution of the action.

8. From the observations of Bonser C.J., it is apparent that what a Court has to be concerned with is whether there was an intention on the part of the principal to clothe the agent with authority. Section 25 (b) of the Civil Procedure Code which runs in the following tenor was interpreted by Bonser C.J. as not imposing a strict requirement of filing the instrument of agency along with the plaint at the time of the institution of the action;

"Persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the court within which limits the appearance or application is made or act done, authorizing them to make such appearances and applications, and do such acts on behalf of such parties; which power, or a copy thereof certified by a registered attorney or notary shall in each case be filed in the court".[4]

9. It is this attenuation of the formalism of Section 25 (b) that gave rise to cases such as ***Udeshi v. Mather*** (supra) and ***Gricilda Hewa v. Thomas Hewa*** (supra). Amerasinghe, J. crystalized the relevant question that a Court has to pose in regard to Section 25 (2) in ***Gricilda Hewa v. Thomas Hewa*** (supra);

"It seems to me that in matters of this nature, the important thing is that the person in fact had authority to act and not whether the instrument of authorization was filed at the time of the institution of the action'.

[4] Section 25 (b) of the Civil Procedure Code

The failure to file the power of attorney of or a certified copy thereof in court, as stipulated in s. 25 (b) is only an irregularity".

10. But the fact remains that the Defendant never gave his mind to the absence of the power of attorney until he settled down to put forth his written submissions to the learned District Judge. In practice written submissions are a norm in the original Courts after the parties have closed their respective cases and it is in his written submissions that the Defendant made a complaint that the power of attorney was *non est* in the case.

11. It would appear that the learned District Judge of Jaffna did not pay his attention to this complaint but proceeded to determine the rights of the parties on the merits. He drew attention to the perennial dictum of U. De Z Gunawardana, J. in ***Ruberu and Another v. Wijesooriya***[5] on declaration of title cases and it is worth quoting the passages of the learned Judge in regard to the merit of the case of the Plaintiffs which was based on a lease and an overholding lessee.

"Whether it is a licensee or lessee, the question of title is foreign to a suit in ejectment against either. The licensee obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the Plaintiff without whose permission he would not have got it. The effect of Section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff is perforce an admission of the fact that the title resides in the plaintiff.

12. The learned Judge of the Court of Appeal (as His Lordship then was) further held that;

[5] (1998) 1 Sri.L.R. 58

"It is an inflexible rule of law that no lessee or licensee will never be permitted either to question the title of the person who gave him the lease or the license or the permission to occupy or possess the land or set up want of title in that person".

13. As regards the scope of an action against an overholding lessee which characterized the action of the Plaintiffs against the Defendant the pertinent citation of Gamini Amarasekara, J. to ***Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*** in the case of ***H.W. Amarasiri and Another v. W.M. Bandara Menika and Others***[6] is worthy of note;

"*The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings.*

Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship……." [7]

"*A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.*"

[6] SC / APPEAL / 108 / 2022
[7] Voet 19.2.32.

14. The aforesaid principles of law seem to have inclined the learned District Judge of Jaffna to decide the case in favour of the Plaintiffs and reject the case of the Defendant. In fact, the learned District Judge ordered the ejectment of the Defendant from the premises in Navalar Road, Jaffna. The import of the judgment of the Court *a quo* is an unambiguous characterization of the Defendant as an overholding lessee.

15. In his appeal to the Civil Appellate High Court of Jaffna, the Defendant persisted in his objection that there was no power of attorney on the record of the case. Much argument before us turned on the fact of a special power of attorney having been tendered to the District Court of Jaffna on 13 March 2019 by way of a motion, which the learned counsel for the Defendant Mr. K.V.S. Ganesharajan pointed out was filed long after the Defendant had preferred his appeal to the Civil Appellate High Court of Jaffna on 4 September 2018. The judgement of the District Court had been pronounced on 4 July 2018. The learned President's Counsel for the Plaintiffs brought to the notice of this Court that the learned Civil Appellate High Court Judges had themselves been put *aut fait* of the tendering of the special power of attorney but the learned Judges of the Civil Appellate High Court treated this as a fundamental vice that vitiated the whole proceedings in the District Court.

16. The learned Civil Appellate High Court Judges by their judgment dated 22 January 2020 concluded that there was a failure on the part of the Plaintiff to file the power of attorney or a copy thereof in Court in compliance with Section 25 (b) of the Civil Procedure Code and in their opinion such a failure was fatal to the maintenance of the action.

17. The learned Judges of the Civil Appellate High Court thus allowed the appeal of the Defendant and dismissed the action of the Plaintiffs.

18. It is from this judgement that the Plaintiffs invoked the appellate jurisdiction of this Court and I would also set down the 3 questions of law that surfaced to the fore at

the threshold stage of leave;

(a) *Is the failure to comply with Section 25 (b) of the Civil Procedure Code not a fatal irregularity?*

(b) *Was the irregularity, if any, cured by the subsequent tender of the power of attorney to the District Court?*

(c) *Did the Learned Judges of the said Civil Appellate High Court misdirect themselves in law in failing to appreciate that in matters of this nature the important thing was whether the power of attorney Holder in fact had the authority to institute action on behalf of the Plaintiffs - Respondents - Appellants?*

19. It has to be remembered that the case ran its full course in the District Court of Jaffna and both parties sought to vindicate their positions by testifying in their favour. Even though the Plaintiffs employed one Nadarajah Thamilalagan to institute this action characterizing the said Nadarajah Thamilalagan as their attorney, the 1st Plaintiff (the husband of the 2nd Plaintiff) himself testified and pleaded his case before the District Court for the ejectment of the Defendant. It was long clear to the Defendant as clear as sunlight that the case had been instituted through an agent. There was no power of attorney which accompanied the plaint or followed thereafter but the Defendant chose not to raise any objections to this defect which the Courts of this country have long cited as a mere irregularity.

20. It is axiomatic that in cases of irregularity Defendants in cases do take objections at the commencement or long before the commencement of a trial to an irregularity or otherwise, and no trace of such an objection is visible upon a perusal of the proceedings in this case. Section 17 of the Civil Procedure Code enjoins a Judge not to dismiss an action for misjoinder or non-joinder of parties.

21. Pereira, J. in ***London and Lancashire Fire Insurance Com. v. P and O Com.***[8] stated the following as regards objections to misjoinder or non-joinder of parties;

> *"An objection on the ground of the misjoinder or non-joinder of parties is not a defence to the Plaintiff's case to be taken by way of answer."*

22. As to an irregularity on misjoinder of cause of action ***Susil Perera v. Kelly and Another***[9] held;

> *"Any objection to misjoinder of cause of action has to be taken before the hearing"*

23. These cases undoubtedly turned on misjoinder and non-joinder of parties that had to be brought to the notice of Court as an irregularity even before the commencement of the trial. But we have seen that in regard to the irregularity of the absence of a power of attorney, these instruments could be brought onto the record of a case even after the case has commenced, in terms of the long-held principles that have developed around Section 25 of the Civil Procedure Code.

24. However, if a suit that was instituted by a power of attorney holder has been decided after going into the merits, it goes without saying that the appellate Court would not entertain an objection as to jurisdiction unless it has resulted in failure of justice. This was a case where the 1st Plaintiff who had, along with his wife held out a special power of attorney, however invalid it was, took the witness stand and was subjected to cross examination by the Defendant. Not a single question was posed to him as to the want of authority of the aforesaid Nadarajah Thamilalagan to institute an action on their behalf.

[8] 18 N.L.R. 15 at p.21
[9] 2002 3 Sri.L.R. part 6 p.163

25. There was no issue raised as to the want of authority of the said agent. Neither did the 1st Plaintiff repudiate in the course of his evidence the said Nadarajah Thamilalagan as his power of attorney holder. It has to be remembered that a power of attorney signifies a contract or an agreement between a recognized agent and a Plaintiff / Defendant in a case. If the authority of the agent is not in question, it would be obnoxious to common sense to insist on a stringent compliance with Section 25 (b) of the Civil Procedure Code so as to invalidate proceedings of a lower Court, when the Plaintiff had ratified the agency by his subsequent conduct of acquiescence in all the acts the said Nadarajah Thamilalagan took in this case.

26. In this context I do well to reflect on the case of ***Kumarihamy v Punchi Menika***[10] where Abrahams C.J. articulated these views as follows;

> *"I see no reason why the opinion expressed in* ***Segu Mohamadu v. Govinden Kangany***[11] *should not apply. There Wood Renton C.J., approved of the finding in* ***Bisandas Valad Majuvian v. Lakmichand Kisamchand***[12]*, which was to the effect that an irregularity of this nature should not be permitted to vitiate the proceedings unless such irregularity affected the merits of the case or the jurisdiction of the Court".*[13]

27. There is also authority across Palk Strait that an objection that the institution of a suit is not within the authority conferred by a power-of-attorney, should be taken at the earliest possible opportunity and before issues are framed – see ***Municipal Committee, Pathankot v. Roshanlal***[14] and that even when an objection is so taken and sustained, the court should not reject the plaint but give an opportunity to the

---

[10] 38 N.L.R. p.385
[11] 12 Leader 61
[12] 6 Bombay High Court Reports 159
[13] At 38 N.L.R. p.387
[14] (1957) ILR Punj 1443

parties to rectify the defect – see ***Radhakishen v. Wali Mohammed***[15]. In a case, the plaintiff, who was of age, presented a plaint by his mother acting as guardian and describing him as a minor. The plaintiff was himself present at the presentation of the plaint and the court, believing that he had acted in good faith held that the defective presentation was an irregularity which did not affect the jurisdiction of the court to accept the plaint – see ***Wali Mohammed v. Ishak Ali.***[16]

28. I take the view that although a power of attorney must be strictly construed as giving only such authority as it expressly or by necessary implication creates, this Court cannot decline to recognize the authority that the 1st Plaintiff himself has impliedly recognized what Nadarajah Thamilalagan had to do whatever was necessary or ordinarily incidental to the effective execution of an express authority conferred on him by a written document that got onto the record long after the appeal had been preferred to the Civil Appellate High Court of Jaffna.

29. Therefore, the learned Civil Appellate High Court Judges grievously erred in dismissing the plaint of the Plaintiffs solely on the ground that there was no written authority that lay on the record. As the parties brought to the notice of this Court, it appears that there was a belated tender of a document styled special power of attorney and in the absence of any objection to the validity of the authority of the agent in initiating this action, this Court cannot be driven to the conclusion that a fundamental vice affected this case so as to invalidate the proceedings in the District Court.

30. This brings me to the cardinal principle that has guided this Court in distinguishing between an irregularity and illegality. The mere circumstance of there being an error, defect or irregularity in any proceeding in a suit, is no ground for reversing or varying a decree in appeal. But if it appears that the error, defect or irregularity affected the

[15] AIR 1956 Hyd 133
[16] AIR 1931 AL 527 (FB)

merits of the case or jurisdiction of the court, it would be a ground for reversing or varying the decree. Where an irregularity is one which affects the merits of a case or the "jurisdiction of a court", it is said to be a material irregularity. Where it does not, it is usually spoken as a mere irregularity.

31. In the circumstances, the Defendant was not prejudicially affected in espousal of his case before Court and he was not misled at all in his defence. Accordingly, I proceed to answer the questions of law in favour of the Plaintiff – Respondent – Appellant and allow his appeal.

32. Thus, the judgement of the learned Civil Appellate High Court Judges dated 22 January 2020 is set aside and the judgement of the learned District Judge dated 4 July 2018 is affirmed and restored.

Judge of the Supreme Court

Kumudini Wickremasinghe, J. **Judge of the Supreme Court**

I agree

A.L. Shiran Gooneratne, J. **Judge of the Supreme Court**

I agree