

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

M.C. Athambawa
117, Saibo Road
Kalmunaikudy

Plaintiff

Vs.

MCA. Azeez
Attorney-at-Law
Saintamaruthu
Kalmunai

Defendant

**C.A. TRANSFER APPLICATION NO: 16/2011
HC (PROVINCIAL CIVIL APPEAL)
No: EP/HCCA/KAL/153/2009
D.C.KALMUNAI CASE NO; 226/MISC**

AND

M.C. Athambawa
117, Saibo Road
Kalmunaikudy

PLAINTIFF-APPELLANT

Vs.

MCA Azeez
Attorney-at-Law

Saintamaruthu

Kalmunai.

DEFENDANT-RESPONDENT

AND NOW

In the matter of an application for Transfer under section 46 of the Judicature Act and section 5A of the High Court of the Provinces (Special Provision) Act No.19 of 1990 as Amended by Act No.54 of 2006.

M.C. Athambawa

11, Saibo Road

Kalmunaikudy

PLAINTIFF-APPELLANT

PETITIONER

Vs.

MCA Azeez

Attorney-at-Law

Saintamaruthu

Kalmunai

DEFENDANT-RESPONDENT-

RESPONDENT

BEFORE : S. SRISKANDARAJAH, J (P/CA)

COUNSEL : A.R.Surandran PC with N.Kandeepan,
for the Petitioner.

Manohara de Silva PC with A.Wijesundera
for the Respondent

Argued on : 04.04.2013

Decided on : 13.06.2013

S.Sriskandarajah, J

The Plaintiff-Appellant- Petitioner (hereinafter referred to as Petitioner) instituted an action bearing No.226/MISC/2001 in the District Court of Kalmunai against the Defendant-Respondent-Respondent (hereinafter referred to as Respondent) claiming, inter alia, damages in a sum of Rs.12,000,000/. The Petitioner submitted that when this case was taken up for trial, the District Judge of Kalmunai declined to hear the case as the Respondent is an Attorney-at-Law practising in Kalmunai Courts, and informed the Judicial Service Commission to appoint another Judge to hear and determine the said case. The Judge appointed by the Judicial Service Commission to hear the case also declined to hear the case as the Respondent is an Attorney-at-Law who was a regular practitioner before him. Thereafter the case was fixed before another District Judge of Kalmunai, and the case was taken up for trial and, at the conclusion of the trial, parties filed written submissions, and the District Judge, by his judgment dated 21/11/1908, dismissed the Petitioner's action as well as the counter claim of the Respondent.

Being aggrieved by the said judgment, the Petitioner preferred an appeal to the Eastern Provincial Civil Appellate High Court holden at Kalmunai. The said appeal

was assigned No.EP/NCCA/KAL/153/2009. The Petitioner is now, by this application in the Court of Appeal, has sought to transfer the said appeal from the Eastern Provincial Civil Appeal Appellate High Court holden at Kalmunai to the Western Province Civil Appellate High Court holden at Colombo or, in the alternative, to make an order to hear the said appeal and determined by the Court of Appeal itself in the exercise of the appellate powers of the Court of Appeal.

The reason for this Application, according to the Petitioner is, that the Defendant-Respondent is a lawyer regularly practising in Kalmunai Courts and, during the pendency of the District Court proceedings, the Petitioner encountered immense difficulty in retaining Counsel from Kalmunai, as almost all the Lawyers practicing there had refused to appear against the Defendant-Respondent. The Petitioner also had submitted that the Counsel who appeared on his behalf in the District Court of Kalmunai had informed the Petitioner that he is now not fit to travel to Kalmunai and appear for the Appellant in the said appeal. He also submitted that he had made attempts to retain the services of a Counsel from the Kalmunai Bar to appear for him in the said appeal, and all Lawyers approached by the Petitioner had declined to appear against the Respondent, a fellow practitioner from the same Bar. In these circumstances the Petitioner submitted that if the appeal is not transferred to another Court, he would be denied a fair hearing and that the Petitioner will be deprived of to present his case through the Counsel of his choice. In the above circumstances, the Petitioner submitted that it is expedient to transfer the said appeal pending before the High Court of Kalmunai for hearing before the Western Province Appellate High Court holden at Colombo where the Petitioner is presently residing.

The Petitioner had made the above Application under Section 46 of the Judicature Act read with Section 5(a) of the High Court of the Provisions (Special Provisions) Act No.19 of 1990, as amended by Act No.54 of 2006. The provisions in Section 46 of the Judicature Act, in particular Section 46(2), deals with "Every

application for transfer of any action, prosecution, proceedings or matter under this Section shall set out the grounds for transfer by way of an Affidavit, and Section 46(3) provides that the Court of Appeal, in making an order for transfer under this Section may, if it thinks fit, direct that the Court, to which such action, prosecution, proceedings or matter was transferred shall call all or any of the witnesses who have been examined before the Court from which the transfer is made and take their evidence afresh." A reading of Section 46 of the Judicature Act, shows that the transfer of cases referred to in that Section by the Court of Appeal is a transfer of cases from one original Court to another original Court and it does not contemplate the transfer of an appeal from an Appellate Court to another Appellate Court.

The jurisdiction to hear appeals are vested in the High Court by the High Court of Provinces (Special Provisions) Act No.19 of 1990, as amended by Act No.54 of 2006. Section 5(a) provides that a High Court established by Article 154(P) of the Constitution for a Province shall have and exercise Appellate and revisionary jurisdiction in respect of judgments, decree and order delivered and made by any District Court or Family Court within such province, and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be. In view of the above Section, the jurisdiction to hear appeals from District Courts has been vested in the High Court of the province in which the judgment delivered by the District Court is situated. In these circumstances the Court of Appeal cannot transfer an appeal from the High Court of a province to High Court of another province.

The Petitioner's grievance is that he had lodged an appeal to the High Court of Kalmunai under the provisions of law against the order of the District Court of Kalmunai, and that he is now deprived of presenting his case before the said High Court as he is finding it difficult to retain a Counsel as Respondent is practising in Kalmunai as an Attorney-at-Law. The Petitioner in this Application has also sought

that if this Court is not inclined to transfer the case from the High Court of Kalmunai to another High Court, the Court of Appeal may order to transfer the case to the Court of Appeal for this Court to hear and conclude this Appeal in the interests of justice.

The Petitioner, when preferring the appeal to the High Court, was well aware the difficulties he would face because he faced the same difficulties when he was pursuing the District Court action in Kalmunai. The High Court of the Province (Special Provisions Act) as amended in Section 5(d) provides that if an appeal from a District Court is filed in the Court of Appeal, the Court of Appeal may transfer that case to the relevant High Court of the Province as may be determined by the President of the Court of Appeal, and upon such reference, the said High Court shall hear and determine such appeal. As the Petitioner was aware of the difficulties he is going to face in the High Court of Kalmunai, he should have preferred the appeal to the Court of Appeal so that the Court of Appeal under the above provisions would have transferred to an appropriate High Court to hear and determine this appeal or the Court of Appeal itself would have heard that appeal. The Petitioner, without filing the appeal directly in the Court of Appeal had filed an appeal in the High Court of Kalmunai. In these circumstances the Court of Appeal has no jurisdiction to transfer the appeal from one High Court of the province to another High Court of the province and, therefore, this Court refuses the Application of the Petitioner to transfer the appeal and dismiss this application without costs.

President of the Court of Appeal