

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

**In the matter of an application for Transfer of Case
No. 5377/L in the District Court of Kalutara under
Article 138(2) of the Constitution of the Democratic
Socialist Republic of Sri Lanka read with Section 46
of the Judicature Act No. 2 of 1978.**

Petrus Verheul,
No. 9/1, Siri Nivasa Road,
Kaluthara North,
Kalutara.

PLAINTIFF- PETITIONER

CA NO.05/ TR /2015

DC Case No. 5377/L

Vs,

1. Singappulige Premalal,
No.23/1, New Road,
Palathota,
Kalutara.

2. P.A. Palliyaguru,
Registrar of Lands,
Kalutara.

DEFENDANT- RESPONDENTS

**Before : Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J**

Counsel : Walter Perera with P.K.W. Wijeratne for the Petitioner,
Rohana Deshapriya with C. Liyanage for the 1st Defendant –Respondent.

Inquiry On : 24.06.2015

Order On : 21.07.2015

Order

Vijith K. Malalgoda PC J

The Plaintiff – Petitioner (hereinafter referred to as the Petitioner) has preferred this application under section 46 of Judicator Act No. 2 of 1978 seeking an order for the transfer of the action pending in the District Court of Kalutara (District Court of Kalutara No. 5377/L) to the District Court of Colombo.

The Litigation between the Plaintiff –Petitioner and the Defendant –Respondents began in the year 2005 and its pending in the District Court of Kalutara nearly for 10 years.

The Petitioner who is a Dutch National was in Sri Lanka with his wife during the time relevant to the District Court Action. According to the Petitioner, he got to know the 1st Defendant- Respondent (here in after referred to as the Respondent) who was working as a bar keeper in a hotel where he stayed with his wife during that period.

Since the Foreigners were permitted to purchase land during this period, Petitioner and his wife were interested in purchasing a Land in Wadduwa area, and they requested the Respondent to find a suitable Land for them.

The Respondent had found a piece of Land at Kalutara North and deed was executed on 18th March 2004 before a Notary introduced by the Respondent. Petitioners have paid Rs. 2,500 000/- for the said Land and Deed of Transfer No. 5476(P-1) was attested by the Notary, Dharmasena Fernando who is also a regular practitioner in Kalutara Bar.

Petitioner has later got to know, when checked with the land registry, that the Respondent had got the said notary to simultaneously execute and attest another Deed of Gift by the said Dutch Couple in

favor of the respondent for the same land, without disclosing to the Dutch Couple. The said Deed of Gift in favor of the Respondent bears the No. 5477 (P-2)

When the Petitioner and his wife got to know that they have been deceived by the Respondent and his notary, he filed the action No. 5377 in the District Court of Kalutara seeking an order to quash the said Deed of gift bearing No. 5477.

Petitioner further submitted that the said action was pending in the District Court of Kalutara since 2005 and in March 2013 Petitioner's wife was called to give evidence. However after giving evidence for two days and before concluding her examination in chief, she expired before the next trial date.

The Petitioner has averred in the Petition and affidavit, the long delay as the main ground for his application. As submitted by the Petitioner the District Court action had gone down for several days since the court could not get down the services of a Dutch interpreter. Obtaining the services of the Dutch interpreter is essential in this case since the Petitioner could not understand any other language. However, Kalutara being a station, a person could travel easily from Colombo, I don't think, it will make any difference, even if this case is transferred to Colombo merely for this reason.

Petitioner has also feared that the Notary Public who attested the deed, being a regular practitioner in Kalutara, that the Petitioner will be deprived of a fair trial if this case is taken up for trial in Kalutara.

In response to the said Argument, the Respondents have submitted that this matter is now pending in the District Court of Kalutara for nearly 10 years but it is alleged that this is the 1st time such allegation is made by the Petitioner.

It is further argued by the Respondent that the Petitioner was represented by counsel in court for the past 10 years, and the Petitioner has never alleged that he was facing problem in retaining counsel from the Kalutara Bar.

Petitioner has further alleged that the issues raised at the trial were not correctly recorded and the admission No. 11 has been mysteriously altered but, the Petitioner has failed to substantiate the steps taken by the Petitioner to correct the proceeding during the trial. The fact that the notary who attested the deed is a regular practitioner in the same bar, is no conclusive evidence to establish that he has influence in the said court house to act prejudicial to the Petitioner.

Petitioner had failed to place any material before this court to establish that the Learned District Judge was bias against the Petitioner. The only allegation made by the Petitioner was that, the granting of longer trial dates by the trial judge, but without knowing the exact trial roll of the relevant District Court, this Court is reluctant to reach any conclusion against the trial judge.

Section 46 (1) the Judicator Act No. 2 of 1978 that regulates the transfer of a case or proceeding lays down the following;

Whenever it appears to the Court of Appeal,

- a) that a fair and impartial trial cannot be had in any particular court or place or
- b) that some question of law unusual difficulties are like to arise or
- c) that a view of the place in or near which any offence is alleged to have been committed may be require for the satisfactory inquiry in to or trial of the same or
- d) that it is so expedient on any other ground

the court may order upon such terms as to the payment of costs or otherwise as the said court thinks fit, for the transfer of any action, prosecution, proceeding or matter pending before any court and accordingly in every such case, the court to which any such action, prosecution, proceeding or matter is so transferred shall, notwithstanding anything to the contrary in this or any other law, take cognizance of and have the power and jurisdiction to hear, try and determine such action, prosecution, proceeding or matter as fully and effectually to all intents and purposes as if such court had an original power and jurisdiction.

If this court to consider the present application on favour of the Petitioner, we have to consider whether the grounds averred by the Petitioner comes under 46 (1) (a) or (d) of the said Act.

In the absence of any material or valid reason for this court to conclude that a fair and impartial trial cannot be had, I don't think it is prudent to consider this application under section 46 (1) (a) of the Judicator Act.

Section 46 (1) (d) of the Judicator Act refers to a situation "so expedient on any other ground" and in the case of **Majeed V. New Eastern Bus Company Ltd (2006) 2 Sri LR 35** the Court of Appeal observed that the word "expedient" in the context of section 46 (1) (d) would mean "advisable in the interests of justice."

In the case of **Amarjit Singh V. State of Panjab (2010) 10 SCC 43** the term “expedient” under Panjab Regional and Town Planning Act was interpreted as follows;

“The term expedient appearing in section 178 though not defined in the Act has to be interpreted keeping in view the context and the object of the provisions in widest amplitude.”

The above Indian decision gives wide interpretation to the term “expedient.”

However in the case of **Sivasubramaniam V. Sivasubramaniam 1980 (2) Sri LR 58** court declined to transfer the case since the petitioner had been contradicted by the lawyers whom she alleged were prevented by respondents from appearing for her.

When considering all these issues, court observes that the petitioner in the present case had failed to satisfy any compelling reason for this court to act under section 46 of the Judicator Act No. 2 of 1978 to transfer the present case. Therefore I make order refusing the application of the petitioner without any cost.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. MADAWALA,

I agree,

JUDGE OF THE CUORT OF APPEAL

Application for transfer is refused.