

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

*In the matter of an application for
Transfer of Case No. HC 8570/16 from
the High Court of the Western Province
Holden in Colombo, Court No. 06, under
and in terms of Section 46 of the
Judicature Act.*

The Democratic Socialist Republic of Sri
Lanka

Complainant

Court of Appeal (Transfer) Application No:

CA (TR) 20/2017

High Court of Colombo Case No: HC 8570/16

-Vs-

Basil Rohana Rajapakse
Medamulana, Weeraketiya.

Accused

AND NOW BETWEEN

Basil Rohana Rajapakse
Medamulana, Weeraketiya.

Accused-Petitioner

Vs.

Hon. Attorney General
Attorney-General's Department,
Colombo 12.

Respondent

Before : L.T.B. Dehideniya J, (P/CA)

&

A.L. Shiran Gooneratne J.

Counsel : Gamini Marapana PC, with Navin Marapana for the Petitioner.

Yasantha Kodagoda ASG for the Respondents.

Supported on : 21/11/2017

Decided on : 24/11/2017

A.L. Shiran Gooneratne J.

The Accused Petitioner, (hereinafter sometimes referred to as the Petitioner) filed Petition dated 27th September 2017, under and in terms of section 46 of the Judicature Act for an order to transfer Case No. HC 8570/16 from the High Court Colombo, Court No. 6 presided over by Hon. Gihan Kulatunge, to another High Court in Colombo, and, inter alia, has sought for an interim order staying further proceedings before the Honourable High Court Judge , until the hearing and final determination of this application.

When this application was supported on 2nd September 2017, court issued notice on the Respondents and further reserved the right of the Petitioner to support the application for interim relief, if the need arises. Thereafter the case was mentioned on 26th November 2017 and 7th November 2017, where the Court has directed to issue notice on the Respondents, returnable on 21st November

2017. By motion dated 16th November 2017, the Accused Petitioner has moved to support an application for interim relief on 21st November 2017.

We have heard the President's Counsel for the Accused Petitioner and the President's Counsel for the Respondent's in respect of the said motion dated 16th November 2017.

The President's Counsel appearing for the accused Petitioner, has drawn the attention of Court to the following issues in support of this application.

- a) Observations made in Proceedings dated 13th November 2017, in Case No. HC 8570/16, by the Hon. High Court Judge in reference to the Transfer Application No. CA (TR) 20/17.
- b) Observations made by the Hon. High Court Judge at page 50 of the Judgement dated 7th September 2017, and page 58 in Court proceedings dated 7th September 2017, in the said Case No. HC 8026/15,

as averred in paragraph 22 of the Petition.

The Counsel for the Petitioner submits that the accused petitioner presently stands indicted before the High Court of Colombo in 3 cases, which are fixed for trial/ to be called before the High Court of Colombo. With reference to Case No. HC 8546/16 and HC 8222/16, the Petitioner submits that HC 8546/16, initially listed before High Court No. 6 was referred to High Court No. 1 for reallocation to another High Court on the basis that another case against the same accused was

already listed for trial before the Hon. Judge. The Hon. High Court Judge had declined to hear HC 8226/16, on the basis that the Accused Petitioner had filed a Writ Application No. 89/2017, therefore has referred the said case for reallocation.

The Petitioner further states that on 15th June 2017, when Counsel appearing for the Accused Petitioner made application before the Hon. High Court Judge in Case No. HC 8570/16, drawing attention to the Writ Application No. 89/2017 pending in this court, the Hon. High Court Judge has refused and declined to send the said case for reallocation on the basis that up to the said date notices had not been issued in the said Writ Application and therefore has proceeded to fix the said case for trial.

On 13th November 2017, when case bearing No. HC 8570/16, was mentioned before Court No. 6, the court directed the trial to be taken up “day to day thereafter as much as practicable”.

The Counsel for the Petitioner has drawn attention to proceeding dated 13th November 2017, in Case No. HC 8570/16, and has referred to the order dated 15th November 2017, where the Hon. High Court Judge has made reference to the Transfer Application No. CA TR 20/2017. The petitioner has also brought to the attention of court the observations made by the Hon. High Court Judge in the Judgement and court proceedings dated 7th September 2017, in Case No. HC 8026/2015 and contends that by such observations the Hon. High Court Judge is seen to be motivated by bias against the Petitioner and or with extraneous

considerations. Such contention is pleaded on the basis, inter alia, that the Petitioner held a Cabinet portfolio in the previous administration.

When a substantive relief prayed for would be defeated in the absence of an interim relief, the court should be mindful to protect the interest of the aggrieved party until such time the substantive matter would be looked into. Every application for interim relief should stand on its own merits and should be decided on the facts and circumstances which may be uniquely distinct from one case to the other. Therefore, it is a pressing need that a Petitioner should be heard on the facts and circumstances of his case.

In the case before us, it is important to decide as to whether the said observations were made at the discretion of the Hon. High Court Judge or whether there was bias or a real likelihood of bias, taking into consideration that the said observations were made in a different case. It is also important to consider whether the Petitioner would be afforded a fair trial in the circumstances. Reference to the said observations by the Hon. High Court Judge is averred to in the Petition dated 27th September 2017, which was supported for notice on the Respondents on 2nd October 2017. Having being satisfied with the submissions made by the counsel for the Petitioner, the court ordered the issue of notices to the Respondents.

In *Mahindasoma vs. Hon. Maithripala Senanayake and others (1996) SLR Vol. 1 page 364*, it was held that the court will be guided, inter alia, by the following principles, in granting interim relief:

- (a) Will the final order be rendered nugatory if the Petitioner is successful
- (b) Where does the balance of convenience lie

I also refer to the case of *Harrison Jayaweera Vs. K.W.A. Sunil Shantha alias Ruwan and another*

C.A. 969/2008 (Transfer), cited by the Respondents, where Anil Gooneratne J. states,

“the learned President’s Counsel who appeared for the Petitioner supported the application for transfer on 2.1.2009 in terms of section 46 (1) (a) and (d) of the Judicature Act and sort to demonstrate that his client would be denied a fair and an impartial trial, and that it would be expedient to transfer the case to be heard by another High Court Judge. Though the inquiry was only for grant or refusal of interim relief, counsel on either side made submission in support of each other’s case more particularly for and against the substantive issue of transfer of the High Court case”.

However, in the present case the application by the Counsel for the petitioner was limited to the interim relief prayed for by motion dated 16th November 2017, which is subsequent to the order made by the Honourable High Court Judge fixing the said case for trial. For the reasons stated above, we hold that the Petitioner has addressed the issues in support of this application, to the satisfaction of court to proceed to hear the respective parties on the substantive relief prayed for.

In the circumstances we are of the view that if a stay order is not granted at this stage, the final relief prayed for will be rendered nugatory. We have also considered the facts and circumstances in the light of public interest and the interest of the petitioner and decide that the balance of convenience favours the petitioner in this case.

Accordingly, we issue an interim order as prayed for in section (c) to the prayer of the petition to be in force until the next date of hearing of this application.

JUDGE OF THE COURT OF APPEAL

L.T.B. Dehideniya J, (P/CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL