

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

IN THE MATTER OF AN APPLICATION MADE UNDER SECTION 48 OF THE JUDICATURE ACT

8/26,/2014

Page

BETWEEN

J M T M M MADHAWA TENNAKOON – PETITIONER

AND

S.P.A.B.W.M.R.R.W.J.THARANGIKA WEGODAPOLA-RESPONDENT

BEFORE : A W A SALAM, J (P C/A)

Romesh Silva PC and **Faizer Muthaffa PC** for the Petitioner and Respondent respectively.

Order on the application for transfer.

This is an application is aimed at obtaining an order directing the of transfer of a maintenance application filed by the respondent against the petitioner in the Magistrate's Court of Matale. The parties are married and presently living apart.

In terms of Section 4 (2) of the Maintenance Act, No 37 of 1999, an application for maintenance may be filed in the Magistrates Court within whose jurisdiction the applicant or the person in respect of whom the application is made or the person against whom such application is made, resides. The maintenance application relating to these proceedings, has been filed on the basis that the respondent and her child born during lawful wedlock to the petitioner are resident within the judicial division of Matale.



Section 2 of the Judicature Act [referred to as the "Act"] provides that the Courts of first instance are (a) the High Court of the Republic of Sri Lanka, (b) the District Courts, (c) the Family Courts, (d) the Magistrates' Courts and (e) the Primary Courts. [emphasis added]

In terms of Section 5 (1) of the Act, as amended by Section 3 of Act No 71 of 1981] in each judicial district there shall be " a District Court" which shall be deemed to be the " Family Court" when exercising the jurisdiction vested in a Family Court or any other written law, and in every judicial division there shall be a " Magistrate's Court" and a " Primary Court " and each such Court shall be holden by and before a person to be called the " District Judge and Judge of the Family Court", " Magistrate " and " Judge of the Primary Court" respectively.

For the purposes of the administration of justice Sri Lanka shall be divided into judicial zones, Judicial districts and Judicial divisions within such territorial limits as may in consultation with the Chief Justice and the President of the Court of Appeal from time to time be determined by the Minister by Order published in the Gazette (Vide Section 3 of the Judicature Act)

The territorial jurisdiction of the Magistrate Court is known as the judicial division and the district Court as the Judicial District. There are two judicial divisions within the Judicial District of Matale. They are the Judicial division of Matale and Naula. There is a Magistrate who exercises territorial jurisdiction within Naula judicial division and another Magistrate to function within the

judicial division of Matale, but both divisions together constitute one judicial district, i.e Matale judicial district which is covered by the District Judge of Matale.

For practical, administrative and more importantly, judicial purposes there is a district court holden at Matale which is also deemed to be the Family Court of Matale, a Magistrate's Court holden at the same place which is deemed to be the Primary Court of Matale and a separate Magistrate's Court holden at Naula which too is deemed to be the Primary Court of Naula . Therefore, in the strict sense, there is no combine Court in Matale. The two Courts are separate from each other and their territorial and judicial jurisdictions are clearly defined.

(Vide PART I : SEC. (I) - GAZETTE EXTRAORDINARY OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA -10.11.2010 for territorial jurisdiction)

This means that parties to a maintenance case, if resident at Naula, are permitted to file such a case only in the Magistrate's Court of Naula. They cannot file the same in the Magistrate's Court of Matale although they are invariably within the judicial district of Matale. Another reason as to why it cannot be filed in the district court is that the exclusive jurisdiction to hear maintenance case is re-vested by Act No 71 of 1981, in the respective Magistrates Courts. The maintenance cases are re-vested in the Magistrates Court by repeal of the reference made to Maintenance Ordinance in the third schedule to the Act. In the same manner a person who has a right to file a maintenance application in the Magistrate Court of Matale cannot file the same

in the District Court of Matale because the exclusive jurisdiction both territorial and statutory jurisdiction is restored in the Magistrate's Court.

As far as the judicial function is concerned both judges are independent of each other and not under one another. Further, they are undeniably not interdependent.

In terms of the Constitution every judge shall exercise his judicial function without being subject to any direction or interference from any other person. Hence, although the judges functioning at the relevant station perhaps at the same premises or in close proximity to each other, are neither under one another nor are they subject to the influence of each other. For an exception to this rule see Article 116 of the Constitution)

It surfaced in the course of the argument that even the judicial service commission cannot grant relief to the petitioner, as it will not interfere or give direction as to the performance of the judicial function, for under 114 of the Constitution the Judicial Service Commission is entrusted only with the powers to make appointment, transfer, dismissal and disciplinary control of judicial officers. [Emphasis added]

Significantly, the Judicial Service Commission also enjoys under Article 115 of the Constitution a constitutional protection against interference, influence or attempts to influence any of its decisions.

An application for transfer of a case is governed by Section 46 in Chapter 17 of the Judicature Act. In terms of the said Provisions

46 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 questions of law of unusual difficulties are likely to arise; or (c) that a view of the place in or near which any offence is alleged to have been committed may be required for the satisfactory inquiry into 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 to any other court.

As far as the present application is concerned, the petitioner relies on (b) and (d) in the preceding paragraph to have the maintenance application transferred from the Magistrate's Court of Matale to any other court.

One of the grounds urged by the petitioner in support of the application is that the respondent who resides in Kandy in terms of the document marked as D, without filing the application in Kandy has filed the same in Matale where her sister's brother (brother-in-law) functions as the District Judge and a fair and impartial trial cannot be had or is otherwise expedient to have the said case transferred. In other words, if I have properly understood him, it is inferable from the petition that the respondent has deliberately filed the case in Matale with an ulterior motive.

In dealing with this application for transfer, one has to be extraordinarily cautious as the learned District Judge who is referred to as the brother-in-law of the respondent is not a party

to the application and therefore is not heard on the matter for or against. The petitioner is not under a duty to make him a party but this being a peculiar circumstance under which a transfer of the case is sought, it needs to be examined with utmost care.

On the question of her residence, the respondent has annexed several documents to establish that she is a permanent resident of Matale. She has been registered as a voter for the year 2013 at the polling division of Rathota at Weligala village in the district of Matale. The National identity card dated 11/1/2013 reveals her address as Ratwattawalawwa , Weligala , Ukuwela. The driving license issued on 1/4/1999 also indicates the respondent as being a resident of Matale. The certificate of residence and character, issued by the Grama Niladhari bearing No. 654053 indicates the address of the respondent as Ratwatta Walauwwa, Weligala, Ukuwela. The petitioner has not seriously denied the averments contained in the statement of claim of the respondent as regards her residence. Hence, it is my view that the initiation of the maintenance proceedings in the Magistrates court of Matale appears to be exercise her statutory right she has exercised. However, this finding of mine is merely superficial and should not bind the learned Magistrate. If an objection is raised with regard to the territorial jurisdiction of the Magistrate's Court of Matale based on non-residence of the respondent, the Magistrate is at perfect liberty to examine the objection elaborately and pronounce a different finding on that issue, if he is of the opinion that this superficial finding warrants a variation.

The petitioner appears to have no objection to the learned Magistrate hearing this case. He has not attributed any bias on the part of the Magistrate. The issue he has put forward in his pleadings is that a fair and impartial trial cannot be had or it is expedient to transfer the case by reason of the presence of the brother-in-law of the respondent in Matale as the District Judge.

As I have pointed out initially, these are two different courts manned by two different judges. The Magistrate does not function under the District Judge nor the District Judge has any power of supervision over the Magistrate. The Magistrate is as independent as any other judge. The petitioner and the respondent being members of the legal fraternity ought to have known better that the Magistrate will not give any undue weight to the application filed by the respondent or undermine the petitioner's case.

In *Kandasamy Vs Subramaniam* 63 NLR 54 (cited by the petitioner) is a case where the judge who participated at a function on the invitation of complainant was prevented from hearing a case. it was observed that the real test is whether the party to a case or even the general public may have some reason to feel that the course of justice was not absolutely fair and impartial. The facts and ruling in that case are not applicable to the present case as the District Judge has not performed any function regarding the present case.

The only purported involvement of the District Judge is that the envelope which contained the summons had the seal of the District Judge not by the name but by his designation. In every court where the registry makes a combined effort to serve the

Magistrate's Court and District Court at the same time through one set of staff headed by one Registrar it is quite possible that the seal of the District Judge to have been affixed on the envelope. This practice must be discouraged. When summons is sent or other correspondence is made the envelope should indicate that it originates from the judge who is expected to deal with matter, particularly when a case comes within the exclusive jurisdiction of a particular court, i.e. in this case Magistrate's Court.

This by itself shows no bias or exertion of undue influence by the District Judge merely because the seal is affixed by the office. It is common sense that the District Judge knowing very well that the petitioner is the respondent of the maintenance application who is also State Counsel would be the last person to affix his seal on the envelope thereby playing into the hands of the petitioner paving the way for an allegation which may be graver in nature.

There is no evidence that the District Judge had anything to do with the dispute between the parties. He has not even played the role of a mediator. The mere fact that he is the brother-in-law of the respondent does not disqualify the Magistrate from hearing the case.

Let me take the liberty to recall the set up that prevailed those days. The appointment of a judge to any position is as sacred as the performance of the judge's duty itself. After all, courts are considered next to places of worship and the judges as the officiating priests. To choose the right judge to the right place is a herculean task. In as much as the appointing authority is concerned with ascertaining to which position and place a judge

could be appointed or posted the appointee also should assess himself as to his exact capacity and the area in which he could perform his function without disappointing the decision making authority or leaving room for criticism that a fair and impartial hearing of a case cannot be had before an officer performing such judicial functions.

In days gone by stringent self-made guidance was followed in appointing a judge to a particular position and posting him to a station. In order to avoid unnecessary conflicts of interest and to ensure that justice is seemed to have been done, it was thought desirable to compel judges to declare whether they have relatives, properties in a particular area and other interests before an appointment or placement is made. Had the District Judge concerned declared his connection to the area or that of his wife or interests of the wife's relatives and connection to people in the area, he cannot be blamed for being posted as District Judge of Mataale, despite such a declaration. Quite unfortunately no such information is available to Court to comment further on that matter.

Be that as it may, the decisions in John Vs Perera 17 NLR 189, Bandaranayaka Vs De Alwis 1982 2 SLR 664, Abdul Hasheeb Vs Mendis Perera 1991 SLR 1 243 do not appear to have any direct impact on the present case. Since, the District Judge has no control over the Magistrate and the Magistrate not being under the District Judge the *ratios* in the above cases are not applicable to the present application. In my opinion there is no proof that there is likelihood of bias on the part of the Magistrate. If the case

expected to be transferred are divorce proceedings between the parties the petitioner could have without an iota of doubt succeeded in the application.

Hence, the transfer application is rejected.

President/Court of Appeal