

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

**In the matter of an application for Transfer of Case No.  
LA / 00215 / 2010 in the District Court of Kandy 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.**

Balasuriya Kankanamlage Abhaya Pathmasiri Balasuriya,  
Y.M.B.A Building,  
Rajapihilla Mw,  
Kandy.

**Now,**

No. 72/44,  
2<sup>nd</sup> Pushpadana Lane,  
Bahirawakanda.

**CA /TR /228 /2014**

**1<sup>ST</sup> CLAIMANT- PETITIONER -PETITIONER**

**DC/KANDY/LA 215 /2010**

**Vs,**

Provincial Secretariat,  
Kandy and Gangawata Korale.

**PLAINTIFF- PETITIONER**

Registrar,  
District Court, Kandy.

**DEFENDANT- RESPONDENTS**

Rev. Nehiniwela Piyadassi Thero,  
Trustee of Gangarama Temple,  
Talwatte Temple, Malwatta Temple,  
Kandy.

**2<sup>ND</sup> CLAIMANT- PETITIONER-RESPONDENT**

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

**Counsel:** 1<sup>st</sup> Claimant-Petitioner-Petitioner appear in person,  
W.D. Weeraratne with N. Nanayakkarafor for the 2<sup>nd</sup> Claimant- Petitioner-Respondent,  
M. Jayasinghe SC for the AG

Written Submissions for the Petitioner On : **19.06.2015**

Written Submissions for the Respondent On : **18.05.2015**

Order On : **03.08.2015**

**Order**

**Vijith K. Malalgoda PC J**

The 1<sup>st</sup> Claimant- Petitioner-Petitioner (here in after referred to as the Petitioner) has preferred this application under section 46 of the Judicator Act No. 2 of 1978 seeking an order for the transfer of the action pending in the District Court of Kandy (District Court Kandy No. LA/215/2010) to the District Court of Colombo.

Divisional Secretary Kandy and Gangawata Korale by notice published in the News Papers on 21<sup>st</sup> February 2012 under section 33 of the Land Acquisition Act Notified the General Public of the deposit of compensation in respect of premises bearing No.471 Katugastota Road Kandy in the District Court of Kandy under case No. LA 215/2010.

Petitioner has submitted a claim before the District Court by way of a Petition, affidavit and documents marked P-1 to P-11 and supported the same before the said District Court on 26.09.2011 through his Attorney -at- Law.

Along with the other documents, the Petitioner has submitted a Deed of Transfer dated P-7A, certified extracts marked P7-B, certified extracts of the Assessment Register marked P-8. Water supply agreement signed with the Kandy Municipal Council marked P-10 and a notice received by the Petitioner from the Divisional Secretary dated 05. 11.2004 calling for claims inquiry marked P-11.

On 14.02.2013 Petitioner being the only claimant for the said compensation has given evidence before the District Court in support of his claim and the Learned Additional District Judge had reserved his order for 26.04.2013.

However before the said order is delivered, on 03.04.2013, the 2<sup>nd</sup> Claimant –Petitioner –Respondent to the present application (here in after referred to as the Respondent) came before the District Court of Kandy and raised an objection to the Jurisdiction of the District Court to hear and determine the said action.

Since then this case has gone down for several dates for various reasons and being suspicious the conduct of the other parties the Petitioner has decided to come before this Court in order to get the case transferred out of Kandy District Court preferably to the District Court of Colombo.

Accordingly the present application was filed before the Court of Appeal and while the transfer application is pending before the Court of Appeal, the Attorney –at –Law who represented the Divisional Secretary had moved to amend the pleadings in the District Court of Kandy. Even though the Petitioner has objected to the said amendment, the Court permitted the said application. According to the Petitioner, by the said amendment the Divisional Secretary has changed the entire schedule of the property in question and once it is realized, moved the District Court to withdraw the action pending in the District Court of Kandy.

By way of an additional affidavit dated 1<sup>st</sup> June 2015, the Petitioner supported for interim relief to suspend the proceedings before the District Court until the final determination of this transfer application. Being satisfied with the material placed before this Court, this Court ordered the proceedings in District Court of Kandy case No. 215/2010 be stayed until the conclusion of the present application.

According to the Petitioner, he become the owner of the Land in question in the year 1992 and thereafter requested the Central Finance Company which was in illegal occupation of the said premises to hand over the same to the Petitioner. At that stage the Petitioner made to understand that the said Central Finance Company was in occupation of the said land on a deed of lease granted to said company.

Petitioner has filed a private plaint against both the grantor and grantee of the said lease and whilst the said plaint was pending in the Magistrate Court of Kandy, Petitioner could not find any lawyer to represent him in the said Magistrate Court. Thereafter Petitioner had gone before the Court of Appeal under section 46 of the Judicator Act No. 2 of 1978 seeking a transfer of the said case from Kandy Magistrate court to Colombo Magistrate Court.

The Court of Appeal by its order dated 02.02.1994 made order transferring the said case from Kandy Magistrate Court to Colombo Magistrate Court (P-4).

However the said case was to be mentioned before the Court of Appeal on 09.05.1994 for reasons not known to the Petitioner but, thereafter the Petitioner was made to understand that the order dated

02.02.1994 was reversed by the Court of Appeal. Petitioner has filed a Special Leave to Appeal Application before the Supreme Court challenging the subsequent decision of the Court of Appeal and the Supreme Court on 27.05.1994 confirmed the original order of the Court of Appeal to transfer the said case from Magistrate Court of Kandy to Magistrate Court of Colombo.

Petitioner alleges an inordinate delay in concluding the proceeding in the District court case and also complains of his difficulty in retaining a counsel from Kandy Bar due to the influential position hold by the respondent.

In the case *Ratnayake Manike V. Dayananda and others 2003 Sri LR 57* where the Petitioner faced difficulty in retaining a lawyer from Kuliypitiya Bar because of the fact that one of the defendant was a practitioner at the same bar. The Court of Appeal had no hesitation in transferring the said case from the District Court of Kuliypitiya to the District Court of Marawila.

We are also mindful of the circumstances under which the Magistrate Court proceeding with regard to the same premises were finally transferred by the Supreme Court, and in the circumstance this Court is disinclined to disbelieve the truth of the causes of disability alleged by the Petitioner contained in his petition, affidavit and I would observe that it is a cardinal principle of Law that a litigant who seeks to vindicate his rights or defend himself in an action or proceeding must enjoy the unfettered right to legal representation and such right cannot be interfered with or derogated from

Section 46 (1) of 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 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 and accordingly in every such case, the court to which any such action, prosecution, proceeding or matter is so transferred shall, notwithstanding to the contrary in this or any other Law, take cognizance of and have the power and the 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.

When considering the grounds under which the petitioner supported his case I prefer to anchor the ground of transfer more particularly on expedience as stipulated by section 46 (1) (d) of the Judicator Act No. 2 of 1978.

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 interest of Justice.”

Under these circumstances it is correct to say that the use of word “expedient” in section 46 (1) (d) of the Judicator Act 2 of 1978 which provides that the transfer must be permitted by the Court of Appeal, if it appears to court that it warrant a transfer in the interest of Justice.

When considering the material placed before this court by the Petitioner, it appears to court that the Petitioner has satisfied that in the Interest of Justice this court must permit the transfer in the present case.

Accordingly I made order, the transfer of District Court Kandy Case No. LA 215/2010 to the District Court of Colombo as prayed by the Petitioner in prayer (a) to this Petition.

**PRESIDENT OF THE COURT OF APPEAL**

**H.C.J. MADAWALA,**

**I agree,**

**JUDGE OF THE CUORT OF APPEAL**