

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

**In the matter of an application for
Transfer under Section 46 of the
Judicature Act No. 2 of 1978 of the
Constitution of The Democratic
Socialist Republic of Sri Lanka**

Liyana Arachchige Manoj Bimsara
Dissanayake
825, Singhapura, Palawatte,
Battaramulla.

Petitioner

CA Application TR 09/2017

Vs.

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

Respondent

NOW BETWEEN

Liyana Arachchige Manoj Bimsara
Dissanayake
825, Singhapura, Palawatte,
Battaramulla.

Accused- Petitioner

Vs.

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

Complainant - Respondent

AND NOW BETWEEN

1. Nihal Pallage Nanayakkara
No. 90, Gordon Drive,
Kialla Lakes,
Shepparton 3631,
Victoria,
Australia.

2. Madugata Kumarage Somadasa
Kumarage
No. 113/1, Treasure Gardens,
Sri Soratha Mawatha, Gangodawila,
Nugegoda.

Intervening Petitioner

Vs

1. Liyana Arachchige Manoj Bimsara
Dissanayake
825, Singhapura, Palawatte,
Battaramulla.

Accused - Petitioner- Respondent

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

**Complainant - Respondent-
Respondent**

**Before : S. Devika de L. Tennakoon, J &
S. Thurairaja PC, J**

**Counsel : Saliya Pieris PC with Susil Waniyapura for the Accused Petitioner
Shavindra Fernando PC with Ranjith Rajakaruna and
Eliza Candappa for Intervening Petitioner
Janaka Bandara, SSC for Respondent**

Order on : 10th August 2017

Order

S.Thurairaja PC, J

5 This is an application for transfer under Section 46 of the Judicature Act. The Petitioner was indicted before the High Court of Colombo for alleged to have committed Criminal Breach of Trust of Australian dollars 108,500 which is punishable under Section 389 of the Penal Code. Indictment was dated 29th September 2011 and the High Court number is HC 5793/2011.

10 The Petitioner submits, that he is an attorney at law with 19 years of professional experience. The Petitioner in his prayers moves that this case to be transferred out of Colombo High Court no. 5 to another High Court.

15 On the request of counsels, the court ordered the Registrar of the High Court to submit the original case record of the said case, and it was perused in open courts. Both counsels made submissions and made reference to the relevant portions of the proceedings. I am possessed of the submissions and the authorities submitted by the counsel.

The Petitioner submits that the trial judge is biased and did not provide him the relevant documents and given him sufficient time to prepare for his case.

20 The Petitioner swore an affidavit and submitted the same fact through his Attorney at Law in his petition, to the fact that on the 15th February 2017 he appeared in the Supreme Court on his fundamental rights case, when he came to the High Court he was arrested and bailed out.

25 The Petitioner submits that the most important document for his case is, the contract between the virtual complainant and him. The document, he asked was not given to him.

The Petitioner had submitted several documents from **P1** to **P24** together with this petition.

30 The learned Senior State Counsel vehemently objecting for the transfer and submits that Petitioner was given reasonable opportunity to prepare for his trial and there is no bias shown against the Petitioner. Further the Senior State Counsel submits that the Petitioner started abusing the rights and privileges granted to him by the law and practice.

35 The counsel submits that the Petitioner filed a motion requesting 50 documents from the court and the prosecution. He itemised the list and submitted that, most of the documents were given to the Petitioner. Some of the balance documents were in fact in his possession. Some documents unknown and non-existent.

The Senior State Counsel forcefully submits that the Petitioner did not come to courts with clean hands and he not only suppressed but also attempted to mislead the Court of Appeal.

40 Considering the available material, I observe that this alleged offense had occurred
somewhere in March 2002, the indictment was preferred by the Attorney General on
the 29th of March 2011. Trial commenced in November 2013. Regularly the trial
proceeded in a slow pace and concluded the evidence of one witness and portion of
another witness. The trial proceedings were adopted and continued before the
45 present judge on the 4th January 2017, as per the court record, evidence of 10
witnesses were concluded, nearly 41 documents were marked by the prosecution
and 59 by the defence. It is also revealed that the prosecution had concluded their
case and defence was called to present their case.

The Petitioner insists on an important document namely the contract between the
50 virtual complainant and him. He submits that he got to know of the said document
from the plaint filed at the District Court of Colombo. That the copy of the said plaint
is attached to the petition as P7 and the plaint is dated 22nd May 2013. Summons
was issued on the respondent i.e. the Petitioner to appear on the 6th August 2013. It
is revealed that the Petitioner got to know about this well before 11th November
55 2013. On the said date, the virtual complainant, the plaintiff in the District Court case
gave evidence in the High Court and he was subject to cross examination. It is
admitted by the Petitioner in open court and it is evident by the High Court record
that the Petitioner had never questioned about the so-called 'consultancy
agreement'. It is only in 2017 almost after 4 years the Petitioner requested the
60 document.

In response to the Petitioner's submission, that the Petitioner was not given an
opportunity to have a counsel of his choice the Senior State Counsel responded to it
and submitted that the Petitioner had changed counsels as and when he wanted,
further at one occasion he had submitted in writing by way of a motion that he will be
65 cross examining and conducting the case for himself.

The Senior State Counsel brings to the notice that the Petitioner has mislead the
High Court by filing a motion dated 5th May 2017 under his own name and signature
and informed the court that he had filed a transfer application and the court had
issued notice on the Attorney General. The State Counsel submits that this is
70 incorrect and the Petitioner had purposefully misled the High Court and caused
threat to the justice system.

President Counsel who is appearing for the virtual complainant wishes to intervene
in this application, made submission and raised his concern under the **Assistance
to and Protection of Victims of Crime and Witnesses Act** No. 4 of 2015 and the
75 Criminal Procedure Code. After the submissions of the Senior State Counsel, the
learned President Counsel submitted that his concerns were attended hence he will
sail with the State.

For the purpose of completeness, I wish to discuss the merit of the petition of the
Petitioner. This is an application made under Section 46(1) of the Judicature Act No.
80 2 of 1978. The Petitioner bases his claim specifically under S.46(1)(a). I reproduce
the relevant portion as follows:

46(1) whenever it appears to the Court of appeal-

85 (a) that a fair and impartial trial cannot be had in any particular court or place;

In **Perera and five others V Hasheeb and three others (1982) Sriskantha's Law Report Pg. 133**, at Pg. 143

90 Lord Hewart, C.J. in **R. Vs. Sussex JJ ex parte Mc Carthy**, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the flimsiest pretexts of bias. While endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J., this court feels that the
95 continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done. [Sic]

100 In the present case, I find that the allegations made against the trial judge and the prosecuting officer is not properly substantiated by the court record. There is no final decision taken in this trial. It is widely accepted that "justice not only be done but should appears to be done".

In **Sivasubramaniam v. Sivasubramaniam (1980) 2 Sri LR 58 (16 October 1980)** the court held that

105 "a party who seeks the transfer of a pending action in Court must adduce sufficient grounds to satisfy the Court of Appeal and that a transfer would not be ordered on light grounds on a careful consideration of all the relevant material placed before court."

110 When we assess the proceedings of the trial court we must be mindful that the court is presided by a well-trained judicial officer who not only has a trained legal mind but also wealth of experience from the Magistrate Court upwards. It is a very serious matter to make an allegation against such a judicial officer, of which, this court will not take it lightly or entertain it without substantial material before the court.

115 I wish to deal the serious allegation made by the Senior State Counsel against the Petitioner. Counsel for the Petitioner commenced his petition and affidavit saying that the Petitioner is an attorney at law with 19 years of practice, further he submits that he holds several positions as Director, Legal director of several companies, etc. in his affidavit he had sworn at Paragraph no. 42 that "**..... when I came to the High Court from the Supreme Court for this case I was arrested and bailed out for delay in coming to the court.**". he also submitted P23 proceedings of the trial
120 court dated 15th February 2017. It contains 4 pages. The Senior State Counsel brought to the notice that is the Petitioner not only submitted a false suit but also suppressed material to this court. When I peruse the original case record, I find that the proceedings had some more pages and on the last page, the High Court judge
125 ordered that, he is postponing further trial to the following day and severely warning the accused and released him. Copies of that day's proceedings is filed of this

record. I do not find any arrest or bailed out order from the proceedings on record. When the court questioned the counsel for the Petitioner had no answer for submitting false suit. Further, he admits that there was no arrest and bail out.

130 The Petitioner filed a motion in the High Court of Colombo under case number HC 5793/2011 under his own name and signature and informed the Honourable High Court judge *that a transfer application CA TR 09/2017 was filed and the court has issued notice on the Attorney General to be present on the 18th May 2017*, which fact is absolutely incorrect and misleading the court.

135 The practice is that any person who comes to courts must come with clean hands. This court takes the misrepresentation and suppression of facts very seriously.

Considering the merits of the application I do not find the court should consider the application for transfer favourably. Further the court takes very serious notice that the Petitioner had submitted false hood under oaths to this court. Further he had
140 submitted incorrect fact to subvert the course of justice to this court as well as to the trial court. The Petitioner did not come to this court with clean hands. Time and again this court and the Supreme Court held that a person should come to courts with clean hands, if not, the court will not grant any relief. Following the decision made previously I decide that the Petitioner is not entitled for any relief, the application for
145 transfer is refused.

Considering the seriousness of the conduct of the Petitioner this court orders cost and it is fixed at Rs.7500.

Considering the submissions of the counsel for the intervening party, I make no order regarding the application for intervention.

150 **Petition dismissed with cost.**

JUDGE OF THE COURT OF APPEAL

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S. Devika de L. Tennakoon, J
I agree,

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JUDGE OF THE COURT OF APPEAL