

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

In the matter of an application in terms of Section 46(1)(d) of the Judicature Act No. 2 of 1978 (as amended), for the Transfer of Testamentary Action No. 983/T pending in the District Court of Batticaloa to a District Court holden in the Western Province.

Parameshway Upali De Silva (nee Parameshwary Velupillai), No. 6 of Pansala Road, Koddaimunai Batticaloa. Presently of No. 6 Ediriweera Avenue, Dehiwala.

PETITIONER

CA/TR/13/2017

DC Batticaloa 983/T

-Vs-

1. Savithri Lokhitharaja (nee Savithri Velupillai) [Deceased]

Substituted by

Kandappan Lokhitharaja
No. 33, Cheyney Avenue,
Cannors Park,
Edgware, Middlesex, HA8 6SA
United Kingdom

2. Selvadurai Sivam Ganeshanandhum
No. 10. Bryan Ogwer, Peaches
Garden, Bange Gurnedd, LL ST 2DX,
United Kingdom.

RESPONDENTS

BEFORE : Hon. A.H.M.D. Nawaz, J (P/CA) &
Hon. Sobhitha Rajakaruna, J.

COUNSEL : Upul Jayasuriya P.C. with P.
Radhakrishnan for the
Petitioner

M. Nizam Kariapper P.C. with M.I.M.
Iynullah and Yamuna for the
Respondents

ARGUED ON : 14.09.2020

DECIDED ON : : 25.11.2020

The Petitioner seeks to have the testamentary case bearing No 983/T, which is pending in the District Court of Batticaloa, transferred to a court in the Western province closer to the residence of the Petitioner and urges her inability to travel to Batticaloa as a ground for transfer of the case from the Eastern Province to the Western Province.

Giving a background to the testamentary case, the Petitioner states that her late father Dr. Alagaratnam Velupillai had executed a last will and testament bearing No 1058 and dated 27.04.1976, bequeathing all his movable and immovable properties to her and her younger sister-the 1st Respondent. The 2nd Respondent-a son in law of the testator who was married to the eldest daughter of the testator had been named by him as an executor but the Petitioner avers that since the executor-her brother in law \ had not taken any steps to have the will proved in

court, she moved the District Court of Batticaloa for the purpose of proving the will and securing letters of administration.

The 2nd Respondent-the executor named in the will joined issue with the Petitioner on the Petitioner's accusation of not initiating a testamentary case to prove the last will. In a statement of objections filed before the District Court of Batticaloa, the said executor took up the position that the Petitioner could not have and maintain the testamentary case as the last will bearing No 1058 and dated 27.04.1976 was revoked by the subsequent execution of another last will bearing No 361 dated 23.05.1979. While the subsequent will had revoked the first last will, the testator Dr. Alagaratnam Velupillai proceeded to donate his properties to his daughters and granddaughters on 25.06.1980. In the statement of objections the 2nd Respondent brought out the salient fact that some of the properties that had been dealt with in the last wills became the subject matters of the disposition which Dr. Alagaratnam Velupillai made on 25.06.1980 and as a result the 2nd last will too lost its validity. In other words the contention of the 2nd respondent was that there was nothing to prove by way of a last will as the properties that formed dispositions under the last Will were later transferred in *inter vivos* dispositions by several deeds. Thus he explained his failure to take steps to prove the last will -see the objections filed by the 2nd Respondent before the District Court of Batticaloa.

Even the other beneficiary of the last will for which the Petitioner seeks to obtain letters of administration confirms the above version of the 2nd Respondent in her objections filed in the District Court-vide the objections by Savithri Lohitharajah (nec Savithri Velupillai) in the case bearing No 983/T. Savithri Lohitharajah-another daughter of Dr. Alagaratnam Velupillai, who was also a beneficiary like the Petitioner of the 1st Last will, attests to its revocation by the subsequent execution of a 2nd last will and also confirms that her father dealt with all the

properties by way of notarial dispositions on 25.06.1980. The father had even donated properties to the Petitioner by way of a deed bearing No 419 and dated 25.06. 1980 and this was one of the properties that had been dealt with in the last will the Petitioner brought before Court for proof. In other words the Petitioner voluntarily accepted the gift given to her by the father but yet she was seeking to prove a prior will because the will had donated the properties only to her and the 1st Respondent whereas the later dispositions by the father of the same properties donates them to several donees-a fact impliedly brought out by the averments of the Respondents in the District Court. Having benefitted out of the deeds by accepting the deed of donation and enjoying the fruits of possession, the Petitioner could not maintain the testamentary case. This seems to be the underlying import of the pleadings in the District Court.

Even the 4th Respondent in the District Court -another sister of the Petitioner confirms the revocation of the 1st last will and the notarial dispositions.

In the circumstances the dispute in the District Court appears to revolve around the question whether the 1st last will bearing No 1058 which the Petitioner seeks to prove still exists. Have they been superseded by the deeds executed by the father of the Petitioner? The case of the Petitioner seems to have had a protracted history.

The proceedings in the District Court of Batticaloa have been stalled by several factors without any resolution in sight. Based on the last will which the Respondents claim no longer exists, the Petitioner had filed a first case in 1986 and after its dismissal in the District Court, the Supreme Court by its judgment dated 11.11.2016 ordered a rehearing of the case in effect.

But the case could not proceed in the District Court as the Petitioner has moved this court for a transfer of these long drawn out proceedings. The grounds of transfer are set out in the Petition and they stem from a spinal injury that the Petitioner had sustained in a bus journey, when she was on a journey by bus to Batticaloa in 2001. She states in the petition that her condition has worsened and she cannot even travel as she is bedridden. It would appear that her application of this transfer is premised upon section 46 (1) of the Judicature Act which reads as follows:

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 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.

The learned President's Counsel reiterated the averments in the Petition before Court and contended that the bus travel in 2001 had brought about several

complications to the Petitioner and he brought the attention of court to the medical certificates appended to the petition. But the learned President's Counsel for the Respondent contended that the Petitioner had lived in Batticaloa and continues to administer her property in Batticaloa through her husband and now that she has shifted her address and is too old and sick to travel to Batticaloa as alleged, that cannot afford a ground to have the case transferred.

If such grounds are accepted as grounds for transfer, then anybody could easily take up residence of his or her choice during their old age and refuse to come to courts where she or he has filed civil action saying she or he is too sick and unable to travel.

We find that if at all the only ground of transfer would be more particularly anchored on "expedience" as stipulated by section 46 (1) (d) of the Judicature Act No 2 of 1978 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) of the Judicature Act No 2 of 1978 would mean "advisable in the interests of justice." The Court of Appeal in the case of *Joe Franco Fransisko v Pannipitiye Malini Dayaratne Manike* CA TR 295/2014 (CA minutes of 05.06.2015) opined that that the word "expedient" would also connote a judgment that the Court of Appeal would reach in the end that it would be "beneficial not only for the petitioner but also for all litigants in the trial or proceedings to order a transfer". The Court went on to hold that the use of the word "*expedient*" in section 46 (1) (d) of the Judicature Act No 2 of 1978 which provides that the transfer must be permitted by the Court of Appeal if it appears to be expedient to do so, should be interpreted to warrant a transfer only if there are "reasonable grounds" for ordering such a transfer.

In the case of *Sivasubramaniam v Sivasubramaniam* (1980) 2 Sri.LR 58 at page 64 Atukorale, J held at page 64

A party who seeks the transfer of a pending action in Court must adduce sufficient grounds to satisfy the Court of Appeal that it is expedient to make order for its transfer and in this context the word expedient' would mean fit or proper. A transfer would not be ordered on light grounds and on a consideration of all the material placed before Court in the present application, the petitioner has failed to adduce sufficient grounds for a transfer of this action.

This Court finds that the Petitioner has long prosecuted this testamentary case in Batticaloa; She is represented by Counsel and the pleadings and the documents filed in the case disclose that she does hail from Batticaloa and holds property and administers it in Batticaloa. The deeds that her late father executed are bound to figure prominently in the District Court and it would appear that some of the witnesses to the deeds hail from Batticaloa. The notaries who executed the deed are all from Batticaloa. In a case bearing No L/6371/2017 filed by a successor of the 1st Respondent Savithri Lokhitharaja in the District Court of Batticaloa, it would appear that the added Defendant Anthony Upali de Silva has claimed prescription to the land citing non-possession by the said Savitri Lokhitharaja-see the answer filed by Anthony Upali de Silva dated 12th February 2019. This is the land that Savithri Lokhitharaja the sister of the Petitioner, a co-beneficiary of the last will, finally received as a gift from her father by a notarial disposition. By virtue of title she received from her father, it would appear that Savithri Lokhitharaja passed her title to one Seenithamby Devadas but the said Anthony Upali de Silva was added as a defendant and he claims prescription to the land in his answer. The pleadings and documents show that Anthony Upali de Silva is married to the Petitioner to this application and this was confirmed by the learned President's Counsel in his oral submissions before this Court. All

this shows that in other related litigation filed in the District Court of Batticaloa as regards the same land, the husband of the Petitioner is defending such litigation in the District Court of Batticaloa. In the circumstances though the medical certificates have been put forward to impress upon a transfer, we are not fortified that the Plaintiff is disabled or under an impediment= in prosecuting the long drawn out testamentary case in the District Court of Batticaloa. This confirms the argument advanced by the Respondents that the Petitioner administers her property through her husband. There is no complaint that the husband of the Petitioner is under any impediment in Batticaloa.

It would appear that apart from the Petitioner who lives in Colombo, the majority of witnesses other than those who live abroad are all from Batticaloa and we reach this finding upon a careful perusal of all the pleadings and documents which are available to us in the record.

Thus we conclude that the it is not expedient to order a transfer of this case from the District Court of Batticaloa to a District Court in the western province. We express the view that the District Judge of Batticaloa must give priority to this case and conclude it as expeditiously as possible.

In the circumstances we refuse the application of the Petitioner.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna., J

I agree.

JUDGE OF THE COURT OF APPEAL