

**S. V. OBEYSEKERA AND OTHERS VS.
J. P. OBEYSEKERA (JNR) AND OTHERS**

COURT OF APPEAL

STHYA HETTIGE, J. (P/CA)

GOONERATNE, J.

CA 963/2008 - CA 967/2008 (TR)

DC ATTANAGALLE 520/L, 519/L, 518/1, 517/L

CA 966/2008 (TR)

DC MT. LAVINIA 2425/07L

JUNE 19, 2009

***Civil Procedure Code - Section 10 - Judicature Act 2 of 1978 -
Section 46 (1) d - Transfer of cases - Expedient? - Transfer -
Balance of convenience?***

Defendants - petitioner made application to transfer 5 D.C. Attangalle cases and 1 D. C. Mt. Lavinia case to Colombo District Court - it was contended that the plaintiff and all the defendants are residing within the territorial jurisdiction of the District Court of Colombo, and the causes of action pleaded are similar in terms and the relief prayed for are same except it relates to different properties and different quantum of damages.

The respondents contended that, the application does not fall within the meaning of expedient as stipulated under Section 46 (1) d - instead it would lead to more inexpedient situation, and scheme of Section 46 is not meant to transfer cases on the ground of mere inconvenience of litigants.

Held

- (1) The applications are made in terms of Section 46. The transfer applications in terms of Section 10 of the Civil Procedure Code should be decided on a balance of convenience.

Per Anil Gooneratne, J.

“Decision to transfer is not based on convenience but it is for the reason that it would be expedient to transfer in the best interest of justice”.

Per Anil Gooneratne, J.

"I wish to add that the Court decide to transfer cases not in flimsy or light grounds. Expedient to do so would also mean fit or proper. A common question of fact and law and to avoid a multicpality in trials as well as conflicting documents would be the reason to transfer all the applications to one original Court.

APPLICATION to transfer cases to one Court.

Cases referred to:

- (1) *Somawathie vs. Danny* - 76 NLR 751
- (2) *In Ranawatte* - 68 NLR 211
- (3) *In Re Sivasubramaniam* - 1980 - 2 Sri LR 68

Romesh de Silva PC with *Kushan D. Alwis* and *M. E. Wickremasinghe* for defendant-petitioner.

Wijayadasa Rajapakse PC with *Dasun Nagastenna* for plaintiff-respondents.

Cur.adv.vult

July 17th 2009

ANIL GOONERATNE, J.

Applications have been made to this court to transfer the following cases to the District Court of Colombo, by the Defendant-Petitioners named in the caption to the five applications.

- (a) D. C. Attanagalla 520/L
- (b) D. C. Attanagalla 518/L
- (c) D. C. Attanagalla 519/L
- (d) D. C Attanagalla 517/L
- (e) D. C. Mt. Lavinia 2450/07/L

It is pleaded in all these applications that the Plaintiff and the Defendants in all the above cases are resident within

the territorial jurisdiction of the District Court of Colombo, but the properties described in each of the complaints filed in the respective District Courts are within the jurisdiction of the abovementioned courts. It is further averred that the causes of action pleaded in all the above actions are similar in terms, and the relief prayed for in all the above actions are the same except it relates to different properties and different quantum of damages.

In support of the transfer applications the following matters are pleaded inter alia in all the applications before this court.

1. The Defendants plead that the evidence to be led in each of the aforesaid actions are similar.
2. The Defendants plead that the issues of law in each of the aforesaid actions are very similar if not identical.
3. The Defendants plead that it is a waste of time and expense of all parties to conduct 7 trials in three different Courts involving similar issues, similar evidence and similar questions of law.
4. The Defendants plead that it is a waste of valuable judicial time and resources to cover the same ground in three different Courts involving similar evidence and similar issues and similar questions of law.
5. The Defendant plead that in the aforesaid circumstances it is expedient that all 7 trials be conducted in the District Court of Colombo and if possible consolidated.

Plaintiff-Respondent on the other hand oppose a transfer of the said cases and move for dismissal of these applications in the objections filed in this court. In the objections it is pleaded inter alia that:

- (a) the parties to the actions are not identical as parties are varied from case to case.
 - (b) the evidence to be taken in one case cannot be adopted in another case.
 - (c) even if the cases are transferred to one court all the trials cannot be taken up before one Judge and shall be taken up before different Judges.
1. In the above circumstances, this application does not fall within the meaning of expedient as stipulated in section 46(1) (d) of the Judicature Act No. 2 of 1978, instead it would lead to more inexpedient situation.
 2. The scheme of section 46 of the Judicature Act is not meant to transfer cases on the ground of mere convenience of litigants.

At the hearing of this application the learned President's Counsel on either side expressed the view and both of them were in agreement to the issue which has to be tried of a forged power of Attorney being made use of to execute several deeds in all the aforesaid cases.

In fact on an examination of the several complaints filed in each of abovementioned cases it is evident that it is pleaded that forged power of Attorney bearing No. 1493 of 27. 10. 2000 in all cases being made use of to execute several transfers, and in the complaints it is averred that a cause of action has accrued to the plaintiff to:

- (a) obtain a declaration of title to the property described in the schedule to the complaint
- (b) eviction of the defendants
- (c) to have declared a forged power of Attorney bearing No. 1493 of 27. 10. 2000

- (d) to declare the respective transfer deed a nullity in each of the complaints.
- (e) damages etc. (vary from case to case)

It is also apparent that the relief prayed for are based on the above and several causes of action are similar and the parties in all the above mentioned District Court, Attanagalla cases are the same. In the District Court of Mt. Lavinia Case (2425/07/L) only the 1st to 3rd Defendants are the party Defendants, in that case, and the 4th defendant namely K. W. Rajakaruna in all the Attanagalla cases is not a party Defendant in the District Court of Mt. Lavinia case. I have been able to gather this information from the material and draft files submitted to the Registry of this court along with the several dockets.

What is important and significant in all the actions filed in the District Court of Attanagalla and Mt. Lavinia is that the original court in all the said cases need to decide the question of forgery pertaining to the above No. 1493 of 27.10.2000, power of Attorney (applicable to all cases). Then comes the causes of action in each case and the relief claimed, between the same parties, except in the District Court of Mt. Lavinia (2425) case, the 4th Defendant in the other cases does not happen to be a party Defendant. 4th Defendant's absence would not make each case different from the other, by its nature and character.

The applications before this court are made in terms of Section 46 of the Judicature Act. The transfer applications in terms of Section 10 of the Civil Procedure Code should be decided on a balance of convenience. *Somawathy vs. Danny*⁽¹⁾ *Ratnawathie's case*⁽²⁾ However it is the view of this court that the Defendant-Petitioner has placed before this court sufficient, relevant and indeal material to invite this court to transfer the cases to a court in a particular jurisdiction.

Decision to do so is not based on convenience but it is for the reason that it would be expedient to transfer in the best interest of justice, and avoid a multiplicity of actions, and a conflict of decisions.

I had the benefit of perusing the authority made available to court by either party. However before I refer to these authorities I wish to add that Section 46 of the Judicature Act enables this court, and gives wide powers to transfer cases when it is expedient to do so. The following authorities though, relevant to other jurisdictions, if of much persuasive value and demonstrate the principle to be followed and applicable to transfer of cases which need to be considered as a yard stick to guide out Courts in the proper administration of justice.

Mulla Civil Procedure Code - 14th Edition pg. 240

Where two persons file suits against each other in different Courts on the same cause of action. It was held desirable that the suits should be tried by one and the same Court (w). Where there are two suits in different Courts which raise common questions of fact and law and the decision in which are interdependent, it is desirable that they should be tried together by the same judge so as to avoid multiplicity in trial of the same issues and conflict of decisions (x). It has likewise been held that where different suits by different plaintiffs were filed in different Courts raising the same questions under sec. 13 of the Pensions Act it was desirable that all of them should be tried by one Court and that orders of transfer should be made for that purpose under Sec. 24(y). An order of transfer would also be made to prevent abuse of the process of the Court.

Halsbury Laws of England 4th Edition pg. 55 - para 64- 65

General power of transfer. The court's power to transfer proceeding from one court to another is a useful corrective to ensure that proceeding, whatever began or whatever forum the plaintiff has initially chosen, should be dealt with or heard or determined by the court most appropriate or suitable for those proceedings. When making or refusing an order for transfer, the court will have regard to the nature and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, It is a discretionary power which will be exercised having regard to all the circumstances of the case.

I wish to add that this court decided to transfer cases not on flimsy or light grounds. Expedient to do so would also means fit or proper. *Sivasubramaniam's Case*⁽³⁾. The petitioner's have adduced sufficient grounds. A common question of fact and law and to avoid a multiplicity in trials as well as conflicting decisions would be the reason to transfer all the applications to one original court. Accordingly we make order that all the five actions instituted be transferred to be District Court of Colombo in terms of sub paragraph (b) of the prayer to the several petitions filed before this court. Registrar of this court is directed to convey the order of this court, to the relevant Registrars of the respective District Court, and the Registrar of the District Court of Colombo. The learned District Judge of Colombo would decide to nominate or allocate the aforesaid cases and that the cases could be heard by a Judge of the District Court of Colombo.

SATHYA HETTIGE J. P/CA - I agree.

application allowed.