

## Sivasubramaniam v. Sivasubramaniam

COURT OF APPEAL.

RANASINGHE, J. AND ATUKORALE, J.

C. A. APPLICATION 1359/78—D. C. BADULLA 9699/D.

AUGUST 1, 1980.

*Civil Procedure Code, section 10—Transfer of case—Grounds justifying such order—Meaning of word “expedient” in section 10—Judicature Act, No. 2 of 1978, section 46.*

The petitioner made this application for transfer of a divorce action instituted against her in the District Court, Badulla by her husband, a practitioner in the said Court. The petitioner purported to make this application under section 46 of the Judicature Act, which Act came into force only after the application was made. Hence by consent of parties the Court heard the application as one made under section 10 of the Civil Procedure Code.

The petitioner supported her application for a transfer on certain grounds based on the conduct of the respondent in preventing other members of the Bar from appearing on her behalf and from being compelled thereby to retain counsel from Colombo. She also alleged that the respondent had intimidated her witnesses and that she had also to suffer tremendous inconvenience in having to travel from Dehiwela to Badulla in this case. The petitioner's allegations were denied in the affidavits filed on behalf of the respondent.

### **Held**

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 had failed to adduce sufficient grounds for a transfer of this action.

APPLICATION for a transfer from the District Court, Badulla.

R. D. C. de Silva, for the petitioner.

C. Thiagalingam, Q.C. with K. Thevarajah, for the respondent.

*Cur. adv. vult.*

October 16, 1980.

### ATUKORALE, J.

This is an application made by the petitioner, who is the wife and a resident of Dehiwala, for the transfer of a divorce action instituted by the respondent (the husband) against her in the District Court of Badulla to the District Court/Family Court of Colombo or Mount Lavinia. The action has been filed on 4.4.1977 praying for a divorce on the ground of malicious desertion. The petitioner has filed answer countersuing the respondent for a divorce on the ground of constructive malicious desertion. At the time the present application for transfer was filed in this court, the trial in the divorce action had been fixed for 19.1.1979. However in view of the order made by this court staying further proceedings in the action until the final determination of this application, the trial has still not commenced.

The present application for a transfer of the divorce action has been filed on 11.12.1978 and has been made, according to the petition, under section 46 of the Judicature Act, No. 2 of 1978. However, as rightly pointed out by learned counsel for the respondent, this Act, though certified on 2.11.1978, came into operation only on 2.7.1979—vide Government Gazette No. 40/16 dated 15. 6. 1979. It was therefore not in force on the date of the filing of the present application. Learned Counsel for the respondent, however, had no objection to the application being considered as one made under section 10 of the Civil Procedure Code. Under this section a party to an action which is pending in any original court may, before trial, apply to this court for the withdrawal of such action from the court in which it is pending and for the transfer of it for trial to any other court competent to try the same in respect of its nature and the amount or value of its subject matter. Such an application may be allowed by this court on being satisfied that such withdrawal and transfer are desirable for any of the following reasons .—

- (a) that a fair and impartial trial cannot be had in any particular court or place ; or
- (b) that some question of law of unusual difficulty is likely to arise ; or

(c) that it is expedient on any other ground.

The section further states that when the action might have been instituted in any one of several courts, the balance of convenience only shall be deemed sufficient cause for such withdrawal and transfer to one of the alternative courts.

Section 46 (1) of the Judicature Act, No. 2 of 1978 (which is now in force) also makes provision for the transfer by this court of *inter alia*, an action pending in any court to any other court, irrespective of whether such other court is one competent to try the action in respect of its nature and the amount or value of its subject matter, for reasons which are the same as aforementioned. Under section 46 (2) an application for transfer of such an action may be made before or after the commencement of trial. It will thus be seen that, in so far as a pending action is concerned, although section 56 of the judicature Act appears to be wider in scope than section 10 of the Civil Procedure Code, yet the grounds on which this court can order a transfer of such an action are the same under both sections. Learned counsel for the petitioner stated to us that he is seeking a transfer of the divorce action from the District Court of Badulla on the ground of expediency, namely that for the reasons set out in the application of the petitioner it is expedient to transfer the action from the District Court of Badulla.

The petitioner in her original petition and affidavit has averred several facts and circumstances which according to her warrant a transfer of the divorce action. Firstly she states that the respondent, who admittedly is a senior attorney-at-law practising in Badulla Courts, has repeatedly abused his position as a practitioner therein to cause difficulties and embarrassment to her. The acts and conduct of the respondent complained of as having cause her difficulties and embarrassment may be summarised as follows:—

- (a) the respondent asks the lawyers of the Badulla Bar retained by her why they are appearing against him and alleges that they are interfering with his married life,
- (b) the respondent casts abusive and insulting remarks at the lawyers appearing for her whilst being seated at the Bar table, and
- (c) the respondent has deprived her of retaining counsel of her choice by refusing to agree to the case being fixed for trial on dates suitable to her own counsel.

In support of ground (a) aforesaid, the petitioner has in her affidavit stated that on 15.9.1978 (which was a trial date in the action) the respondent questioned Mr. Basil de Silva, the attorney-at-law who appeared for her, as to why he was appearing against him and alleged that he was interfering in his married life. Mr. Basil de Silva himself in his affidavit R1, which has been tendered to this court together with the respondent's objections, has however denied that the respondent uttered such words to him. He has stated that as Mr. L. S. V. Perera, the registered attorney of the petitioner, was indisposed on that day he, at the request of Mr. L. S. V. Perera, appeared for the petitioner. In fact the affidavit of Mr. T. Sri Pathmanathan, another senior practitioner of the Badulla Bar, which has been tendered to this court after the respondent filed his objections, contains no reference to the respondent having uttered such words to Mr. Basil de Silva. It only states that the respondent was not on talking terms with Mr. Basil de Silva for some time after the latter appeared for the petitioner in the absence of Mr. L. S. V. Perera. Thus apart from the bare statement of the petitioner herself there is no material to substantiate this allegation of the petitioner.

In support of ground (b) aforesaid, namely, that the respondent casts abusive and insulting remarks at the lawyers appearing for the petition whilst being seated at the Bar table, the petitioner in her application states that the respondent abused and after removing his black coat even threatened to assault Mr. Wijaya Perera, attorney-at-law, who was appearing for her in the maintenance case filed by her against the respondent at Badulla. Thereupon, according to her, the other members of the Bar intervened and prevented a fight taking place in court premises. The respondent thereby compelled her to withdraw the maintenance case filed by her at Badulla and caused her to file a fresh case in Colombo. Mr. Wijaya Perera in his affidavit tendered to court by the respondent with his objections has categorically denied such an incident and has also stated that the respondent never attempted to prevent him from appearing for the petitioner. Mr. T. Sri Pathmanathan in his affidavit has stated that Mr. Wijaya Perera and the respondent had a quarrel in the District Court of Badulla over an alleged remark by the respondent that Mr. Wijaya Perera was indulging in immoral activities and that he himself intervened and restrained Mr. Wijaya Perera from taking any action over this alleged remark. He however does not depose to a threat of assault on Mr. Wijaya Perera by the respondent although the petitioner states that he was a witness to the incident referred to by her in her affidavit.

Nor is it clear from Mr. Pathmanathan's affidavit that the incident referred to by him was one that arose in consequence of Mr. Wijaya Perera's appearance for the petitioner. There appears to me to be material discrepancies in the versions given by the petitioner and Mr. Pathmanathan. Furthermore it is clear that Mr. L. S. V. Perera, a very senior practitioner of the Badulla Bar and a J.P.U.M. and also a former Crown Proctor, is the registered attorney-at-law of the petitioner in the divorce action. There is not even a suggestion that the respondent has sought to harass, insult or intimidate him for appearing on behalf of the petitioner.

In regard to ground (c) aforesaid, namely, that the respondent has deprived the petitioner from retaining counsel of her choice by refusing to agree to the case being fixed for trial on dates suitable to her own counsel, the petitioner states that the respondent did not agree to the action being fixed for trial on any of the free dates of her counsel, Mr. Sethukavaler and that the respondent got it fixed for trial on a date which did not suit Mr. Sethukavaler. The respondent in his affidavit whilst denying that he refused to accommodate Mr. Sethukavaler states that the court at Badulla is a combined court and only Mondays and Fridays have been allocated for civil work. At least some of the dates suggested by Mr. Sethukavaler happened to be days set apart for criminal work and thus a date suitable to Mr. Sethukavaler could not be given. Moreover since the date of trial in a case is one fixed by court after taking into consideration the dates that are suitable to counsel appearing for the parties, I do not think it would be possible for the respondent, even if he was inclined to do so, to deliberately manipulate a date that is unsuitable to the petitioner's counsel. In the instant case it would appear that there were two trial dates, namely, 15.09.1978 and 19.01.1979. There is no allegation that the first date was unsuitable to the petitioner's counsel. The second date is one that was suitable to her counsel, Mr. Vernon Wijetunge, and but for this application the trial would probably have commenced on that date. Thus the attempts if any, by the respondent to achieve a situation by which counsel of her choice would not be able to appear for her have proved unsuccessful.

Secondly the petitioner has urged that the respondent has been abusing and threatening her witnesses. In her affidavit she has stated that that the respondent once telephoned and found fault with one Mr. Gnanamuttu for collecting her from the bus stand and giving her accommodation. Mr. Gnanamuttu is on the petitioner's list of witnesses. He in his affidavit (X 3) has stat-

ed that the respondent rang him up and asked him why he picked her up and gave her accommodation to which he replied that he and his wife acted in pursuance of a request made over the telephone by the petitioner's mother who happened to be in Colombo. He further informed the respondent that they would have done the same thing to him if he was in similar circumstances. There is nothing in this conversation to suggest that the respondent has abused or threatened Mr. Gnanamuttu.

The third ground on which the petitioner seeks a transfer of the divorce action is for the reason that she has to incur tremendous inconvenience as a result of it being heard in Badulla and her having to travel there from Dehiwela. There is sufficient material to show that the petitioner's mother and sister are resident in Badulla. She is therefore put to no inconvenience in seeking accommodation at Badulla whenever she has to attend court in connection with the case. Once she reaches Badulla her mother would no doubt provide her with comfortable accommodation. The only inconvenience that may be caused to her is probably a little physical discomfort in travelling to Badulla. But such discomfort is inevitable when one has to travel by public transport. The petitioner has also stated that she has to undergo inconvenience in making arrangements for the minor children to be looked after in her absence. Here again there is material to show that the petitioner did make such arrangements for the care and custody of the children when she was away in India for about 10 days. She should therefore have no difficulty whatsoever to make similar arrangements for a couple of days at the most until she returns from Badulla. In this connection it is significant to note that twelve of the thirteen witnesses in the petitioner's list of witnesses are residents of Badulla whilst the other witness is out of the Island. All the witnesses of the respondent except one are also from Badulla.

Finally the petitioner has also stated that as a result of the case being fixed at Badulla litigation has been made unbearably expensive to her since she is compelled to take counsel from Colombo who have to charge her much higher fees than they would have charged had the case been fixed for trial at Mount Lavinia, where the petitioner is resident. No doubt fees charged by Colombo counsel to appear at Badulla would be comparatively higher than those charged by them to appear in Colombo itself. But the fees charged by Colombo counsel vary with the individual counsel and would depend on the particular counsel who is retained to appear. Further there are also counsel available in other courts closer to Badulla than Colombo who may

be retained at less expense. There is also material to show that the petitioner is possessed of valuable assets which provide her with a regular income. She certainly does not appear to be so poor as to be unable to raise funds to retain counsel even from Colombo.

A party to an action who seeks a transfer of a pending action from the court in which it is pending to another court must adduce sufficient grounds to satisfy us that it is expedient to make order for its transfer. 'Expedient' in this context, in my view, means fit or proper. A transfer would not be ordered on light grounds. On a careful consideration of all the relevant material placed before us I am of the opinion that the petitioner has failed to adduce sufficient grounds for a transfer of the divorce action from the District Court of Badulla. The present application is therefore refused with costs.

**RANASINGHE, J.**—I agree.

*Application refused.*

K. Thevarajah,  
Attorney-at-law.

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