

MANATUNGA
v
AMARASINGHE

COURT OF APPEAL
SOMAWANSA, J. AND
EKANAYAKE, J.
CA 83/2004.
DC KURUNEGALA 6709/M.
JULY 16, 2004.

Judicature Act, — Section 46 (1) — Transfer of a case — Fair and Impartial trial cannot be held? — Members of the Bar refusing to appear — Proof? — Civil Procedure Code section 87 (3).

The petitioner is seeking to get the inquiry under section 87 (3) transferred from the Kurunegala District Court to the District Court of Colombo.

The petitioner contends that the members of the Kurunegala Bar are refusing to appear for her as her earlier attorney-at-law who had admitted that he has made a mistake in informing the petitioner a wrong date as the trial date is a member of the Kurunegala Bar and contends that the members of the Kurunegala Bar had refused to appear for her in the case.

Held:

- (1) Except for a mere statement that the members of the Kurunegala Bar are refusing to appear for her the plaintiff - petitioner has not mentioned the name of a single attorney-at-law who refused to appear on her behalf.

- (2) The plaintiff petitioner is not without remedy for if no attorney-at-law from the particular Bar would appear for her she could still get the services of an attorney-at-law from an outside Bar even if such endeavour turns out to be costly for it is she who had instituted the instant action seeking certain reliefs.
- (3) In making an order under section 46 one must also keep in mind the hardships if any the respondent would have to face if the application is allowed. If the application is allowed then the defendant - respondent too would have to incur heavy costs for travelling and for retaining counsel from Colombo.

APPLICATION under section 46 of the Judicature Act.

D. K. Dhanapala with K. S. Kulatunga for petitioner.

S. Mahawanniarachchi for respondent.

Cur.adv.vult.

July 30, 2004.

ANDREW SOMAWANSA, J.

In this application the plaintiff-petitioner is seeking the transfer of case No. 6709/M of the District Court of Kurunegala to the District Court of Colombo in terms of section 46 of the Judicature Act as amended. The basis of this application appears to be that no Attorney-at-Law from the Kurunegala bar is willing to appear for her and that she would not have the benefit of a fair and impartial trial. The defendant-respondent has filed objections to this application. When this matter was taken up for inquiry both parties agreed to resolve the matter by way of written submissions. Accordingly both parties have tendered their written submissions. 01

It is common ground that the trial in the instant case was fixed for 25.03.2002 on which date the Attorney-at-Law for the plaintiff-petitioner moved for a postponement of the trial. A postponement was granted subject to the plaintiff-petitioner paying costs fixed at Rs. 1000/- and the trial was re-fixed for 11.06.2002. 10

The position of the plaintiff-petitioner is that on 10.06.2002 she went to see her Attorney-at-Law Mr. D.M.D. Dissanayake to give him instructions but was asked by Mr. Dissanayake to come on the following day. When she went to Mr. Dissanayake's office on the

following day the office was closed and there was a notice to say the trial in the instant action would be taken up on 11.07.2002 and with instructions for her to be present in Court on 11.07.2002. Subsequently she had come to know that her case had been called on 11.06.2002 and as she was absent and unrepresented the case had been dismissed. When she brought this to the notice of her Attorney-at-Law Mr. Dissanayake he had filed an affidavit dated 20.06.2002 and on 25.06.2002 the said Attorney-at-Law Mr. Dissanayake had revoked his proxy. Thereafter the plaintiff-petitioner filed a new proxy of Mr. W. F. B. Fernando, Attorney-at-Law on 02.07.2002 and the said Attorney-at-Law filed papers to have the order made on 11.06.2002 vacated and to have the case restored to the trial roll. The inquiry into this application was fixed for 09.12.2002 and Mr. W. F. B. Fernando, Attorney-at-Law also handed over to plaintiff-petitioner revocation papers dated 25.07.2002 to revoke his proxy which she filed in Court subsequently. Thereafter she had made a complaint to His Lordship the Chief Justice and to the President of the Bar Association, informing them of the incident that had taken place and her inability to retain an Attorney-at-Law from the Kurunegala bar. Copies of these complaints were also filed of record and also a motion was filed in Court on 06.10.2003 seeking a postponement of the inquiry in order to retain an Attorney-at-Law.

Counsel for the plaintiff-petitioner submits that all the Attorneys-at-Law practicing in Kurunegala bar have refused to appear on her behalf to rectify the error made by Mr. Dissanayake, Attorney-at-Law as he is a fellow member of the said bar. That under these circumstances no lawyer from Kurunegala or Kuliypitiya bars would appear on her behalf and the plaintiff-petitioner's attempts to retain an Attorney-at-Law from outside also failed due to heavy fees required by them. He also submits that she cannot afford such payment of fees to a registered Attorney-at-Law and a counsel brought in from another bar to appear on her behalf in the District Court of Kurunegala and that she feels justice will not be meted out to her if the case is heard in Kurunegala.

On the face of the averments in the petition there does not seem to be any reason for any Attorney-at-Law to refuse or refrain from appearing on behalf of the plaintiff-petitioner, in an inquiry under

section 87(3) of the Civil Procedure Code and if as alleged by the plaintiff-petitioner her Attorney-at-Law had taken down the trial date incorrectly there is no reason for the same Attorney-at-Law or for any other Attorney-at-Law to refuse to appear on her behalf and to take steps to have the dismissal set aside. For in terms of section 87(3) of the Civil Procedure Code an order dismissing an action for failure of plaintiff to appear on the trial date may be vacated on an application made within a reasonable time and good cause shown for default of appearance. In the circumstances except for the two complaints made to His Lordship the Chief Justice and the President of the Bar Association which are her own doing, there does not appear to be any other reason as to why an Attorney-at-Law from the Kurunegala bar would refuse or refrain from appearing for the plaintiff-petitioner. In fact Mr. D.M.D.B. Dissanayake has admitted that the mistake was on his part in informing the plaintiff-petitioner a wrong date as the trial date and has given an affidavit to this effect which had been tendered to Court, Paragraphs 2, 3 and 4 of his affidavit reads of follows:

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02. අංක 6709/මුදල් දරණ තුරුණෑගල අතිරේක දිසා අධිකරණයේ පවරා ඇති නඩුවේ ලේඛණගත නීතිඥ මම වන අතර, පැමිණිලිකාරියගේ උපදෙස් මත අදාළ පැමිණිලි ල සහ සාක්ෂි ලැයිස්තුව එකී නඩුවට ගොනු කළ අතර 2002.03.25 වන දින විභාගයට නියමිතව තිබුණ බව කියා සිටිමි.

03. එකී විභාග දිනයක්හි දී එම නඩුවේ මිළඟ විභාග දිනය වශයෙන් සඳහන්ව තිබුණේ මගේ පෞද්ගලික ලිපි ගොනුවේ 2002.07.11 වන දිනය වන අතර සේවාදායිකාවට ද එම දිනය විභාග දිනය වශයෙන් මා විසින් උපදෙස් දී තිබුණි.

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04. එසේ වුවද 2002.06.11 වෙනි දින මෙම නඩුව විභාගයට කැඳවා ඇති අතර, එදින මගේ සේවාදායිකාව හෝ මා අධිකරණයට පෙනී නොසිටීම නිසා නඩුව ප්‍රතික්ෂේප වී ඇති බව ලිපි ගොනුව පරීක්ෂා කිරීමේ දී පෙනී ගිය බව මා කියා සිටිමි. තවද ජුනි මස 11 යන්න ජුලි 11 යනුවෙන් ප්‍රමාද දෝෂ වලින් සඳහන් වීම නිසා මෙම තත්ත්වය උද්ගත වූ බව වැඩිදුරටත් කියා සිටිමි.”

I might also say that except for a mere statement that the members of the Kurunegala bar are refusing to appear for her the plaintiff-petitioner has not mentioned the name of a single attorney-at-law who refused to appear on her behalf after Mr. W. F.B. Fernando revoked his proxy.

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Counsel for the plaintiff-petitioner also refers to journal entry (02) dated 11.06.2002 which reads as follows:

නිතිඥ ඩී. ඇම්. ඩී. බී. දිසානායක මයා පැමිණිලි ල වෙනුවෙන්,
නිතිඥ කේ. පටබැඳි මයා විත්තිකරු වෙනුවෙන්
පැමිණිලිකරු නැත.
විත්තිකාරිය සිටි.
පෙර ආස්තුවක් ලෙස රු. 1,000/- ක් ගෙවයි. ඒ අනුව නඩුව ආස්තුවට යටත්ව
නිෂ්ප්‍රභා කරමි.
ප්‍රධාන අධිකරණයේ ද නඩුව කැඳවන ලදී.

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අත්සන: දිසා විනිසුරු

He submits that the very unusual payment of Rs. 1000/- in the absence of the petitioner amounts to suspicion. As the plaintiff-petitioner was absent on 11.06.2002 who had paid the said sum of Rs. 1000/- to the defendant-respondent is not clear. Be that as it may, the plaintiff-petitioner admits that she was absent on that day and there being no application for a postponement the learned District Judge has correctly acted in terms of section 87(1) of the Civil Procedure Code in dismissing the plaintiff-petitioner's action. The learned District Judge cannot be faulted for dismissing the action and no suspicion can be attached to the order of the learned District Judge.

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Section 46 of the Judicature Act in terms of which this application is made reads as follows:

46 (1) "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

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(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.” 130

The grievance of the plaintiff-petitioner appear to be that in the instant action filed by her a fair and impartial trial cannot be had in the District Court of Kurunegala. However reasons given by the plaintiff-petitioner in this respect I should say, do not warrant or are insufficient to arrive at such a conclusion. Hence I am unable to find any justifiable or valid reason as to why this Court should act in terms of the said section 46 of the Judicature Act. 140

In making an order under section 46 of the Judicature Act one must also keep in mind the hardship if any the respondent would have to face. In the instant application the plaintiff-petitioner is seeking a transfer of an action instituted in the District Court of Kurunegala to the District Court of Colombo. As submitted by counsel for the defendant-respondent if this application is allowed the defendant-respondent too would have to incur heavy costs for travelling and for retaining counsel from Colombo. 150

I might also say that even if this application is not granted the plaintiff-petitioner is not without remedy for if no Attorney-at-Law from the Kurunegala bar would appear for her she could still get the services of an Attorney-at-Law from an outside bar, even if such an endeavour turns out to be costly. For it is she who had instituted the instant action seeking certain reliefs.

For the above reasons, I see no merit in the plaintiff-petitioner's application and the same has to fail. Accordingly I dismiss the plaintiff-petitioner's application with costs fixed at Rs. 2500/= 160

EKANAYAKE, J. – I agree.

Application dismissed.