

**RATNAYAKE MENIKE**  
**v**  
**DAYANANDA AND OTHERS**

COURT OF APPEAL  
FERNANDO, J.  
EDIRISURIYA, J.  
CA REV. 663/2003  
D.C. KULIYAPITIYA NO. 12149/P  
JUNE 25, 2003

*Judicature Act S.46 – Transfer of Case – Fundamental Right of every litigant to be represented by an Attorney-at-Law – Fair and impartial trial to be held.*

**Held :**

1. It appears that, the petitioner is unable to retain a lawyer from the Kuliypitiya Bar because of the fact that one of the defendants is a practitioner at the same Bar.
2. It is a fundamental right of every litigant that he/she must have the liberty to be represented by an Attorney-at-Law at the trial.

**APPLICATION** for Transfer of case.

**Cases referred to :**

1. *Sivasubramaniam v Sivasubramaniam* – 1980 2 Sri LR 58 (Distinguished)
2. *Jayakody v Attorney General* – 4 Sri Lanka Law Reports 106

*Chula Bandara* for the petitioner.

*Aravinda Athurupana* for the 7th defendant-respondent

*Cur.adv.vult*

July 11, 2003

**RAJA FERNANDO, J.**

The plaintiff-petitioner has filed this application for the transfer of 01  
D.C. Kuliypitiya case No. 12149/P to the District Court of Colombo  
in terms of section 46 of the Judicature Act as amended.

Section 46 of the Judicature Act permits the transfer of any action prosecution, proceeding or matter pending before a court to any other court where it appears to the Court of Appeal :

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

In the petition and affidavit of the petitioner it is stated that no lawyer from the Kuliyaipitiya and Kurunegala Bars would appear for the plaintiff-petitioner as the 7th defendant-respondent is a lawyer practicing in Kuliyaipitiya and Kurunegala Courts. 10

It is further stated in the petition and affidavit of the petitioner that they retained a lawyer from Marawila courts and he too having initially accepted the brief later, on the morning of the trial date, i.e. 4th of October 2002 returned the brief stating that he could not appear in the case as the 7th defendant-respondent was an Attorney-at-Law practicing in that court.

The defendant-respondents have filed their objections to the transfer on the ground that great hardship difficulties and prejudice would be caused to the eleven defendant-respondents if the case is transferred out of Kuliyaipitiya District Court. 20

Further it is submitted on behalf of the respondents that there is no material other than the bare assertion of the petitioner in her affidavit to substantiate what she asserts.

In the counter affidavit of the petitioner she has listed the names of eleven Attorneys-at-Law to whom the petitioner has gone who have declined to accept her brief for the reason that they are personally known to the 7th defendant-respondent.

The court would not expect the petitioner to file affidavits from each of the lawyers she went to in support of her assertion that they declined to appear for her for the reasons stated. 30

According to the proceedings of 4th October 2002 the plaintiff-petitioner has been awarded costs in a sum of Rs.15,000/- to be paid to the defendant for the postponement of the trial. Counsel for the respondents cited two cases *Sivasubramaniam v Sivasubramaniam* <sup>(1)</sup> and *Jayakody v The Attorney-General* <sup>(2)</sup>.

In the first case the grounds for transfer was the same as in this

case; however the court did not allow the application mainly for the reason that the affidavit of the petitioner was contradicted by the lawyers whom she alleged were prevented by the respondent from appearing for her. 40

In the other case the Court of Appeal allowed the transfer of the case to another Court close to the court where the case was originally instituted.

In the present case it would appear that the petitioner is unable to retain a lawyer from the Kuliyaipitiya Bar because of the fact that one of the defendants is a practitioner at the same Bar.

It is a fundamental right of every litigant that he/she must have the liberty to be represented by an Attorney at the trial which in this case the petitioner finds difficult to exercise due to the fact that the case is taken up in Kuliyaipitiya District Court. 50

Therefore we find that a fair and impartial trial cannot be had in the Kuliyaipitiya District Court.

In the circumstances we are of the view that it will be expedient to have the case transferred from the Kuliyaipitiya District Court to the District Court of Marawila which is not too far from Kuliyaipitiya.

Accordingly we order the transfer of D.C. Kuliyaipitiya case No. 12149/P to the District Court of Marawila. 60

**EDIRISURIYA, J.** - I agree.

*Application allowed. Case transferred.*