

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an appeal filed under Section
14(2) of the Maintenance Act No. 37 of 1999.

SC. Appeal No. 117/2010

HC. Colombo Appeal No. 264/08

HC.Colombo Revision

Application No. 168/08

M.C. Mt. Lavinia

No. 273/Maintenance

Hewa Kankanamage Pushpa Rajani
No. 13, 1st Chapel Lane
Wellawatta.

Applicant

Vs.

Ruhunuge Sirisena
13A, 1st Chapel Lane,
Wellawatta.

Respondent

And Between

Ruhunuge Sirisena
13A, 1st Chapel Lane,
Wellawatta.

Respondent-Appellant

Hewa Kankanamage Pushpa Rajani
No. 13, 1st Chapel Lane
Wellawatta.

Applicant-Respondent

And Now Between

Ruhunuge Sirisena

13A, 1st Chapel Lane,
Wellawatta.

**Respondent-Appellant-
Appellant**

Hewa Kankanamage Pushpa Rajani
No. 13, 1st Chapel Lane
Wellawatta.

**Applicant--Respondent-
Respondent**

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BEFORE : **Amaratunga, J.**
Marsoof, PC., J. &
Wanasundera, PC., J.

COUNSEL : Rohan Sahabandu PC. for Respondent-Appellant-Appellant.
G.D. Kulatilake for Applicant-Respondent-Respondent

ARGUED ON : 27.02.2013

DECIDED ON : 08-05-2013

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Wanasundera, PC., J.

The Respondent - Appellant - Appellant (hereinafter referred to as the Appellant) in this case has come before the Supreme Court being aggrieved by the judgment of the High Court of the Western Province established under Article 154P of the Constitution which had dismissed an appeal filed by him against the order of the Magistrate' Court of Mount Lavinia awarding maintenance for his wife, the Applicant – Respondent – Respondent (hereinafter referred to as the Respondent) and the children..

The Appellant had also filed the Revision Application No. 168/2008 before the High Court against the same final order of the Magistrate's Court. Both the final appeal and the Revision Application were consolidated and taken up for hearing by the High Court together. Both cases were dismissed by the Learned High Court Judge by his judgment and order dated 14.07.2010.

The Appellant sought leave to appeal to the Supreme Court from the High Court itself, as provided for in Section 14(2) of the Maintenance Act No. 37 of 1999 and the Learned High Court Judge granted leave on 23.08.2010 in the absence of the Respondent. Later on, the Respondent appealed to the High Court Judge not to grant leave to appeal but after hearing the submissions, the High Court Judge made order on 03.9.2010 confirming the leave granted to the Appellant on 23.08.2010, on five questions of law which the Supreme Court is invited to deal with at the hearing.

The questions of law on which leave was granted are enumerated as follows:-

1. Did the High Court err in law in holding that the Respondent had discharged the burden cast on her by law, of proving the income and means of the Appellant?
2. Did the High Court err in law in casting a burden on the Appellant of proving that he was not earning such income as alleged by Respondent in her oral testimony, whereby casting upon the Appellant the burden of proving a negative?
3. Did the High Court err in law in failing to consider whether the Respondent had failed to establish and/or discharge the burden cast on her of 'neglect' and/or unreasonable refusal and/or refusal by the Appellant to maintain the Respondent and the three children, as provided in Section 2 of the Maintenance Act No. 37 of 1999?
4. Did the High Court err in law in failing to consider whether the Respondent has failed to discharge the burden cast on her, in terms of Section 2 of the Maintenance Act No. 37 of 1999, to prove that the

Appellant has neglected and/or reasonably refused and/or refused to maintain the Respondent and the three children?

5. Did the High Court err in law in failing to address its mind to the income of the Appellant and/or his ability to earn and/or the means and circumstances of the Appellant in terms of Section 2 of the Maintenance Act No. 37 of 1999?

Hereinafter I proceed to analyse the High Court judgment dated 14.7.2010 having the aforementioned questions of law in mind. The final order of the Magistrate's Court of Mt. Lavinia case No. 273/Maintenance was the basis for the High Court judgment. The appeal to the High Court was made under Section 14(1) of the Maintenance Act No. 37 of 1999 by the Appellant.

The facts could be summarised in this way. R. Sirisena married H.K.P. Ranjani on 18.1.1989 and they had three children. At the time of filing the maintenance action on 13.6.2006 the children were 16 yrs, 10 yrs and 9 yrs old. The wife Ranjani knew at the time of her marriage to R. Sirisena that he had three more children as a result of him having lived in adultery with another female namely Wimalawathie who was not divorced from her husband. In 2006 those children were 36 yrs, 35 yrs and 27 yrs of age and as such those three children were much elder to Ranjani's three children.

R. Sirisena and Ranjani are living in different portions of a four storied big building in the 1st Chapel Lane, Wellawatta. R. Sirisena is at No. 13A, 1st Chapel Lane and Ranjani with her three children are at No. 13, 1st Chapel Lane. There is a garment factory in one of the four storeys of this building which was run by R. Sirisena and Ranjani but it is now run by R. Sirisena and his 27 years old son of his first bed, Amila. Problems allegedly started when Ranjani did not agree to sell a property worth of One Hundred and Fifty Million rupees and the money to be given to the 27 years old son Amila who was the youngest child from the 1st bed of Sirisena. Allegedly R. Sirisena harassed Ranjani physically and mentally and finally filed a divorce case in the District Court of Mt. Lavinia. The case number is 4897/D where Ranjani is the Defendant and it is still pending. R. Sirisena has filed two other cases against Ranjani with regard to properties

which are in the name of both husband and wife, worth millions of rupees, namely 46/05 Trust and 48/06 Trust. Ranjani decided to file the maintenance case only after all the other three cases were filed against her by R. Sirisena and only when R. Sirisena allegedly neglected to look after her and the children. The neglect and/or refusal to maintain the wife and the three children had allegedly lasted for 8 months before Ranjani filed the maintenance case.

The Magistrate hearing the case acting under Section 11(1) of the Maintenance Act made an interim order for the Appellant to pay Rs.15000/- per month, on 25.10.2006. The Respondent Ranjani prayed for a monthly maintenance payment of Rs.125000/- in her application to the Magistrate's Court but at the end of the hearing the Magistrate ordered only Rs.55000 as the monthly maintenance which amount is less than half the amount claimed by the Respondent Ranjani. The Appellant Sirisena in the Magistrate's Court has not paid that amount but had appealed to the High Court and now to the Supreme Court. The date of the order of the Magistrate is 19.9.2008. The date of the High Court judgment in HCMCA 264/08 is 14.7.2010. In the Revision application filed by the Appellant husband Sirisena in the High Court he has obtained a stay order, staying the payment of Rs.55000/- and consented to add Rs.10000/- to the interim order of maintenance of Rs.15000/- granted by the Magistrate, making it Rs.25000/- per month as maintenance to the wife and 3 children. The High Court dismissed the appeal of the Appellant Sirisena on 14.7.2010. As such the Appellant R. Sirisena is in arrears of payment of maintenance from 19.9.2008 up to date.

The learned High Court Judge had quoted authorities to the effect that the Appellate Courts should not interfere with the judgment of the lower Courts unless there is a grave legal discrepancy in the decision of the lower Court or there is a grave error in the analysis of the evidence before the lower Court. I fully endorse his views and appreciate the citations in that regard, namely *Jayasuriya Vs. Sri Lanka State Plantations Corporation* 1995, 2 SLR 379, *Ceylon Cinema and Films Studio Employees Union Vs. Liberty Cinema Ltd.* 1994 3 SLR 121 and *Bandaranaike Vs. Jagathsena & Others* 1984, 2 SLR 397. Having said that the Learned High Court Judge has gone deeply into the analysis of the evidence done by the Magistrate and come to

the conclusion that the basis on which the amount to be paid as maintenance was just and equitable and reasonable and that, therefore the judgment should not be interfered with.

The questions of law before the Supreme Court are based on Section 2 of the Maintenance Act No. 37 of 1999. Section 2(1) is with regard to the maintenance of a wife. Section 2(2) is with regard to the maintenance of children. Section 2(1) reads as follows:-

“Where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal, order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit, having regard to the income of such person and the means and circumstances of such spouse;

Provided however, that no such order shall be made if the applicant spouse is living in adultery or both the spouses are living separately by mutual consent.“

How to inquire into a maintenance application is set out in Section 11 of the Act. It reads:-

Section 11(1) "Every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application, and the Magistrate shall, if satisfied that the facts set out in the affidavit are sufficient, issue a summons together with a copy of such affidavit, on the person against whom the application is made to appear and to show cause why the application should not be granted;

Provided however the Magistrate may in his discretion at any time make an interim order for the payment of a monthly allowance which shall remain operative until an order on the application is made, unless such interim

order is earlier varied or revoked, and such interim order shall have effect from the date of the application or from such later date as the Magistrate may fix.”

When an application for maintenance is made before the Magistrate with an affidavit by the Applicant, from there onwards, the Magistrate is bound to act on the evidence before Court sworn in the affidavit. If what is said on oath in the affidavit by the Applicant is satisfactory and sufficient to create a prima-facie case to be tried by the Magistrate, it is only then that the Magistrate sends the summons. The summons tells the Respondent **“to show cause why the application should not be granted?”** In any civil case the summons issued directs the receiver only to file in Court the answer to the plaint therewith and not to show cause. An application made under Section 2 of the Maintenance Act is not a civil case. Section 12 of the Maintenance Act 37 of 1999 reads as follows:-

“ The Magistrate may proceed in the manner provided in Chapter V and VI of the Code of Criminal Procedure Act, No. 15 of 1979 to compel the attendance of the person against whom the application is made and of any person required by the applicant or the person against whom the application is made or by the Magistrate to give evidence, and the production of any document necessary, for the purposes of the inquiry.”

It is quite clear that a maintenance inquiry is more of a criminal nature and quite far from a civil action. Furthermore Section 10 provides that an application for an order of maintenance is free of stamp duty. Section 5 deals with enforcement of orders which gives the Magistrate the power to sentence the person in breach of a maintenance order to imprisonment.

Section 6 deals with an ‘attachment of salary of the Respondent’. In summary this Section gives the Magistrate the power to direct the employer of the Respondent to deduct an ordered amount from the salary and/or earnings of the Respondent and pay it to the Applicant. Section 6(2) (b) reads thus:-

“ The Magistrate may also by an order served on the Respondent, require him to furnish to the Court within such period as may be specified in such order, a statement specifying-

- (a) the name and address of his employer or employers as the case may be, if he has more than one employer;
- (b) such particulars as to his salary, inclusive of deductions, as may be within his knowledge; and
- (c) any other particulars as are required or necessary to enable his employer or employers to identify him.”

The wording here shows that the Magistrate could **order the Respondent to furnish to Court his income and all the details**. I am of the view that this suggests that the Respondent in any maintenance inquiry is called upon to prove his income. The Applicant- wife and/or children do not have the knowledge of the exact income of the Respondent and when the Respondent is before Court, the Magistrate orders the person to give details of his income, the place from where he gets the income etc. and it is prima facie proof of his income. The Applicant is not called upon by way of the Provisions in the Act to prove the Respondent's income. The Applicant wife has only to get the Respondent to come to court and then Court has the authority to get him to divulge his income, so that Court can make an attachment of salary order, in cases where the husband is working under another employer. In the instant case, the husband is self-employed.

Therefore as it is mentioned in Section 11 of the Act, in the Magistrate's Court the Respondent has to show cause why the application should not be granted. The burden of proof of his income is cast on the Respondent and not the Applicant in such an instant.

As mentioned in Section 2 the Applicant has to prove;

- (a) that the Respondent has sufficient means,

- (b) that the Respondent has unreasonably refused to maintain the wife/children, and
- (c) that the Applicant is unable to maintain herself and/or the children.

In this case the Applicant in the Magistrate Court has given evidence. She had been educated in the Mathematics stream up to the Advanced Level class in school. She had helped the husband to develop his businesses. 'They had earned together and bought properties together. They became rich and had lived a comfortable life. The husband had looked after her and the children until the time he got down one of his sons from the first bed, namely Amila and Amila's wife into the same building to live . The husband Sirisena wanted his wife Ranjani to consent to sell immovable properties worth millions of rupees and give money to children of the first bed who were all adults. The evidence of the wife with regard to the husband's properties and income was corroborated by other government officials who gave evidence. The husband did not disprove or challenge her evidence even in cross examination. In her evidence she has detailed his income from house rent, business and the value of his properties. The documents to prove ownership of the properties etc. are in the hands of the Respondent. He never denied his worth but tried to say that he has heart ailments and had to undergo an operation. His evidence was that he is living with the money given by his older children from the first bed which the Magistrate decided on a balance of probabilities to be not of any true value as evidence to disprove that he has sufficient means. The Applicant wife was not working and not having any businesses of her own because she developed the business of the husband and her properties are co-owned with him. She had no means to live and look after the children. Trying to give what the children needed in continuation of the comfortable life they were used to, she was in debt having sold her jewellery etc. The evidence of the Applicant showed amply that she is unable to maintain herself and children in the way that they were used to. The husband having the means was not maintaining the wife and children which proved the element of neglect or unreasonably refusing to maintain the family.

Thus I am of the view that the Applicant wife in the Magistrate's Court has proved all the elements she was called upon to prove under Section 2 of the Maintenance Act. The burden of proving 'why the application should not be granted' is on the Respondent

husband. He has failed to show cause why the application should not be allowed. The learned Magistrate has considered the evidence as a whole by both parties and having regard to the income of the Respondent husband and the means and circumstances of the Applicant wife and children, the Magistrate has weighed them carefully. The Magistrate has decided on the balance of probabilities.

Due to the aforementioned reasons I have decided the five questions of law on which leave was granted in the negative. I hold that Section 2 of the Maintenance Act places the burden on the Applicant to prove that the Applicant is unable to maintain herself; that the Respondent has neglected or unreasonably refused to maintain such Applicant and that the Respondent has sufficient means to maintain the Applicant. On the other hand Section 11 of the Maintenance Act places the burden of proof on the Respondent to show cause why the application should not be granted. In other words the burden of proof of showing that the Respondent does not have sufficient means is on the Respondent. In this case in the Magistrate's Court the Respondent has totally failed to show cause why the application of the Applicant should not be granted because he never came out with his monthly income and did not challenge the ownership of the immovable properties and the income from renting out his other houses in the same lane and profits earned from the garment business run inside the same four storeyed building. The Magistrate had decided on the monthly maintenance having considered the evidence on a balance of probabilities. The High Court has affirmed it.

I affirm the judgment of the High Court dated 14.7.2010 and further determine that the Applicant-Respondent-Respondent is entitled to the arrears of payment of maintenance from 19.09.2008 the date of the order of the Magistrate with legal interest as of today and dismiss the appeal of the Respondent-Appellant-Appellant with taxed costs. I order that this judgment be sent to the Magistrate's Court of Mt. Lavinia forthwith for enforcement of the order as provided for in Section 5 of the Maintenance Act No. 37 of 1999.

JUDGE OF THE SUPREME COURT

Amaratunga, J.

I agree.

JUDGE OF THE SUPREME COURT

Marsoof,PC.J.

I agree.

JUDGE OF THE SUPREME COURT