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

In the matter of an application for an Appeal to the Supreme Court from the Judgement dated 27th of January 2016 of the High Court Kurunegala in case No. HC Kurunegala No. 70/2014 under Section 14(2) of the Maintenance Act, No. 37 of 1999.

Case No: SC APPEAL 49/2016

High Court (Kurunegala) Case No: 70/2014

Magistrate Court (Polgahawela) Case No: 2481/12

Pilawala Pathirennehelage Upeksha Erandathi,

Otharakiruwanpola, Keppitiwalana,

APPLICANT

vs.

Dasanayake Achchilage Dammika Kumara Dasanayake,

Otharakiruwanpola, Keppitiwalana.

RESPONDENT

AND BETWEEN

Pilawala Pathirennehelage Upeksha Erandathi,

Otharakiruwanpola, Keppitiwalana.

APPLICANT-APPELLANT

Vs

Dasanayake Achchilage Dammika Kumara Dasanayake,

Otharakiruwanpola, Keppitiwalana.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Dasanayake Achchilage Dammika Kumara Dasanayake,
Otharakiruwanpola, Keppitiwalana.

RESPONDENT–RESPONDENT-APPELLANT

Vs

Pilawala Pathirennehelage Upeksha Erandathi,
Otharakiruwanpola, Keppitiwalana.

APPLICANT-APPELLANT-RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J**
JANAK DE SILVA, J AND
ACHALA WENGAPPULI, J

COUNSEL : N.M. Riyaz with Ms. G. B. Madhushani Chandrika instructed by Amali Ranasinghe for the Respondent-Respondent-Appellant.
W. Dayaratne, PC with Ms. Ranjika Jayawardena, for the Applicant-Appellant-Respondent.

WRITTEN SUBMISSIONS : No written submissions filed

ARGUED ON : 14th February 2023

DECIDED ON : 07th February 2024

S. THURAIRAJA, PC, J

The Applicant-Appellant-Respondent, namely Pilawala Pathirennehelage Upeksha Erandathi, ("Hereinafter referred to as the "Applicant-Respondent") had filed an application before the Magistrate Court of Polgahawela on 5th January 2012 against the Respondent-Respondent-Appellant, namely, Dasanayake Achchilage Dammika Kumara Dasanayake (Hereinafter referred to as the "Respondent-Appellant"), to whom she was married from 24th September 2009, praying for a sum of Rs. 10, 000/- as maintenance in terms of Section 2(1) of the *Maintenance Act, No. 37 of 1999*.

Respondent-Appellant claimed that he did not have sufficient income or assets to pay the same and prayed for the dismissal of the Applicant-Respondent's application. The Magistrate Court delivered the order on 23rd May 2014 and dismissed the application of the Applicant-Respondent.

Aggrieved by the said order, the Applicant-Respondent then appealed to the Provincial High Court of North Western Province Holden in Kurunegala. By judgment dated 27th January 2016, the learned High Court Judge held in favour of the Applicant-Respondent and the Respondent-Appellant was ordered to pay Rs. 7,500/- monthly as maintenance from January 2012. Aggrieved by the said decision of the learned High Court Judge, the Respondent-Appellant filed the instant application before this Court.

Initially, the Attorney-at-Law for the Respondent-Appellant identified the following questions of law:

> "*1. To what extent is an Appellate Judge entitled to disturb a trial judge's finding which was based on testimonial trustworthiness?*
>
> *2. Can a Court consider unmarked documents filed with the written submissions?*
>
> *3. Is the Maintenance Act, No. 37 of 1999 a consolidating or codifying Act?*"

When the case was taken up on 14th February 2023, the Counsel for the Respondent-Appellant submitted that he wished to confine himself to the aforementioned second question of law.

The Factual Background of the Case

According to the Applicant-Respondent, the Applicant-Respondent and Respondent-Appellant, who had been a Navy deserter unbeknownst to her at the time, registered their marriage on 24th September 2009 as a result of a romantic relationship. Following the marriage, they had relocated to Australia, where they were employed in various capacities for about two years.

The Applicant-Respondent asserted that she pursued a Diploma during this period while enduring severe mistreatment, characterized by beating and forceful appropriation of money she had earned. The Applicant-Respondent further claims that the Respondent-Appellant was "addicted to unnatural sexual behaviour", which she could not tolerate. The Applicant-Respondent claimed that when she refused to engage in such unnatural sexual behaviours, he would resort to physical violence and beat her.

The Applicant-Respondent and the Respondent-Appellant had returned to Sri Lanka on 2nd November 2011. The Applicant-Respondent asserted that her inability to endure the harsh treatment within the confines of married life, coupled with genuine concerns for her personal safety, prompted her to file a complaint at the Katunayake Airport Police after her arrival. Thereafter, she had filed two further complaints dated 03rd November 2011 and 6th November 2011 at the Alawwa Police Station, having chosen to reside with her parents in the said area for her safety.

The Applicant-Respondent had subsequently initiated divorce proceedings bearing Case No. 10408/Divorce at the District Court of Kurunegala. Within the context of these legal proceedings, the Applicant-Respondent contended that the Respondent-Appellant, through fraudulent means, acquired funds belonging to her. She asserted

that she has been left with only the "clothes she is wearing", as the Petitioner allegedly obtained all other assets and belongings.

The Applicant-Respondent further stated that she had not been employed since she returned to Sri Lanka and that she has been living with her parents with no income.

The position of the Respondent-Appellant throughout these proceedings has been that he does not have sufficient means and all that he earned while in Australia was used to pay back his debts. He further asserted that the Applicant-Respondent has a good earning capacity considering her educational background and strong command of the English language.

Analysis

The question of law to be considered in the instant case is, simply, whether or not a judge is able to consider unmarked documents filed with written submissions as evidence.

Where unmarked documents are considered by a judge in arriving at his or her decision, especially when such documents are submitted at a later stage of a case, a party may be prejudiced where such party is not afforded sufficient time and opportunity to answer or explain the contents of such document. Where prejudice is so caused, an appellate court is left with no option but to interfere with the findings of the original court.

Then, what this Court needs to inquire into are the following:

1. Whether or not the learned High Court Judge has considered any unmarked documents in arriving at his findings; and
2. If the answer to the above is positive, then whether such documents being considered has affected the outcome of the case, thereby causing prejudice.

The unmarked document referred to in the instant case is the Medico-Legal Report dated 6th November 2011, which was submitted as evidence in the aforementioned divorce proceedings bearing Case No. 10408/Divorce before the District Court of Kurunegala. Despite the Applicant-Respondent's plea for the same to be adopted in the maintenance proceedings, the record reveals that the learned Magistrate has unequivocally rejected this plea.[1] The learned High Court judge in his judgment dated 27th January 2016 has not once mentioned the Medico-Legal Report.

Section 2(1) of the *Maintenance Act, No. 37 of 1999* provides 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."*

According to the aforementioned provision, in making an order for maintenance, a Magistrate must satisfy himself/herself as to the following elements:

i. The person against whom the claim is made has sufficient means;

ii. Such person neglects or unreasonably refuses to maintain his/her spouse;

iii. The spouse is unable to maintain herself/himself; and

[1] Order dated 23rd May 2014 by the Magistrate of Polgahawela in Case No. 2481/12/නඩත්තු at pp. 13-14; Case Record at pp. 201-202

iv. The case does not fall within the proviso therein, i.e. the spouse is not living in adultery and the spouses are not living separately by mutual consent.[2]

Once a Magistrate is satisfied with all said elements, an order to pay a monthly allowance for the maintenance of the spouse can be made against such a person. Although this allowance can be made at a rate as the Magistrate thinks fit, such rate must be decided having considered the income of the person and the means and circumstances of the spouse.

The learned High Court Judge, in his judgment dated 27th January 2016, has first dispensed with the question with regards to the proviso. In that, the question of adultery has been correctly dismissed for there is no allegation of adultery against the Applicant-Respondent. Even where such an allegation is made the burden of proving the same would be on the person who alleges it.[3]

In considering whether there has been a mutual separation, the learned Magistrate has considered the allegations of unnatural sexual behaviour in the following manner, and the same has been accepted by the learned High Court Judge:

> "කෙසේ නමුත් වගඋත්තරකරු වෙනුවෙන් හෝ වගඋත්තර කරුගේ සාක්ෂි මඟින් එකී කාරණාව නඹ කිරීමක් සිදු කොට නොමැති හෙයින් ‘‘දැඩිමුණි විමලසේන එදිරිව නීතිපති’’ නඩුවේ තීන්දුව ප්‍රකාරව වගඋත්තරකරු ඉල්ලුම්කාරිය සමඟ අස්වාභාවික ආකාරයෙන් ලිංගික ක්‍රියා වල යෙදී ඇති බවට පිළි ගැනීමක් ලෙසට සැලකීමට බාධාවක් නැති අතර ඒ අනුව වග උත්තරකරුගේ ලිංගික හිරිහැර නිසා ඉල්ලුම්කාරියට ඔහුව හැර යන්නට සිදු වී ඇති බවටත්, ඔහු නැවත විවාහ ජීවිතය ගත කිරීමට ආරාධනා කිරීම ප්‍රතික්ෂේප කිරීමට තරම් ප්‍රමාණවත් හේතුවක් බවත් පැහැදිලි වන බවයි.

[2] *Hewa Walimunige Gamini v. Kudaanthonige Rasika Damayanthi,* SC Appeal 151/2017, SC Minutes of 11th March 2020 at 8

[3] *Vide* Section 103 of the Evidence Ordinance; *Selliah v. Sinnammah* 48 NLR 261; *Armugam v. Athai* 50 NLR 310; *Weerasinghe v. Renuka* [2016] 1 Sri LR 57

[However, as the same has not been refuted on behalf of the Respondent or by the evidence of the Respondent, by virtue of the decision in Dadimuni Wimalasena v. Attorney-General, there is no impediment to considering the fact that there had been unnatural sexual behaviour with the Applicant as an admission, and, as such, due to these sexual harassments the Applicant had had to separate from him and it is revealed that there are reasonable grounds to refuse his invitation to resume their marital life.]"[4]

Although she has only made this allegation to Katunayake Police after returning to Sri Lanka after a considerable delay without ever informing the authorities in Australia, this need not affect her testimonial creditworthiness. It is naturally difficult for anyone subjected to such treatment to muster up the courage to voice out their concerns—especially when living in a foreign country, far away from anyone who may lend a shoulder. After arriving in Sri Lanka, she has expeditiously informed the police of her ordeal, which the learned High Court Judge has taken into account in assessing her evidence.[5]

The decision of the learned Magistrate in refusing to make an order concerning the payment of maintenance was mainly based on his finding that the Respondent-Appellant did not have sufficient means. The learned Magistrate had further concluded the Applicant-Respondent to have a higher earning capacity compared to the Respondent-Appellant and that she was able to maintain herself.

The learned High Court Judge has analysed the ability of the Applicant-Respondent to maintain herself in the following manner:

[4] Order dated 23rd May 2014 by the Magistrate of Polgahawela in Case No. 2481/12/නඩත්තු at pp. 14-15; Case Record at pp. 202-203 (An approximate translation added to reflect the text as closely as possible)

[5] Judgment dated 27th January 2016 of the Provincial High Court of the North Western Province Case No. HCA 70/2014 at p. 7

"'ඉල්ලුම්කාරියගේ සාක්ෂිය විශ්ලේෂණය කිරීමේදී අතිශෝක්තියකින් යුතුව තමා අසරණ භාවයට පත් වී ඇති බව පෙන්වා දීමට උත්සාහ දරා ඇති බව පෙනේ' යනුවෙන් මහෙස්ත්‍රාත්වරයා තම නියෝගයේ සඳහන් කර ඇත. එසේ කියා ඇත්තේ තමාට අදායමක් නොමැති නිසා ඇඳුම් ගැනීමට හෝ නොහැකිව තමාගේ සහෝදරියගේ ඇඳුම් අඳින බවට සාක්ෂි මඟින් කියා ඇති බව සඳහන් වේ. මෙහිදී මහෙස්ත්‍රාත්තුමා පියාගේ වත්කම් සලකා ඇය එවැනි මට්ටමකට පැමිණිය නොහැකි බව කියා ඇතත්, මෙවැනි ඉල්ලීමකදී දෙමාපියන් සතු වත්කම් සලකා බැලමේ අවශ්‍යතාවයක් නීතිමය ලෙස නොපවතී. එබැවින් එවැනි පදනමක පිහිටා ගනු ලබන තීරණ නිවැරදි ලෙස සැලකිය නොහැක.

[The magistrate has stated in his order that "in the analysis of the testimony of the petitioner, it seems that efforts have been made to point out that she is helpless with some exaggeration". It was so found as the witness had said that she wears her sister's clothes because she has no income or is unable to afford even clothing items. Here, although the magistrate has said that she cannot reach such a level considering the assets of the father, there is no legal requirement to consider the assets of the parents in an application of this nature. Therefore, a decision made on such a basis cannot be deemed accurate]"[6]

I am inclined to agree with the findings of the learned High Court Judge. The assets of her parents, or any relative for that matter, cannot be considered her own means, although parents and relatives may naturally lend a hand. The means and circumstances of relatives cannot release a spouse from the responsibility of maintaining the other.

Furthermore, the learned High Court Judge has arrived at a different conclusion to that of the learned Magistrate in assessing whether the Respondent-Appellant has sufficient means. The learned High Court Judge has arrived at his conclusion based on

[6] Judgment dated 27th January 2016 of the Provincial High Court of the North Western Province Case No. HCA 70/2014 at p. 15 [An approximate translation added]

the testimonial creditworthiness of the evidence produced before the Magistrate on behalf of the Respondent-Appellant—the overall improbability of the evidence was considered in particular.

The Respondent-Appellant had submitted that he had no sufficient means of maintaining his spouse owing to being unemployed and having to spend the entirety of his earnings in Australia on paying back his debts.

According to the evidence led before the learned Magistrate, the Respondent-Appellant had had Rs. 3,108,940/- in an account maintained by him at the Bank of Ceylon as of 2nd December 2011, and all but Rs. 2706.63/- had been withdrawn after the Applicant-Respondent took necessary legal steps to separate from him. The Respondent-Appellant had taken the position that he withdrew the money in order to pay back his loans, obtained to facilitate their migration to Australia.

One Wipulasena—a relative of the Respondent-Appellant—had testified that he lent the Respondent-Appellant two million rupees by pawning his wife's jewellery and leasing his vehicle. One Buwaneka had testified that he lent one million rupees, which he collected from his friends, to the Respondent-Appellant. Neither of them have taken any security or documentation in lending the said amounts, nor have they charged any interests.[7] As the learned High Court Judge has correctly concluded, such amounts being let with no security or documentation and not interest, while the lenders would be paying interest themselves, is highly improbable and cannot therefore be accepted.

As the learned judge has further noted, despite having returned to Sri Lanka in the early days of November 2011, the Respondent-Appellant has waited over a month to purportedly pay back his debts, while his friend and relative who lent him money were paying interests. This, too, is highly improbable.

[7] Case Record at 172-183

Moreover, the learned High Court Judge has concluded the Respondent-Appellant to have *sufficient means* based on the finding that the Respondent-Appellant had the capacity to earn, for he has failed to adduce any proof of illness or similar incapacity despite having so claimed. He had already worked as a labourer from time to time, at the time material, according to his own admission.

The learned Judge has relied on the case of ***Rasamany v. Subramaniam*,**[8] where His Lordship Basnayake J observed as follows:

> *"In my view section 2 should be given a wide meaning and not restricted in its scope to persons having an income or actually earning at the time of the application. In this context the word " means " should be taken to include capacity to earn money. It cannot be that the legislature when enacting these provisions intended to exclude from the scope of sections 2 and 3 able-bodied men capable of earning and maintaining their wives and children but who by their voluntary act refrain from so doing*."[9]

Citing Eales JC in ***Me Tha v. Nga San E.*[10]** with approval, His Lordship further noted that *"a mere denial by the man himself of sufficiency of means, when that man is an-able bodied man, is not conclusive proof of want of sufficient means"* and that *"a man is not, and ought not to be, permitted by his own voluntary act to free himself from the elementary duty of maintaining his wife and children"*.[11]

The aforementioned observations were made with regard to section 2 of the Maintenance Ordinance, well before the enactment of the *Maintenance Act, No. 37 of 1999*. Despite that, the observations are most certainly consistent with the scheme of

[8] [1948] 50 NLR 84

[9] Ibid at 86

[10] 13 Cr. L.J. 162

[11] Citing *Maung Tin v. Ma Hmin* 34 Cr. L.J 1933

the Maintenance Act and therefore remain as relevant today as they were five decades ago.

As it can be observed, the question of law in the instant case is purely hypothetical and has no bearing on the case as the learned Magistrate nor the learned High Court Judge had based their decisions on the Medico-Legal Report or any other unmarked document submitted with the written submissions. As such, I see no need to answer the question of law.

Therefore, I see no reason to interfere with the decision of the learned High Court Judge and the same is affirmed. The decision of the learned High Court Judge is to be accordingly implemented. The Applicant-Respondent is entitled to costs.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE SUPREME COURT