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

Warnakulasuriya Ludgar Leo
Kamal Thamel,
'Rebeka', Play Ground Road,
Wennappuwa.
Plaintiff

SC APPEAL NO: SC/APPEAL/153/2019
SC HCCA LA NO: SC/HCCA/LA/47/2018
HCCA NO: NWP/HCCA/KURUNEGALA/18/2017/LA
DC MARAWILA NO: 3173/D

Vs.

Nawarathna Tirani Deepika
Damayanthi Nawarathne,
'Rebeka', Play Ground Road,
Wennapuwa.
Defendant

AND BETWEEN

Nawarathna Tirani Deepika
Damayanthi Nawarathne,
'Rebeka', Play Ground Road,
Wennapuwa.
Defendant-Petitioner

Vs.

Warnakulasuriya Ludgar Leo
Kamal Thamel,
'Rebeka', Play Ground Road,
Wennappuwa.
Plaintiff-Respondent

AND BETWEEN

Warnakulasuriya Ludgar Leo
Kamal Thamel,
'Rebeka', Play Ground Road,
Wennappuwa.
Plaintiff-Respondent-Petitioner

Vs.

Nawarathna Tirani Deepika
Damayanthi Nawarathne,
'Rebeka', Play Ground Road,
Wennapuwa.
Defendant-Petitioner-Respondent

AND NOW BETWEEN

Warnakulasuriya Ludgar Leo
Kamal Thamel,
'Rebeka', Play Ground Road,
Wennappuwa.

Plaintiff-Respondent-Petitioner-Appellant

Vs.

Nawarathna Tirani Deepika Damayanthi Nawarathne,
'Rebeka', Play Ground Road,
Wennapuwa.
Defendant-Petitioner-Respondent-Respondent

Before: Hon. Justice Murdu N.B. Fernando, P.C.
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Harsha Soza, P.C. with Ajith Moonesinghe for the Plaintiff-Respondent-Petitioner-Appellant.
Sudarshani Coorey for the Defendant-Petitioner-Respondent-Respondent.

Argued on: 31.05.2023

Written Submissions:

By the Appellant on 22.07.2019 and 14.07.2023
By the Respondent on 27.09.2019 and 13.07.2023

Decided on: 28.02.2024

Samayawardhena, J.

Background

The plaintiff filed action against the defendant in the District Court of Marawila seeking a decree of divorce on the ground of constructive malicious desertion and custody of their four children. The defendant-wife filed an application under section 614 of the Civil Procedure Code dated 26.01.2006 seeking alimony *pendente lite* until the determination of the divorce action and costs of litigation. After a lengthy inquiry, the District Court by order delivered on 04.05.2017 directed the plaintiff to pay Rs. 60,000 *per mensem* as alimony *pendente lite*. The District Court did not order costs of litigation, possibly due to oversight. On appeal by the plaintiff, the High Court of Civil Appeal of Kurunegala, by judgment dated 11.01.2018, affirmed the order of the District Court. This appeal by the plaintiff is against the judgment of the High Court.

On 12.06.2019, this Court granted leave to appeal against the said judgment on the question whether the amount ordered as alimony is excessive in terms of section 614(1) of the Civil Procedure Code. At the argument on 31.05.2023, learned President's Counsel for the plaintiff refined this question stating that the order of the District Court is not in compliance with the proviso to section 614(1) of the Civil Procedure Code. However, this was raised as an additional question of law.

Section 614 of the Civil Procedure Code reads as follows:

> *614(1) In any action under this Chapter, whether it be instituted by a husband or a wife, the wife may present a petition for alimony pending the action. Such petition shall be preferred and dealt with as of summary procedure, and the husband shall be made respondent therein; and the court, on being satisfied of the truth of the statements therein contained, may make such order on the*

husband for payment to the wife of alimony pending the action as it may deem just:

Provided that alimony pending the action shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

(2) A husband may present a petition for alimony pending the action. The provisions of the preceding subsection shall apply, mutatis mutandis, to such application.

(3) Where one of the spouses is not possessed of sufficient income or means to defray the cost of litigation, the court may at any stage of the action order the spouse who is possessed of sufficient income or means to pay to the other spouse such sum on account of costs as it considers reasonable.

It may be noted that subsections (2) and (3) above were introduced by the Civil Procedure (Amendment) Law, No. 20 of 1977.

Based on section 614(1), the argument of learned President's Counsel for the plaintiff (as morefully described in the post-argument written submissions) is two-fold:

(a) The defendant did not follow the summary procedure; and
(b) The order is not based on the net income of the plaintiff for the three years immediately preceding the date of the order.

Hence, it is argued that the order of the District Court and the judgment of the High Court are bad in law and should be set aside.

I must state that leave was not granted on (a) above although learned President's Counsel for the plaintiff has dedicated significant portion of his post-argument written submissions on that matter.

Let me now consider both the said arguments in turn.

Failure to follow summary procedure

In terms of section 614(1), the "petition shall be preferred and dealt with as of summary procedure". The summary procedure is set out in sections 373-391 of Chapter XXIV of the Civil Procedure Code.

In the instant case, admittedly, summary procedure was not followed although the application was filed by petition and affidavit before the District Court. After the plaintiff filed objections, the matter was fixed for inquiry. However, halfway through the inquiry, on 22.01.2009, the Court brought the matter of failure to adopt the summary procedure to the attention of the parties. Both parties consented to the procedure adopted and agreed to continue with the inquiry.

Learned President's Counsel for the plaintiff now argues that the parties cannot by consent follow a different procedure and the failure to follow the summary procedure renders the whole proceedings void *ab initio*. I have no hesitation in rejecting this argument.

If the Court has plenary jurisdiction to hear a case, a party who has acquiesced in the wrong procedure being adopted cannot later raise objections to the procedure once he realises that the order is against him. All objections to the procedure should be raised at the earliest opportunity before the trial Court and not in the appellate Court. Otherwise, such objections are deemed to have been waived.

In *Dabare v. Appuhamy* [1980] 2 Sri LR 54 the defendant sought dismissal of the plaintiff's action on *res judicata.* This was rejected by the

trial Court. On appeal, the contention of the plaintiff was that the dismissal of his former action was invalid as the Court had followed the wrong procedure, in that, instead of summary procedure, regular procedure had been followed. The Court of Appeal rejected this argument and allowed the appeal. The Court stated that notwithstanding that the wrong procedure had been followed, the order of dismissal made by the Court was valid since the Court had jurisdiction to hear and determine the action and the plaintiff did not take objection to the wrong procedure being followed at that time.

In the instant case, the parties have consented to the wrong procedure being adopted by signing the case record when they were represented by their lawyers. Therefore, the plaintiff is estopped from taking up that objection before this Court.

The relevancy of the income of the plaintiff for the three years immediately preceding the date of the order

Learned President's Counsel for the plaintiff argues that the impugned order delivered over eleven years after the application was filed, without any evidence being produced "*pertaining to the plaintiff's net income for the three years preceding the date of the impugned order*", is "*fatally bad and defective for non-compliance with the proviso to section 614*". His argument is that the documents marked by the defendant at the inquiry were all beyond three years from the date of the order and therefore could not have been taken into consideration in deciding the quantum of alimony. I find myself unable to agree with this argument.

The argument of learned President's Counsel presupposes that the proviso to section 614(1) imposes conditions upon a wife seeking alimony in a divorce action. It is not so. Prior to the Civil Procedure (Amendment) Law, No. 20 of 1977, in terms of section 614, only the wife, whether she

was the plaintiff or the defendant, could ask for alimony from the husband; *vice versa* was not possible. This proviso has been in effect since the beginning.

The proviso to section 614(1) is not against the wife but in favour of her. It does not impose any condition on her but rather facilitates her in obtaining a sufficient amount as alimony from her husband. What does this proviso say? It says alimony "*shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order*". This means, the alimony order **must exceed** one-fifth of the husband's **average** net income for the three years preceding the date of the order. This does not imply that the evidence related to income must be limited to the earnings for the three years immediately preceding the date of the order. If sufficient evidence has not been presented regarding the average net income of the husband for the three years next preceding the date of the order, the Court does not lack jurisdiction to make an order for alimony, but the applicant is not guaranteed a minimum amount.

In reference to the proviso to section 614(1), Dr. Shirani Ponnambalam in her book titled *Law and the Marriage Relationship in Sri Lanka*, 2nd Edition (1987), page 401 states:

> *When quantifying alimony pendente lite the Sri Lankan law, following early English law practice, ensures that the alimony awarded is in no case "less than one-fifth of the husband's average net income for the three years next preceding the date of the order". This rule has been abolished in the English law. See P.M. Bromley, Family Law (5th ed. London 1976) p.529, note 1.*

In the instant case, for instance, the plaintiff has stated in evidence that his monthly average net income was Rs. 75,000. If it was accepted by

Court, the Court should have ordered him to pay more than Rs. 15,000 as alimony to the wife, if the order was delivered within three years. Assuming the defendant claims that his income later decreased to Rs. 25,000, then he would still be required to pay more than Rs. 5,000 as alimony. Notably, the Rs. 15,000 and Rs. 5,000 mentioned above represent the minimum payment, not the maximum. The precise amount to be paid shall be determined by assessing the evidence led at the inquiry in its overall context.

The argument of learned President's Counsel for the plaintiff that the documents marked by the defendant are beyond three years from the date of the order and therefore could not have been taken into account in calculating the quantum of alimony is unacceptable. Those documents are not obnoxious to the proviso to section 614(1).

Although, at first glance, section 614 does not explicitly require the consideration of the financial status of the applicant-wife in ordering alimony, our Courts have consistently taken into account the financial status of the wife when determining the quantum of alimony. However, this does not mean that if the wife has some income, she must use it for litigation, and that in such circumstances, the Court lacks the power to order alimony against the husband. It is hard to lay down fixed criteria in the determination of the quantum of alimony pending action. The decision shall depend on the unique facts and circumstances of each case.

In *Jeffery v. Jeffery* [1949] HCA 28 at 581, the High Court of Australia stated:

> *It would be wrong to lay down a rule that as long as a wife had any means whatever she could not obtain an order for alimony pendente lite. She is not bound to exhaust the whole of a small capital in order*

> *to maintain herself during the pendency of a suit. Each case must be considered in all its circumstances and particularly with regard to the station in life and the financial position of each of the parties.*

In an alimony inquiry, the Court is not required to go into the merits of the main case. As S.N. Silva J. (as His Lordship then was) stated in *Edirippuli v. Wickramasinghe* [1995] 2 Sri LR 22 at 24:

> *The merits of the action and the question of matrimonial fault are not gone into at an inquiry into an application for alimony and costs made under Section 614. If the merits are gone into at this stage it would result in the question of matrimonial fault being determined prior to even the pleadings are completed. The only matters at issue in an application for alimony pendente lite are the need for financial support on the part of the applicant spouse, that stems from the lack of his or her income and income of the respondent spouse.*

In any event, the defendant could not lead evidence on the husband's income for the three years next preceding the date of the order, due to reasons beyond her control. The plaintiff prolonged the inquiry by filing various applications and appeals. The evidence at the inquiry had been led before several judges. When an inquiry spans a decade, this is not uncommon. Following the conclusion of the inquiry, there was a delay in appointing a judge to deliver the order. Ultimately, the order was delivered by a judge before whom no evidence was led. Can the defendant be found fault with for those matters? The answer should be in the negative. In such circumstances, the Court can invoke legal maxims such as *lex non cogit ad impossibilia* (the law does not compel the performance of what is impossible) and *actus curiae neminem gravabit* (the act of the Court shall prejudice no man) to prevent injustice to a party to the action.

In the case of *The Young Men's Buddhist Association v. Azeez and Another* [1995] 1 Sri LR 237, the leave to appeal application was filed before the Court of Appeal out of time. When this was raised before the Supreme Court, Kulatunga, J. (with the agreement of G.P.S. de Silva C.J. and Ramanathan J.) held at 241:

> *I am of the view that taking into consideration all the facts, including conditions of civil unrest which prevailed in the country and the fact that the judgment was delivered on a date other than the date which the Court had fixed for delivery of judgment, no lapse, fault or delay can be attributed to the plaintiff-appellant in filling the application for leave to appeal on 25.10.95; hence the principle "lex non cogit ad impossibilia" would apply, in addition to the principle "actus curiae neminem gravabit".*

The Supreme Court has reiterated this in several cases including *Gamaethige v. Siriwardena and Others* [1988] 1 Sri LR 384 at 402.

The plaintiff is a successful businessman. A large number of documents have been marked by the defendant through several witnesses to show the plaintiff's income. Unlike a person who draws a monthly fixed salary, it is not easy to prove someone else's business income.

It may be in that context, the Maintenance Act, No. 37 of 1999, shifts the burden to the respondent to show cause why the application for maintenance should not be allowed. Section 11(1) of the Maintenance Act reads as follows:

> *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:*

In the Supreme Court case of *Pushpa Rajani v. Sirisena* (SC/APPEAL/117/2010, SC Minutes of 08.05.2013) Wanasundera J. observed:

> *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.*

Her Ladyship then concluded:

> *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 instance.*

Section 614(1) is also to a similar effect. The procedure to be adopted is summary procedure where, upon issuance of order *nisi*, the husband is required to show cause against making it absolute.

It should be borne in mind that the order for alimony is a temporary order made until the dissolution of the marriage, and such order can also be varied based on a change of circumstances. Hence there is absolutely no necessity to have a long drawn out inquiry for alimony. It is unfortunate

that this inquiry has taken more than a decade due to various reasons, including intervening appeals preferred by the plaintiff, which, according to the defendant, were done to delay the finality of the alimony inquiry. As a general rule, alimony inquiries must be concluded as early as possible. If the Court thinks that the opposite party is adopting dilatory strategies to frustrate the early conclusion of the inquiry, the Court may, by invoking the inherent powers of the Court referred to in section 839 of the Civil Procedure Code, issue an interim order for alimony, inducing the parties to conclude the inquiry speedily. (cf. *Aslin Nona v. Peter Perera* (1945) 46 NLR 109)

Although no evidence had been led before the judge who wrote the alimony order, the order of the learned District Judge is a well-considered one. The learned District Judge has analysed all the documentary and oral evidence led at the inquiry. There is no necessity to repeat them in this judgment. In the course of the judgment, he has *inter alia* stated that notwithstanding the plaintiff is admittedly the owner of three business establishments, he has not given correct details of his income. The learned Judge has decided that, given the facts and circumstances of this case, he cannot accept the plaintiff's version that he earns only Rs. 75,000 as profits *per mensem*. Eventually, he has come to the following conclusion.

> 2003.09.19 සිට 2004.12.18 දක්වා මාස 51ක කාලයක් ඇතුලත පැමිණිලිකාර වගඋත්තරකරු විසින් ආනයනය කරන ලද භාණ්ඩවල වටිනාකම රු.126,396,394,842/- ක අගයක් ගන්නා අතර, ඒ සඳහා ගෙවන ලද බදු මුදල රු.108,651,570/- කි. ඒ අනුව ඒ සඳහා දැරූ සම්පූර්ණ පිරිවැය රු.235,046,412/- කි. ඒ අනුව මසක කාලයක් තුළ පැමිණිලිකාර වගඋත්තරකරු මෙරටට ආනයනය කරන ලද භාණ්ඩවල අගය රු.4,608,753.17/-ක අගයක් ගනී. වාර්ෂිකව පැමිණිලිකාර වගඋත්තරකරුගේ අලෙවි භාණ්ඩවල වටිනාකම රු.55,305,038/- කි. එකී මෙම වාර්ෂික ආදායමෙන් 10%ක ප්‍රමාණයක් ලාභ වශයෙන් උපයා ගත්තේ නම් පැමිණිලිකාර වග උත්තරකරුගේ වාර්ෂික ආදායම රු.55,30503/- කි. එම මුදලින් 50%ක මුදලක් ව්‍යාපාර නඩත්තු, සේවක වැටුප්

ආදිය වෙනුවෙන් වැයකළ ද, රු.27,65251/-ක මුදලක් ලාභ වශයෙන් පවතී. මෙම ගණනය කිරීම මෙරට සැපයුම්කරුවන්ගෙන් මිලට ගෙන විකිණීමෙන් උපයන ආදායම නොමැතිව වේ. ඒ අනුව මෙරට සැපයුම්කරුවන්ගේ භාණ්ඩ ලබාගෙන විකුණා ලාභ ලබාගැනීම ද සැලකිල්ලට ගතහොත් මසකට රුපියල් දෙලක්ෂ පනස්දහසකට වඩා වැඩි ආදායමක් පැමිණිලිකාර වගඋත්තරකරු උපයා ගන්නා බව පැහැදිලි වේ. 614 වගන්තිය අනුව මුදල තීරණය කිරීමේදී එකී වගඋත්තරකාර කාලත්‍රයාගේ පසුගිය වර්ෂ තුනේ සාමාන්‍ය ආදායමේ 1/5 කට අඩු නොවිය යුතු වේ. ඒ අනුව මාසිකව විත්තිකාර පෙත්සම්කාරියට රු.60,000/-ක නඩු තීන්දුව තෙක් දික්කසාද දීමනාවක් ලබාදිය යුතු බවට නියම කරමි.

His conclusion is that the plaintiff earns more than Rs. 250,000 per month, and therefore, the plaintiff should pay Rs. 60,000 per month as alimony to the defendant. Despite the defendant seeking alimony and costs of litigation separately, the learned District Judge has not ordered costs of litigation. It is assumed that the costs of litigation are included in this, although alimony *pendente lite* (governed by section 614(1) of the Civil Procedure Code) and costs of litigation (governed by section 614(3) of the Civil Procedure Code) are regulated by two separate provisions.

It is the submission of learned President's Counsel for the plaintiff that the District Judge's order is based on assumptions. I cannot agree. The Court needs to arrive at findings on the evidence led at the inquiry. Such findings are not based on assumptions. Given the facts and circumstances of this case, I am of the view that the amount ordered is not excessive.

Conclusion

I answer the two questions of law in favour of the defendant.

The order of the District Court pronounced on 04.05.2017 and the judgment of the High Court of Civil Appeal dated 11.01.2018 are affirmed.

The order of the District Court should take effect from the date of the alimony application.

The appeal is dismissed with costs.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court