

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

H.M. Chandrakanthi,  
Kohombagahawatta,  
Badulla golla,  
Medegama.  
Applicant

**SC APPEAL NO: SC/APPEAL/127/2019**

**SC LA NO: SC/SPL/LA/75/2018**

**HC NO: UP/HC/02/2017 APPEAL**

**BIBILE MC NO: 26361**

Vs.

K.M. Gamini Kumara,  
Lununeligahawatta,  
Helearawa,  
Pitadeniya,  
Medegama.  
Respondent

AND BETWEEN

K.M. Gamini Kumara,  
Lununeligahawatta,  
Helearawa,  
Pitadeniya,  
Medegama.  
Respondent-Appellant

Vs.

H.M. Chandrakanthi,  
Kohombagahawatta,  
Badulla golla,  
Medegama.  
Applicant-Respondent

AND NOW BETWEEN

H.M. Chandrakanthi,  
Kohombagahawatta,  
Badulla golla,  
Medegama.  
Applicant-Respondent-Appellant

Vs.

K.M. Gamini Kumara,  
Lununeligahawatta,  
Helearawa,  
Pitadeniya,  
Medegama.  
Respondent-Appellant-Respondent

Before: P. Padman Surasena, J.  
A.H.M.D. Nawaz, J.  
Mahinda Samayawardhena, J.

Counsel: Nuwan Bopage with Chathura Weththasinghe for  
the Petitioner-Respondent-Appellant.

Niroshan Mihindukulasuriya with Roshini  
Fernando for the Respondent-Appellant-  
Respondent.

Argued on: 31.03.2021

Decided on: 20.05.2022

Mahinda Samayawardhena, J.

The Applicant wife instituted these proceedings by application dated 25.08.2014 in the Magistrate's Court of Bibile seeking maintenance from the Respondent husband under section 2(1) of the Maintenance Act, No. 37 of 1999, on the basis that the Respondent expelled her from the matrimonial home around 9.00 p.m. on 30.07.2014 and refused to maintain her thereafter. The Applicant did not state the reason for this incident in her application. However, at the inquiry before the Magistrate's Court, it was revealed that the said incident took place due to adultery committed by her in the matrimonial home with a person named Guneris. The Respondent had found both of them together on that specific day. As seen from the inquiry notes V6 of the female Sub Inspector of the Medegama police station (which was not marked subject to proof), the Applicant and Guneris admitted at the inquiry that they had been continuing with an adulterous relationship for about four months leading up to the aforesaid incident. This is admissible evidence. (*Punchi Banda v. Seelawathie* [1986] 2 Sri LR 414)

After the inquiry into the Applicant's maintenance application, the learned Magistrate held that the allegation of adultery had not been proved to a high degree of proof. Hence, the Respondent was ordered to pay maintenance to the Applicant at a rate of Rs. 7,000 per month.

On appeal, the High Court set aside the order of the Magistrate's Court on the basis that the Applicant was living in adultery at the time of filing the maintenance application and was therefore disentitled to maintenance in terms of the proviso to section 2(1) of the Maintenance Act.

Section 2(1) of the Maintenance Act with the proviso reads as follows:

*2(1) 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.*

Being dissatisfied with the Judgment of the High Court, the Applicant has now come before this Court on the basis that the

High Court misdirected itself in its interpretation of “living in adultery” contained in the proviso to section 2(1) of the Maintenance Act. This is the question of law upon which leave to appeal was granted by this Court.

Learned counsel for the Applicant does not canvass the finding of the High Court that the Applicant committed adultery with Guneris on 30.07.2014 and for approximately four months before the said date (as admitted at the police inquiry). His argument is that, even assuming this is correct, the Applicant is not disqualified from claiming maintenance from the Respondent as there is no evidence that she was “living in adultery” (as opposed to “committing adultery”) at the time of filing the application, as contemplated in the proviso to section 2(1) of the Maintenance Act.

*Black’s Law Dictionary* (11<sup>th</sup> Edition) at page 64 defines adultery as “voluntary sexual intercourse between a married person and someone other than the person’s spouse.” The proof of “living in adultery” does not mean proving the act of sexual intercourse by direct evidence.

I am sensitive to the fact that the proviso to section 2(1) states: “no such order shall be made if the Applicant spouse is living in adultery”. It does not state: “no such order shall be made if the Applicant spouse committed adultery”. It states “is living in adultery”, not “was living in adultery” or “had been living in adultery”. It means the Applicant at the time of making the application was cohabiting with a person other than his or her spouse or “living a life of promiscuous immorality” as a

continuing act, as distinguished from one or two lapses of virtue. *Vide Wijesinghe v. Josi Nona (1936) 38 NLR 375, Pushpawathy v. Santhirasegarampillai (1971) 75 NLR 353.*

However, in order to prove “living in adultery”, the Respondent spouse need not prove that the Applicant was living in adultery on the date of filing the application. The words “living in adultery” means the Applicant shall be living in adultery at or about the time of filing the application. No rule of thumb can be laid down in deciding what constitutes “at or about the time”. It shall be decided on the unique facts and circumstances of each individual case.

In the instant case, the Applicant was found with Guneris at about 8.00 p.m. on 30.07.2014 in the matrimonial home. At the police inquiry held on the following day, it was admitted that they had been continuing with the adulterous relationship for about four months before this incident. Thereafter, the Applicant filed the application seeking maintenance on 25.08.2014 – less than one month after the incident. In my view, the Applicant was living in adultery at or about the time of filing the application for maintenance.

The facts in *Weerasinghe v. Renuka [2016] 1 Sri LR 57* – the Judgment heavily relied on by learned counsel for the Applicant – are distinguishable. In the said case, the Applicant wife filed a maintenance case against the Respondent husband after the latter left the matrimonial home. The Respondent refused to pay maintenance on the basis that there had been previous incidents of adultery committed by the Applicant with her

brother-in-law. The Magistrate's Court held with the Respondent but the High Court set aside the order. On appeal, this Court held that the said incidents of adulterous conduct on the part of the Applicant with her brother-in-law had taken place "long before the separation of the parties", and the parties had been living together after the said incidents until they later separated over a "minor incident" unrelated to adultery, and therefore the Applicant was not living in adultery "at or about the time the application [was] made". The facts in the instant case are different.

The Court shall be able to depart from the plain meaning of statutory text when its literal application would lead to absurdity. If "living in adultery" is strictly interpreted to mean that the Applicant shall be living in adultery on the date of or at the time of filing the application, an astute Applicant living in adultery can temporarily cease such adulterous cohabitation in order to bring his or her application within the ambit of section 2 of the Maintenance Act. This could never have been the intention of the legislature. Proximity in time between living in adultery and filing a maintenance application is a question of fact. Each case shall be treated independently.

In the instant case, the High Court has not misdirected itself in its interpretation of "living in adultery" in the proviso to section 2(1) of the Maintenance Act. Hence I answer the question of law on which leave to appeal was granted against the Applicant.

I affirm the Judgment of the High Court and dismiss the appeal but without costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.

I agree.

Judge of the Supreme Court