IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to appeal in terms of Section 14 (2) of the Maintenance Act No. 37 of 1999 as amended read with Article 127 of the Constitution.

Dona Ahangama Anoma Kanthi Liyanage,

Wijaya Mahal, Nikatenna,

Galagedara.

APPLICANT

SC Appeal 126/2014

SC Spl. LA Application No. 74/14

HC No. AP 13/2011

MC Kandy No. M 5240

Vs

Chandana Thilaka Karunapala,

No. 250D, Kandekumbura,

Galagedara.

RESPONDENT

AND BETWEEN

Dona Ahangama Anoma Kanthi Liyanage,

Wijaya Mahal, Nikatenna,

Galagedara.

APPLICANT-APELLANT

Vs

Chandana Thilaka Karunapala,

No. 250D, Kandekumbura,

Galagedara.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Chandana Thilaka Karunapala,

No. 250D, Kandekumbura,

Galagedara.

RESPONDENT-RESPONDENT-PETITIONER

Vs

Dona Ahangama Anoma Kanthi Liyanage,

Wijaya Mahal, Nikatenna,

Galagedara.

APPLICANT-APELLANT-RESPONDENT

BEFORE: Buwaneka Aluwihare PC J.

Vijith K. Malalgoda PC J.

Murdu N. B. Fernando PC J.

COUNSEL: Sajeevi Siriwardhena for the Respondent-Respondent-Appellant.

Dr. Jayampathi Wickremaratne, PC with Pubudini Wickremaratne for the Applicant- Appellant-Respondent.

ARGUED ON: 12/10/2018

DECIDED ON: 15/11/2019

Aluwihare PC J.

The instant Appeal arises from an order relating to an application for the payment of maintenance to a spouse. The Applicant-Appellant-Respondent (hereinafter sometimes also referred to as "the Applicant") made an application to the Magistrate's Court for maintenance for the child born out of her marriage to the Respondent-Respondent-Petitioner-Appellant (hereinafter sometimes also referred to as "the Respondent-Appellant") and for herself. On 28th March 2008, When the Maintenance Application No. M-3938 was taken up before the Court, the parties had entered into a settlement. The settlement was to the effect that the Respondent-Appellant would pay Rs. 15,000/- as maintenance for the child, with Rs. 3,000/- out of the said amount to be deposited in the Bank Account of the child and the remainder to be handed over to the Applicant. Consequent to the said settlement the Applicant had withdrawn the application for Maintenance for herself. Four months after the aforesaid settlement was entered, on 28th July 2008 the Applicant, by a fresh application (Application No.M-5240) sought to obtain maintenance for herself in a sum of Rs. 25,000/-. The learned Magistrate, by order dated 18th February 2011, held that the Applicant is a spouse who *"is capable of maintaining herself in terms of Section 2 (1) of the Maintenance Act"* and proceeded to dismiss her application for maintenance.

Aggrieved by the said order, the Applicant appealed to the Provincial High Court on the grounds that the Learned Magistrate had wrongfully interpreted, both the Section 2 of the Maintenance Act and the principles of law relating to the granting of maintenance under the Act. The High Court by its order dated 28th March 2014, ordered the Respondent-Appellant to pay Rs. 20,000/- as maintenance to the Applicant with effect from 28th July 2008, the date on which the maintenance application was originally filed in the Magistrate's Court. The quantification of compensation was based on the consideration that the Respondent required Rs. 10,000/- to pay the monthly rent for the house she and the child were living in and that a further Rs. 10,000/- would be needed for the Applicant to maintain the same standard of life that she maintained while living with the Respondent-Appellant. Aggrieved, the Respondent-Appellant moved this Court seeking to set aside the decision of the Provincial High Court.

Leave to appeal was granted on the following questions of law;

1. Did the High Court err in law by reversing the order of the Learned Magistrate on facts, when the analysis of the facts by the Learned Magistrate was not perverse?
2. Did the High Court err in law by failing to consider that the Respondent **(the Applicant)** had failed to adhere to new grounds for claiming maintenance after the dismissal of an earlier application for maintenance bearing No. M-3938?
3. Did the High Court err in law in failing to consider the capacity of the Respondent **(the Applicant)** to earn her living and the Petitioner's means? (The emphasis is mine.)

In answering the questions, which this court is called upon to do, consideration of Sections 2 of the Maintenance Act (hereinafter also referred to as the "Act") would be necessary. **Section 2 (1) of the Maintenance Act No. 37 of 1990** 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."

Hence, by the operation of the proviso to section 2 (1), even in instances where an Applicant had established that the spouse is unable to maintain herself or himself, the Applicant would not be entitled to a favourable order of maintenance, if;

(a) the Applicant was living in adultery;
or

(b) the Applicant and the Respondent were living separately by mutual consent;

In terms of the provisions of the Act, in every application made for maintenance, there is a primary duty cast on the Magistrate to address his or her mind to the statutory disqualifications referred to above before making an order either in granting or refusing maintenance. Whilst in relation to "(a)" above, the Respondent may have to adduce material to satisfy the court that the spouse (the applicant) is living in adultery, in relation to (b), however, the policy of the Maintenance Act demands that the Magistrate plays a pro- active role rather than a passive one in arriving at his decision.

The first question of law on which leave was granted is, whether the High Court erred in law by reversing the order of the Learned Magistrate on facts, where, it was contended that, the analysis of the facts by the Learned Magistrate cannot be said perverse.

The Magistrate in refusing the application of the Applicant for maintenance, had observed that the Applicant has not submitted any evidence to substantiate the allegation that the Respondent- Appellant had either ill-treated her or he committed adultery. "ඉල්ලුම්කාරිය සිය ඉල්ලුම් පත්‍රයෙන් වගඋත්තරකරු කෲර සහගත ලෙස තමාට සැලකූ බවත් ඔහුගේ අනියම් ප්‍රේම සම්බන්ධතාවයක් නිසාත් තමා වගඋත්තරකරුගෙන් වෙන් වී ජීවත් වන බව ප්‍රකාශ කළත් අධිකරණයේ සාක්ෂි දෙමින් එකී කරුණු 2 සම්බන්ධයෙන් කිසිදු සාක්ෂියක් ඉදිරිපත් කර නොමැත." The Magistrate has further observed that the Applicant is living separately from the Respondent-Appellant due to a minor disagreement over where they should reside. Therefore, the Magistrate has concluded that she has been living separately since 2003 for reasons not revealed to the Court and that the Respondent-Appellant has not refused or neglected to pay the maintenance ordered under case No. M-3938 (in respect of the child).

The Magistrate made a fundamental error when she concluded that the Applicant had not placed **any evidence** on the aspect of "ill treatment" or "adultery", the main reasons the Applicant had asserted, for living separately. The learned Magistrate had overlooked the fact that the Applicant had filed an affidavit along with the Petition in compliance with Section 11 of the Act and it is trite law that the contents sworn to, in an affidavit, is evidence.

In terms of Section 11 of the Act, the Magistrate is required to issue summons on the person against whom the Application is made, **only in instances where the Magistrate is satisfied that the facts set out in the affidavit are sufficient**. In the instant case, the Magistrate having considered the affidavit of the Applicant, had thought it fit to issue summons on the Respondent-Appellant.

In terms of Section 11, once summons is issued, the burden shifts to the person against whom the Application is made, **to appear and show cause.**

The procedure that should be adopted by the Magistrate when deciding to issue summons, is succinctly elaborated by Justice R.B. Ranarjah in an article, under the

title "Maintenance". His Lordship states that, *"The procedure a Magistrate should follow upon the Defendant* ***(Respondent)*** *appearing on summons is, when he admits marriage to the Applicant, to inquire from him whether he is inviting the Applicant to live with him on his undertaking to maintain her. Where the Defendant* ***(Respondent)*** *offers to do so, the Magistrate should then inquire from the Applicant whether she is prepared to accept the Defendant's offer. If the reply is in the affirmative, the court should do whatever possible for a successful reconciliation. Where the Applicant refuses to accept the* ***offer of the husband,*** *the Magistrate on the evidence placed before the court, consider the reasons for the refusal given by her."*

In the instant case no such *offer* did forth come from the Respondent- Appellant.

In paragraph 7 of the affidavit of the Applicant, she had sworn to the effect that: *"Due to acts of cruelty and illicit love affair on the part of the Respondent- I live separately".* Hence it would be reasonable to conclude that, when it was decided to issue summons on the Appellant Respondent, the said decision was taken only upon the magistrate having formed the view, that the facts set out in the affidavit of the Applicant were sufficient to have a summons issued.

In terms of the Proviso to Section 2 of the Act, the Magistrate only needs to be satisfied that the Applicant and the Respondent-Appellant was not living separately by **'mutual consent'**. The old Maintenance Ordinance, which was repealed when the new Act came into operation in 1999, however, carried an additional disqualification in instances where the applicant (wife) **without sufficient reasons** refuses to live with her husband. One of the grounds for the magistrate to reject the application for maintenance was that the Applicant was living separately due to "minor disagreements" over the house they were living in. Under the provisions of the Act, the nature or the gravity of the disagreement for living separately is immaterial as the disqualification for maintenance under Section 2 (1) of the Act has to stem only from a separation that is '*mutual*'.

The Respondent-Appellant had given evidence under oath at the Inquiry but had not refuted the assertion referred to in paragraph 7 of the Applicant's affidavit referred to above, nor has he, in the course of his testimony, challenged the assertions made by the Applicant and as such, the said assertions made by the Applicant remain unassailed. Furthermore, under cross examination, the Applicant had stated that she was engaged in business prior to her marriage and that she transferred the business to the Appellant Respondent. After the business was transferred, the Appellant Respondent did not allow her to attend to any matters relating to the business.

As observed earlier as well, when considering the scheme of granting maintenance in terms of the provisions of the Act, other than the two instances referred to in the Act where if the spouse is disqualified from obtaining maintenance, the Magistrate is vested with wide discretion in granting maintenance to a spouse.

The Magistrates, however, should exercise caution in drawing inferences and should avoid doing so, in the absence of any material to arrive at conclusions. In the instant case, the learned Magistrate in her order has also misdirected herself by holding that, the Applicant could have engaged in some employment by leaving the child with her mother. However, no evidence had been led at the inquiry with regard to the capacity of the Applicant's mother to look after the child. The age of the Applicant's mother, her condition of health, her willingness to take the additional responsibility to look after a young girl are matters the court ought to have considered before drawing such an inference. Bereft of any such material, I do not think the Magistrate was justified in drawing the inference that the child could have been entrusted to the Applicant's mother, to be looked after. The High Court Judge has correctly observed that the Magistrate has also erred in stating that the Applicant's mother or her sisters could take care of the child while the Applicant engages in some form of employment.

Another matter that ought to have been considered was, the fact that the Applicant is a single parent who was encumbered with the duties of a father as well as those of a mother in bringing up a young girl.

The fact that both the Applicant and the child were suffering from illnesses had been conceded by the Respondent-Appellant. Given her ill health and the necessity of looking after the child after school and attending to matters that are ancillary to her education in the best interests of the child, the High Court has decided that the Applicant is unable to engage in full-time employment and therefore the Respondent-Appellant is liable under the provisions of the Act to pay maintenance.

The learned Magistrate had failed to consider any of these matters before refusing the Application of the Applicant for maintenance and I am of the view that the learned High Court judge was justified in reversing the order of the learned Magistrate and the order of the learned High Court Judge cannot be considered as perverse.

The second question of law that the Court is called upon to answer is whether, after the dismissal of the earlier application for maintenance No. M-3938, the Applicant could have maintained the present action without adducing evidence with regard to change of circumstances. It was contended on behalf of the Respondent-Appellant that the Applicant withdrew the earlier application for maintenance on her behalf (Case No. M3938) and that the Applicant pleaded similar grounds as in Case No. M3938 in her subsequent maintenance application, which is germane to the case before us.

With regard to an application for maintenance, the prerogative is with the spouse in deciding as to whether the spouse wishes to avail herself of the provisions of the Act to obtain maintenance. It must be noted that the Applicant, initially having asked for an order for maintenance for the child as well as for herself, did not

pursue the application for maintenance on her behalf in Case No. M3938 when the Respondent-Appellant agreed to pay maintenance for their child.

Thus, the issue is, in view of the withdrawal of the initial application for maintenance, whether the Applicant could have filed a fresh application subsequently. It was contended on behalf of the Respondent-Appellant that a fresh application can only be permitted if new grounds are averred. Although the learned Counsel for the Appellant-Respondent relied on the provision embodied in Section 8, the provisions of the Act, however, do not stipulate such a restriction. In terms of the said provision (Section 8), the Magistrate is empowered to make an alteration in the allowance already ordered, upon **proof of a change in the circumstances**.

As held in the case of **Anna Perera v Emaliano Nonis and Justina v Arman 12 NLR 263**, the policy of the then Maintenance Ordinance was that applications for maintenance should not be disposed of otherwise than upon adjudication on the merits. As referred to earlier, M-3938 was disposed of without adjudicating on the merits. On the other hand, it is the prerogative of the applicant to decide as to whether maintenance should be asked for and if so when.

The learned counsel for the Respondent- Appellant drew the attention of the Court to **Section 8 of the Maintenance Act** which states that; ***"On the application of any person receiving or ordered to pay a monthly allowance under the provisions of this Act and on proof of a change in the circumstances of any person*** *for whose benefit or against whom an order for maintenance has been made under this Act, the Magistrate may either cancel such order or make such alteration in the allowance ordered as he deems fit: Provided that such cancellation or alteration shall take effect from the date on which the application for cancellation or alteration was made to such Court, unless the Magistrate for good reasons to be recorded, orders otherwise."* Accordingly, it was argued that the burden of establishing new and changed circumstances, is on the Applicant.

The Respondent- Appellant's contention that where a change of circumstances has not been adduced, the Applicant is barred from obtaining maintenance by a fresh application on the principle of *res judicata,* in our view, is not the correct position of the law in relation to application for maintenance.

This position was elaborated in the case of **Ranjith v Piyaseeli (2006) 2 SLR 325)**

The Court held;

> *"Provisions of Sections 34, 207 and 406 of the Civil Procedure Code, which embody* ***the principles of Res Judicata will not apply to maintenance proceedings.***
>
> *The Maintenance Act does not contemplate decrees. It deals with orders. Therefore, an order made under the Maintenance Act is not a decree that comes under the expression all "decrees" in section 207. Unlike in section 188 of the Code, the Maintenance Act does not provide that after the judgment is pronounced, a decree be drawn up by the court.*

In application M-3938, the Applicant has not referred to any expenses she had to incur for medication and has stated that she is living with her child at her parents' house. However, the Magistrate has observed that in application M-5240 (marked 'P1') she has stated that she is incurring more than Rs. 4,500/- as medical expenses for herself and is currently living in a rented house (at Paragraph 8 of 'P1'), thereby indicating a change of circumstances. Considering the above, this Court is of the view that the second question on which leave was granted also should be answered in the negative.

In any event Section 8 of the Maintenance Act has no application here as it can only be invoked by *any person receiving or ordered to pay a monthly allowance under the provisions of this Act.* The applicant was not *a person receiving a monthly allowance* as referred to in the provision of the Law.

The final question is whether the High Court erred in law in failing to consider the capacity of the Applicant to earn her living and the sufficient means of the Respondent-Appellant.

The learned Counsel for the Respondent-Appellant drew the attention of this court to the principles laid down in the case of **Fonseka v Candappa 1988 2 SLLR 11.**It has been held that *"It becomes a question of law, where the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or the conclusions rest mainly on erroneous considerations or is not supported by sufficient evidence."*

This court is also mindful of the decision in the case of **Collettes Limited v Bank of Ceylon 1984 2 SLLR 253** where the special circumstances when a higher Court has the jurisdiction to revise the findings of fact of a lower Court were recognized. It was observed that ordinarily, with regard to a finding of a lower Court, a higher Court will not "*… interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may, but is under a duty to examine the supporting evidence and reverse the findings."*

Bearing in mind the principles laid down in the cases referred to above, I now proceed to consider whether the High Court erred in law in the considerations it made regarding the Applicant's capacity to earn a living and the Respondent-Appellant's means.

The High Court has observed that although the Respondent-Appellant, has conceded that he is earning an income of Rs. 50,000/-. (Page 17 of the proceedings of 08 March 2010 before the Magistrate) he had subsequently (on 07 June 2010)

stated that he has lost employment due to Tandon Lanka Pvt. Ltd. where he was employed being closed down. The learned Magistrate had been of the opinion that even though he has lost his employment, as a mechanical engineer he would have no difficulty finding new employment. In fact, he had admitted in evidence, that he has the potential to find work. According to his evidence, he had been involved in developing 'memory chips' for computers. It is common knowledge that there is a great demand for experts in the field of Information Technology (IT) in Sri Lanka, and the learned Magistrate, in my view, was justified in drawing such an inference in terms of Section 112 of the Evidence Ordinance. The Applicant in her evidence had stated that the Respondent-Appellant does private work during his free time in repairing computers and makes an income of about Rs. 100,000/- a month. The Respondent-Appellant, however, has denied that he earns such an income.

A reading of Section 2 (1) shows that the Act contemplates the payment of maintenance by a spouse who has 'sufficient means'. It is sufficient that if the Respondent spouse has some mode of income or has funds at his disposal to pay maintenance to the Applicant spouse, without having to forgo funds necessary for his expenses. Going by the evidence placed at the inquiry, if the Applicant is to be believed, the Respondent-Appellant had been earning a considerable sum through computer repairs and it appears that he is in a position to pay the sum of Rs. 20,000/- ordered by the High Court, and still be left with sufficient means to provide for himself at the same time. It is also pertinent to note that even though the Respondent-Appellant had stated that he lost employment, he has not made any application declaring a difficulty to pay maintenance for the child, which he could have done in terms of Section 8 of the Act, if he had lost his income.

On whom does the burden of proof lie, regarding the 'sufficient means' of the Respondent spouse, is another relevant consideration when answering the third question of law. I wish to cite with approval, the observation made in relation to Section 11 of the Act in the case of **Ruhunuge Sirisena v Hewa Kankanamage**

Pushpa Rajani SC Appeal No 117/2010 SC Minutes, 08. 05. 2013 Their Lordships held that *"…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 the instant case, refusal by the Magistrate to grant maintenance to the Applicant was not because the Respondent-Appellant had no capacity to pay, but on the basis that the Applicant is a healthy person who had the capacity and possessed the requisite experience to engage in a business and therefore 'not a person who is unable to maintain herself' in terms of the Act.

The learned Magistrate in fact had rejected the assertion of the Respondent-Appellant that he was not employed. "වග උත්තරකරු ඉංජිනේරු උපාධියක් ලබාගෙන ඇති උගත් අයෙක් වන අතර එකී ආයතනය වසා දැමීම නිසා දැනට රැකියාවක් නොකරන්නේය යනුවෙන් කරනු ලබන තර්කය පිළිගත නොහැක." (Page 8 of the Order) Therefore, even though the High Court has not referred to the loss of employment of the Respondent-Appellant nor his income through computer repairs, upon considering the evidence adduced regarding the financial situation of the Respondent-Appellant, I see no reason to alter the order to pay Rs. 20,000/- made by the High Court. It is to be noted that both the Applicant and the child were living in rented premises at a monthly rent of Rs.10, 000/-. It is also to be noted that not only the Applicant, but the child also needs decent living space for herself as well.

The learned High Court Judge had weighed a number of facts admitted in evidence in deciding whether the Applicant had the capacity to earn a living. The Applicant being compelled to stay with the child and having to attend to her various needs, primarily her educational pursuits and matters attendant to it, were held as justifiable reasons for the Applicant's inability to engage in any employment. Therefore, there was no failure on the part of the learned High Court Judge to consider the Applicant's capacity to earn an income or to be gainfully employed.

In view of the above, the Court is of the view that the third question on which leave was granted also should be answered in the negative.

Accordingly, the Appeal is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MURDU N. B. FERNANDO PC

I agree

JUDGE OF THE SUPREME COURT