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

In the matter of an Appeal in terms of section 14 (2) of the Maintenance Act No. 37 of 1999 with leave of the Provincial High Court

Kudaanthonige Rasika Damayanthi
No. 106, FC02 Yaya 18,
Agunakolapelessa.

Applicant

SC Appeal 151/2017

Provincial High Court Tangalle
Case No. 01/ 2016
MC/ Agunakolapelessa Case No. 9731

Vs,

Hewa Walimunige Gamini
Yaya 15, D3 Ela,
Hakmanagedara, Yakawala,
Agunakolapelessa.

Respondent

And then between

Kudaanthonige Rasika Damayanthi
No. 106, FC02 Yaya 18,
Agunakolapelessa

Applicant-Appellant

Vs,

Hewa Walimunige Gamini
Yaya 15, D3 Ela,
Hakmanagedara, Yakawala,
Agunakolapelessa.

Respondent-Respondent

And Now between

Hewa Walimunige Gamini
Yaya 15, D3 Ela,
Hakmanagedara, Yakawala,
Agunakolapelessa.

Respondent-Respondent- Appellant

Vs,

Kudaanthonige Rasika Damayanthi
No. 106, FC02 Yaya 18,
Agunakolapelessa

Applicant-Appellant-Respondent

Before: **Justice Vijith K. Malalgoda PC**
Justice P. Padman Surasena
Justice E.A.G.R. Amarasekara

Counsel: Widura Ranawaka for the Respondent-Respondent-Appellant

W. Dayaratne, PC with Ms. R. Jayawarene for the Applicant-Appellant-Respondent

Argued on: 16.12.2019

Decided on: 11.03.2020

Vijith K. Malalgoda PC J

Respondent-Respondent-Appellant (hereinafter referred to as the Respondent-Appellant) before this court had filed the instant appeal with leave obtained from the Provincial High Court of Tangalle under section 14 (2) of the Maintenance Act No 37 of 1999 on the following questions of law,

1) Did the learned High Court Judge err in deciding the required level of burden of proof with regard to the income of the applicant when making a maintenance order under section 2 (1) of the Maintenance Ordinance?
2) Did the learned High Court Judge err when she had only considered the amount referred to as the Appellant's monthly income, when deciding the monthly maintenance to the Applicant-Respondent?
3) Has the Applicant refused to live with the Appellant as required under section 2 (1) of the Maintenance Ordinance?
4) Has the learned High Court Judge failed to appreciate the correct income and the capacity of the Respondent-Appellant to pay the maintenance under section 2 (1) of the Maintenance Ordinance?
5) Did the learned High Court Judge err in law when she conclude that the Respondent-Appellant had to establish his income?
6) Did the learned High Court Judge err in deciding that it is the duty of the Respondent-Appellant to establish his income when considering the provisions in section 102 and 103 of the Evidence Ordinance?

As revealed before this court, the Applicant-Appellant-Respondent (hereinafter referred to as Applicant-Respondent) had commenced proceedings before the Magistrate's Court of Angunakolapelessa under the provisions of the Maintenance Act No 37 of 1999 for obtaining maintenance for herself and her 5 years old child. During the inquiry before the Magistrate, the Applicant-Respondent, her eldest sister as well as her eldest daughter had given evidence for the Applicant-Respondent. At the conclusion of the inquiry the learned Magistrate had dismissed her application and refused granting any maintenance both to the Applicant and her five years old child.

Being dissatisfied with the said order of the learned Magistrate dated 24.11.2015, the Applicant-Respondent had preferred an appeal to the Provincial High Court of the Southern Province Holden in Tangalle.

In consideration of the said appeal, the learned High Court Judge by her order dated 08.05.2017, had allowed the appeal and granted maintenance in sum of Rs. 10,000/- with regard to the child and Rs. 5000/- to the mother (Applicant-Respondent) and ordered the effective date as 24.11.2015 for the maintenance order.

The Respondent-Appellant being dissatisfied with the said order had moved for leave under section 14 (2) of the Maintenance Ordinance on the questions of law referred to above.

However, during the appeal before this court, the learned counsel who represented the Respondent-Appellant agreed to restrict his appeal to two questions of law contained in sub paragraphs (1) and (4) which reads as follows;

1). Did the learned High Court Judge err in deciding the required level of burden of proof with regard to the income of the Applicant when making a maintenance order under section 2 (1) of the Maintenance Ordinance

4) Has the learned High Court Judge failed to appreciate the correct income and the capacity of the Respondent-Appellant to pay the maintenance under section 2 (1) of the Maintenance Ordinance

As observed by this court the entire case for the Appellant and the Respondent relied upon the provisions of sections 2 (1), 2 (2) of the Maintenance Act No. 37 of 1999 which reads as follows:

Section 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.

Section 2 (2);

> Where a parent having sufficient means neglects or refuses to maintain his or her child 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 refusal, order such parent to make a monthly allowance for the maintenance of such child at such monthly rate the Magistrate thinks fit, having regard to the income of the parents and the means and circumstances of the child.

When going through the provisions referred to above, it is clear that the legislature had expected the Magistrate who acts under the above provision, when considering an application before him for maintenance of a spouse and/or a child, to satisfy himself

a) With regard to the spouse whether he or she is unable to maintain him or herself, proof of such neglect or unreasonable refusal, such monthly rate as the Magistrate thinks fit having regard to the income of such person, and means and circumstances of such spouse,
b) With regard to the child whether the child is unable to maintain him or herself, such monthly rate the Magistrate thinks fit having regard to the income of the parents and the means and circumstances of the child,

when ordering maintenance against the errant spouse or the parent

In addition to the above requirement, it is further observed that there is a general requirement under section 2 of the Maintenance Ordinance that, "such person against whom the maintenance order is made should have sufficient means" and then neglects to maintain the spouse or the child as the case may be.

However, the legal provisions with regard to the awarding of maintenance to the wife prior to 1999 was not identical to the present legal provisions referred to above. The Maintenance Act No. 37 of 1999 was enacted by parliament in the year 1999 and came in to effect from 22nd October 1999. The Maintenance Ordinance which amended the law relating to vagrants came in to effect on 31st December 1889 by Ordinance 19 of 1889 which was subsequently amended by Ordinance 13 of 1925 and Act No. 2 of 1971 and 19 of 1972.

Section 2 of the said Ordinance (as amended) which provided for the maintenance for wife as well as children (legitimate or illegitimate) reads as follows;

> "If any persons having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the Judge of the family Court may,

> upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, as the Judge of the Family Court thinks fit, having regard to the income of the defendant and the means and circumstance of the Applicant or such child and to pay the same to such person as the Judge of the Family Court may from time to time direct. Such allowance shall be payable from the date on which the application for maintenance is made".

When awarding maintenance, almost an identical question of law was raised from time to time, "whether a married woman having sufficient means of her own is entitled to claim maintenance from her husband even under the said Ordinance."

This matter was once again raised in the case of ***Sivasamy V. Rasiah (1943) 44 NLR 241*** and a divisional bench presided by *Soertsz SPJ* was nominated, since there was a difference of opinion on this issue.

In this case, the two contrary views taken by *Macdonell CJ* in ***Silva V. Senaratne (1931) 33 NLR 90*** purports to follow an old case ***Carder Umma v. Calendran (1863- 1868) Ram 141*** which was based on the old Vagrant's Ordinance, and view taken by *Wood Renton CJ* in ***Goonewardene v. Abeywickreme (1914) 17 NLR 450*** was considered by *Soertsz SPJ*.

As observed by *Soertsz SPJ*, the view taken by *Wood Renton CJ* was not considered in his Judgment by *Macdonell CJ*. However as observed by *Soertsz SPJ*, one of the main issues to be considered was the ambiguity in the use of the word "itself" in section 2 of the Maintenance Ordinance.

Whilst observing the view taken by *Wood Renton CJ* in ***Goonewardene v. Abeywickreme***, and the provisions in section 2 and 10 of the Maintenance Ordinance, *Soertsz SPJ* had resolved the ambiguity in the following terms,

> "The first question that arises for consideration is whether, so far as wives are concerned, the Maintenance Ordinance provides a certain measure of relief to indigent wives alone, and it seems to me that there need be no difficulty in answering that question if we guide ourselves by the plain words of the relevant sections of that Ordinance. Section 2 says: -
>
> > "If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself…. The Magistrate may order

such person to make a monthly allowance for the maintenance of his wife or such child ……"

"These words, correctly interpreted, can only mean that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means by the husband and is not affected by the fact that she has sufficient means of her own."

……..

"In the case of *Goonewardene v. Abeywickreme*, as well as in this case, counsel for the husband sought to interpret the words "unable to maintain itself" as qualifying both the antecedent words "wife" and "child", and in support of that interpretation, they relied on Form 2 in the Schedule of the Ordinance. Wood Renton C.J., appears to have agreed that in that form "inability to maintain" was applicable to the wife also, but he disposed of the argument with the word of Lord Penzance in *Dean v. Green 8 P.D. 89*, that "it would be quite contrary to the recognized principle upon which Courts of Law have to construe Acts of Parliament to restrain the operation of an enactment by any reference to the words of a mere form given for convenience sake in a schedule." But, for my part, I am unable to agree that in the Form, inability to maintain is made applicable to the wife. What, in my opinion, the Form does is to change he neuter "itself" in section 2 into the masculine "himself" and the feminine "herself" to be applied in that way to the case of a male or female child respectively. Be that as it may, the words of the section are clear and they must govern the question"

……..

"I read section 2 of the Ordinance as entitling a wife to claim maintenance in virtue of her wifehood alone and to obtain it by proof that her husband has sufficient means.

Section 3 and 4 follow and state the only circumstances in which a husband, although possessed of sufficient means, may repel his wife's claim to maintenance. Except in those circumstances, there are no words in the Ordinance that debar a wife from asking for maintenance, notwithstanding the fact that she is able to support herself.

But, is contended that by the implication of section 10 of the Ordinance a wife must satisfy the Court that she has no means of her own in order to obtain an order against her husband. I have scrutinized that section, but I cannot find that there is, necessarily, such an implication."

……..

"For these reasons, I am of opinion that, on a correct interpretation of the various provisions of the Ordinance itself, a wife possessed of means is entitled to claim maintenance from her husband provided he has sufficient means himself.

And that is as it should be for, as observed in the Judgment delivered by Creasy C.J. and Thomson J, in *Ukku v. Thambia (Ram, 1863-1868, p 71)*:

> "the husband, by the marriage contract, takes upon himself the duty of supporting and maintaining his wife so long as she remains faithful to the marriage vow."

……..

However, when going through the provision of the Maintenance Act No. 37 of 1999 it is clear that, the said ambiguity resolved by *Soertsz SPJ*, had been cleared by the legislature by introducing specific provisions with regard to the maintenance of the spouse and the child separately.

As already discussed in this Judgement, under section 2 (1) of the Maintenance Act No. 37 of 1999 there is unambiguous provisions requiring that the learned Magistrate may order such person to pay maintenance, upon proof of,

"a person who is having sufficient income, neglects or unreasonably refuse to maintain the spouse, whether the spouse is unable to maintain her/himself, having regard to the income of that person and means and circumstance of the spouse" and all these requirements are necessary ingredients in making a maintenance order under the provisions of the Maintenance Act No. 37 of 1999.

In establishing the said requirements, sections 11 and 12 of the Maintenance Act No 37 of 1999 provides the procedure to be followed before the learned Magistrate.

Section 11 (1) of the above act provided,

> "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 summon together with a copy of such affidavit, on the person against when the application is made to appear and to show cause why the application should not be granted."

Section 12;

> "The Magistrate may proceed in the manner provided in Chapter V or Vl 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 purpose of the Inquiry."

When considering the procedure referred to above, it appears that, when an application for maintenance was made before the Magistrate with an affidavit by the Applicant, the Magistrate is required to act upon the affidavit if the material submitted are sufficient to act upon, and thereafter once the Respondent appear before him, to hold an inquiry in the manner provided in Chapter V or VI of the Code of Criminal Procedure Act No. 15 of 1979.

As further observed by this court, there are several provisions in the Maintenance Act, which provides the Magistrate to obtain the necessary details for him to come to a correct conclusion as required in section 2 of the said Act.

The above provisions introduced to the Maintenance Act will clearly demonstrate the extent to which the legislature had expected the Magistrate to satisfy when making a maintenance order as provided by the said Act.

During the argument before us the learned Counsel who represented the Respondent-Appellant took up the position that the Applicant-Respondent had failed in establishing,

a) That the Applicant-Respondent is unable to maintain herself and
b) The income of the Respondent-Appellant

and submitted that the learned High Court Judge erred in law when she reversed the Judgment of the learned Magistrate, contrary to the prevailing provisions of the Maintenance Act and the evidence available in the case in hand.

As already observed in this Judgement, the provisions of the Maintenance Act No 37 of 1999 had cleared the ambiguity with regard to the maintenance of the spouse and the child by introducing specific provisions with regard to each category and also introduce the legal frame work to hold an inquiry for the court to satisfy when making a maintenance order.

However, when going through the evidence of the Applicant-Respondent before the Magistrate, it is observed that except for the following portion of the evidence, no evidence was placed before the Magistrate with regard her inability to maintain herself and the income of the Applicant-Respondent.

> "දැනට මගේ භාරයේ දරුවන් දෙදෙනෙක් ඉන්නවා. දැන් ලොකු දරුවත් තුන්වෙනි දරුවත් ඉන්නවා ලොකු දරුවා ගාමන්ට් යනවා. මට රැකියාවක් කරන්න හැකියාවක් නැහැ. ස්වාමිපුරුෂයා ඒ වෙන කොට ත්‍රීවිල් 6 ක් ගෙනාවා යන කොට ත්‍රීවිල් එකක් ගෙනාවා. රු. 392000/-කට ට්‍රැක්ටරයක් ගෙනාවා. ත්‍රීවිල් රථ 7ම මිලට ගත්තේ සල්ලි බැඳලා. කොම්පැනියෙන් ගත්තේ. ඒවා ගෙදරින් යනකොට අරන් ගියා. ත්‍රීවිල් එකක්, අත් ට්‍රැක්ටරයක්, බයික් එකක් තියෙනවා. වාහන මිලට ගන්නේ කුඹුරු කරලා දැනට කුඹුරු කරනවා..... පොඩි දරුවා දැන් මොන්ටිසොරි යනවා. ලොකු දරුවා ගන්න පඩියෙන් තමයි ජීවත් වෙන්නේ."

But however, under cross examination the applicant had admitted the following;

Page 67;

ප්‍ර: දැනට කුඹුරක් වැඩ කරනවා නේද?

උ: ඔව්

ප්‍ර: තමුන් වැඩ කරන කුඹුර කාගේද?

උ: මගේ සල්ලිවලට ගත්තේ

ප්‍ර: කාගෙන්ද ගත්තේ?

උ: ගෙවල් කිට්ටුව සුනිල් කියලා මහත්තයෙක් ගෙන්

.....

ප්‍ර: මම යෝජනා කරන්නේ තමුන් මේ විත්තිකාරයාගේ කුඹුර දැනට අස්වද්දමින් වැඩ කරනවා කියලා?

උ: ඔව්

During the inquiry the Applicant-Respondent's eldest daughter too had given evidence on behalf of her. This witness too had admitted the following when she was cross examination at the inquiry;

Page 76;

ප්‍ර: තමුන් පොඩි කාලෙ ඉඳලා අම්මා තාත්තා එකට ජීවත්වුනේ 'දිලංකා' කියන නිවසේ?

උ: ඔව්

ප්‍ර: දැනට තාත්තා කොහෙද ඉන්නේ?

උ: තාත්තගේ අම්මගේ ගෙදර මගේ ආච්චිලාගේ ගෙදර

ප්‍ර: දැනට මෙම නඩුව පවරන්න කලින් මීට පෙරත් අම්මා තාත්තට විරුද්දව නඩත්තු නඩුවක් පවරා තිබුනා කියලා දන්නවාද?

උ: ඔව්

ප්‍ර: ඒ නඩුව ඉල්ලා අස්කරගත්තා කියලා දන්නවාද?

උ: ඔව්

ප්‍ර: ඒ නඩුව පවරන කාලයේ තාත්තා කොහෙද පදිංචි වෙලා හිටියේ?

උ: ආච්චිලාගේ ගෙදර හිටියෙ තාත්තගේ අම්මගේ ගෙදර හිටියේ

ප්‍ර: සාක්ෂිකාරිය මීට පෙර නඩත්තු නඩුව පවරනකොට තාත්තට යෝජනා කලා නේද තාත්ත ඉන්න 'දිලංකා' නිවස හා තාත්තා වැඩ කරන කුඹුර අම්මට දෙන්න?

උ: තාත්තාට කුඹුරු නැහැ.

ප්‍ර: පෙර නඩුව පවරනකොට සාක්ෂිකාරිය දුව හැටියට තාත්තගෙන් ඉල්ලීමක් කලානේද 'දිලංකා' නිවසත් තාත්තා වැඩ කරන කුඹුරත් අම්මට දෙන්න කියලා?

උ: ඔව්

ප්‍ර: එතකොට ඒ අනුව එම නඩුව ඉල්ලා අස්කරගත්තා නේද?

උ: ඔව්

ප්‍ර: එතකොට මේ කුඹුරෙ තාත්තා වැඩ කරනවාද?

උ: නැහැ

ප්‍ර: අද වැඩ කරන්නේ කව්ද?

උ: මම

ප්‍ර: අම්මා නෙවිද කරන්නේ?

උ: නැහැ

ප්‍ර: අම්මා වෙනුවෙන්ද කරන්නේ?

උ: ඔව්

When considering the above evidence it is clear that as a settlement in a previous maintenance action between the same parties, the Respondent had given his house and the paddy field he worked to his wife, the Applicant in the case in hand and at the time his eldest daughter gave evidence, the said eldest daughter admitted that she is working the paddy field given by her father on behalf of her mother. It is further revealed that neither the Applicant-Respondent, nor the witness placed any material before the Magistrate to the effect that the Applicant-Respondent is unable to maintain herself except for the following evidence

Examination in chief at page 61

> "දැනට මගේ භාරයේ දරුවන් දෙදෙනෙක් ඉන්නවා. දැන් ලොකු දරුවත් තුන්වෙනි දරුවත් ඉන්නවා ලොකු දරුවා ගාමන්ට් යනවා. **මට රැකියාවක් කරන්න හැකියාවක් නැහැ.** "

Other than the above evidence both the Applicant-Respondent and her daughter (witness No.02) had admitted under cross examination that they engaged in cultivation in the paddy field belonging to them.

Cross examination of the Applicant at page 67;

ප්‍ර: දැනට කුඹුරක් වැඩ කරනවා නේද?
උ: ඔව්
ප්‍ර: තමුන් වැඩ කරන කුඹුර කාගෙද?
උ: මගේ සල්ලිවලට ගත්තේ

Cross examination of witness No.2 at page 78;

ප්‍ර: පෙර නඩුව පවරනකොට සාක්ෂිකාරිය දුව හැටියට තාත්තගෙන් ඉල්ලීමක් කලානේද 'දිලංකා' නිවසත් තාත්තා වැඩ කරන කුඹුරත් අම්මට දෙන්න කියලා?

උ: ඔව්

ප්‍ර: එතකොට ඒ අනුව එම නඩුව ඉල්ලා අස්කරගත්තා නේද?

උ: ඔව්

ප්‍ර: එතකොට මේ කුඹුරෙ තාත්තා වැඩ කරනවාද?

උ: නැහැ

ප්‍ර: අද වැඩ කරන්නේ කව්ද?

උ: මම

ප්‍ර: අම්මා වෙනුවෙන්ද කරන්නේ?

උ: ඔව්

From the above evidence, it is clear that both witnesses were engaged in cultivation and the 2nd witness is cultivating the paddy field given to the Applicant-Respondent by the Appellant-Respondent.

However as observed by this court both the Magistrate as well as the High Court Judge had failed to consider the above fact in their respective Judgments. In other words, both the Magistrate and the High Court Judge were not mindful of the fact, whether the Applicant-Respondent had submitted sufficient evidence before the Magistrate, that she is unable to maintain herself, before coming to a conclusion.

When refusing maintenance, the learned Magistrate had mainly considered the income of the Respondent-Appellant and had come to a conclusion that the Applicant-Respondent had failed to establish the correct income of the Respondent. As already discussed in this Judgment, Maintenance Act No. 37 of 1999 had provided several provisions to facilitate the court as well as the Applicant to bring evidence with regard to the income of the Respondent but, as further observed by this court, the above provisions will help an Applicant who claims that the Respondent is employed at an institution or drawing a steady income from known sources. But it is difficult to establish the income of an ordinary villager who is not employed but depend on daily income he gets from odd jobs. In the said circumstances there is a duty cast upon the Applicant to bring evidence through witnesses who can speak about the Applicant, and in the instant case I observe that, some effort had been taken to establish this fact but, the Magistrate had not seen the importance of the said evidence.

When reversing the Judgment of the Magistrate the learned High Court Judge had correctly considered the evidence led on behalf of the Applicant with regard to the income of the Respondent-Appellant but had failed to consider whether there is sufficient material before the Magistrate to conclude that the Applicant is able to maintain herself or not, which is an important ingredient that has to be established by an Applicant when requesting a maintenance order in support of the said party.

As referred to in this Judgment, the Respondent-Appellant had agreed to restrict his appeal to the questions of law contained in questions one and four which refers to a maintenance order made

under section 2 (1) of the Maintenance Act No. 37 of 1999 but it does not refer to an order made under section 2 (2) of the said Act.

As observed by me, the learned High Court Judge when reversing the order of the Magistrate, had made order under both the above provisions, i.e. under section 2 (1) and 2 (2) of the Maintenance Act No. 37 of 1999.

Since the Appellant had only challenged the order made under section 2 (1) of the Maintenance Act No. 37 of 1999, I will not be going in to the validity of the order made under section 2 (2) of the said Act, making a maintenance order directing the Appellant-Respondent to pay Rs. 10,000/- for the child of them.

For the reasons given in this Judgement, I quash the maintenance order made under section 2 (1) of the Maintenance Act No 37 of 1999 which granted Rs. 5000/- as maintenance to the Applicant-Respondent but make no order with regard to the maintenance order made under section 2 (2) of the Maintenance Act No 37 of 1999.

The appeal is allowed as far as the order made under section 2 (1) of the Maintenance Act of 37 of 1999 is concerned.

Judge of the Supreme Court

Justice P. Padman Surasena

I agree,

Judge of the Supreme Court

Justice E. A. G. R. Amarasekara

I agree,

Judge of the Supreme Court