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

In the matter of an application for Special leave to Appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 9 of The Provinces (Special Provisions) Act No.19 of 1990 as amended and Section 14(2) of the Maintenance Act No.37 of 1999.

Dissanayaka Mudiyanselege Renuka Dissanayaka, No.164, Village No.4, Muthukandiya, Siyabalanduwa.

APPLICANT

S.C.Appeal Case No.02/2016

S.C.Application No.SC/SPL/73/2015

Provincial High Court of Monaragala

Case No.11/2014/Appeal

Monaragala Magistrate's Court

Case No.47241/2011 **V.**

R.M.Pradeep Weerasinghe,

No.47, Near School,

Kandaudapanguwa, Siyabalanduwa.

RESPONDENT

AND

Dissanayaka Mudiyanselage Renuka

Dissanayaka, No.164, Village No.4,

Muthukandiya, Siyabalanduwa.

APPLICANT-APPELLANT

V.

R.M.Pradeep Weerasinghe,

No.47, Near School,

Kandaudapanguwa,Siyabalanduwa.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

R.M.Pradeep Weerasinghe,

No.47, Near School,

Kandaudpanguwa,Siyabalanduwa.

RESPONDENT-RESPONDENT-APPELLANT

v.

Dissanayaka Mudiyanselage Renuka

Dissanayaka, No.164, Village No.4,

Muthukandiya, Siyabalanduwa.

APPLICANT-APPELLANT-RESPONDENT

BEFORE:- B.P.ALUWIHARE,PCJ.

H.N.J.PERERA, J. &

PRASANNA .S.JAYAWARDENA, PCJ.

COUNSEL:-Niranjan de Silva for the Respondent-Respondent-Appellant

Nuwan Bopage with Lahiru Welgama and Chathura Weththasinghe for the Applicant-Appellant-Respondent

ARGUED ON:-14.09.2016

DECIDED ON:-28.10.2016

H.N.J.PERERA, J.

The Applicant-Appellant-Respondent (hereinafter sometimes referred to as the Applicant) instituted the above styled action against the Respondent-Respondent-Appellant (hereinafter sometimes referred to as the Appellant) her husband under Section 2(1) and Section 4(1)(c) of the Maintenance Act No. 37 of 1999 in the Magistrate's Court of Monaragala seeking maintenance of Rs. 6000/= per month. The Appellant resisted the said application on the basis that the Applicant is living in adultery and is therefore not entitled to receive maintenance under the said Act.

Thereafter, after inquiry the learned Magistrate delivered order dated 21.07.2014 in favour of the Appellant holding that it has been proved

that the Applicant is living in adultery and that hence under Section 2(1) the applicant is not entitled to any maintenance under the Maintenance Act. Being aggrieved by the said judgment the Applicant preferred an appeal to the High Court of Moneragala seeking to set aside the said judgment.

The High Court delivered judgment dated 19.03.2015 and set aside the order of the Magistrate dated 21.07.2014 in favour of the Applicant holding that the Appellant had not established that the Applicant was living in adultery for the Applicant to be disqualified for maintenance under Section 2(1) of the Maintenance Act.

Thereafter the Appellant filed an application before the High Court seeking leave to appeal from the judgment of the High Court dated 19.03.2015 and the said application was refused by the High Court on 01.04.2015. Subsequently the Appellant preferred this special leave to appeal application to the Supreme Court and the Supreme Court granted leave to appeal on the following questions of law averred in paragraphs 11(B) and 11(G) of the said Special Leave to Appeal application.

11(B)-Is the judgment/final order of the Honourable Provincial High Court of Uva Province Holden in Moneragala marked as “Y” dated 19.03.2015 contrary to the weight and the meaning of the evidence led in the Magistrate’s Court of Moneragala?

11(G)- Has the Learned High Court Judge of the Honourable Provincial High Court of the Uva Province Holden in Moneragala erred in law in holding that for ”living in adultery” as envisaged by Section 2(1) proviso contained in the Maintenance Act No.37 of 1999 to exist that there should be instances of adultery committed by the Applicant at least within a two month period before the parties stopped living together or adultery committed at the time when the Application for maintenance

was preferred by the Applicant under the Maintenance Act No. 37 of 1999?

It was contended on behalf of the Applicant that in order to succeed with proviso of the Section 2(1) of the Maintenance Act the Appellant must prove the wife is living in adultery.

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

Therefore in order to succeed with proviso of the section 2(1) of the Maintenance Act, the husband must prove that the wife is "living in adultery". It is admitted that parties married on 2nd July 2009. The Petitioner himself admitted the fact that till 5th December 2010 parties were living together. However subsequent to an incident occurred on that date they were separated. The Applicant's case was on or about 5th December 2010 the Appellant had left the matrimonial home after assaulting the Applicant subsequent to which the Appellant has completely refrained from maintaining the Respondent.

The Appellant while admitting the fact that till 5th December 2010 he was living with the Applicant took up the position that there were previous

incidents that Applicant committed adultery with her brother-in-law. The Appellant's position was that the Applicant was living in adultery and accordingly under the section 2(1) of the Maintenance Act No 37 of 1999, the Applicant is not liable to pay maintenance for a person living in adultery.

The main issue before this Court in this appeal is the interpretation of the phrase "Living in adultery" contained in Section 2(1) of the Maintenance Act No 37 of 1999.The Sri Lanka Courts have interpreted "living in adultery" literally, and held that it is not sufficient that the wife had lived in adultery before the application, but that the applicant must be proved to be "living in adultery" at the time the application is made. Thus the burden is cast upon the person alleging immorality to prove it since the law presupposes the wife is leading a chaste life.

If the husband while admitting that she is his wife, alleges that she is living in adultery, it is for him to prove that fact. There is a presumption of innocence not only in regard to the commission of a crime, but also in regard to any allegation of wrong doing or immoral conduct. There is a burden on the person who alleges immorality to prove it. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person-(Section 101,102, and 103 of the Evidence Ordinance).

In Selliah V. Sinnammah 48 N.L.R 261, it was held that when allegation is made under section 4 of the Maintenance Ordinance that the wife is living in adultery, the burden is on the husband to prove the fact.

Therefore there is no doubt that, in the instant case the burden was on the Appellant to prove that the Applicant was "living in adultery."

It was also held in Armugam V. Athai 50 N.L.R that a person who asserts that his wife is disentitled by section 4 of the Maintenance Ordinance to receive an allowance by reason of the fact that she is living in adultery must establish that she is leading a life of continuous adulterous conduct.

In Isabelahamy V. Perera C.W.Reporter Vol.111, p 294, it was held that the words "living in adultery "in section 4 meant a continuous of a life of adultery with some ascertained person or life of prostitution.

In Balasingham V, Kalaivany 1986 SLR 378 it was held, that so long as the marital tie subsists an order for maintenance made in favor of a wife will be cancelled only if:-

(1)The wife is guilty of a more or less continuous course of adulterous conduct and not merely isolated acts of adultery-there being a clear distinction between 'committing' adultery and 'living in adultery' which is what section 5 of the Maintenance Ordinance requires.

(2)The wife was living in adultery at or about the time of the application for cancellation of the order for maintenance.

The phrase 'living in adultery' has been construed in the same sense by the High Courts in India as well.

In Ma Thein V. Maung Mya Khin A.I.R 1937-Nagpur, 67 it was held that the words 'living in adultery' refers to course of guilty conduct and not to lapse from virtue. It was further observed in the said case that the word 'live' convey the idea of continuance, and consequently the phrase "living in adultery" refers to a course of guilty conduct and not to a single lapse from virtue.

In S.S.Manickam V. Arputha Bhavani Rajam C.L.J.1980 (1), Pandian, J observed that:-

"While the words 'is living in adultery' in sub-section (4) of section 125, Cr.P.C. would not take into it fold stray instances of lapses from virtue it would not also mean that the wife should be living in adultery on the date of the Petition. The proper interpretation would be that there should be proof of adulterous living shortly before or after the Petition, shortly being interpreted in a reasonable manner viewing it in the light of the facts of the case. ……The term 'living in adultery' has been the subject matter of discussion in several decisions of various High Courts. The present view taken by the Courts is that the expression 'living in adultery' is merely indicative of the principle that a single or occasional lapses from virtue is not sufficient reason for refusing maintenance.

Further in Ma Mya Khin V. N.N.Godenho A.I.R.1936 Rang 446, it was held that the words 'living in adultery' in s-488 (5) denoted a continuous course of conduct and not isolated acts of immorality. One or two lapses from virtue could be acts of adultery, but would be quite insufficient to show that the woman was living in adultery, which means that she must be living in the state of quasi-permanent union with the man with whom she is committing adultery. Further, it has been pointed out that there is a great distinction between the words 'committing adultery' and 'living in adultery' and that the ratio is that a solitary lapse from virtue, as distinguished from contumacious immoral conduct, should not be a ground for denying maintenance.

In Pushpawathy V. Santhirasegarampillai 75 N.L.R 353 where a husband against whom an order of maintenance had been made in favour of his wife sought the cancellation of the order on the ground that, about four years after the order was made, the wife gave birth to a child which was not his- it was held that the birth of the child did not, by itself, establish that the wife was living in adultery with someone. It only established that the wife had committed adultery with someone, which act might be a single lapse of virtue. This case could be clearly distinguished from the

facts of the case of Ma Thein V. Maung Mya Khin - the question was whether the applicant has been guilty of adultery and, if so, whether only once or more. There was evidence in this case to prove the fact that her child was begotten when the Respondent could not get access to her. There moreover, definite evidence on the record to prove that San Hla was seen going to her house and actually caught one night in her bed. The Court held that the wife must have been guilty of adultery on more than one occasion and therefore she was not entitled to any maintenance under section 488.

It was submitted on behalf of the Appellant that on the facts of the instant case, it is clear that the Applicant has committed adultery on a number of occasions with her Brother-in-Law one Rajakaruna.

It was contended on behalf of the Appellant that there was clear evidence on the adulterous conduct of the Applicant that she was carrying on with one Rajakaruna who is the Brother-in-Law of the Applicant. It was the position of the Counsel for the Appellant that the Appellant's mother D.M.Karunawathie has given evidence of three instances where an inference of committing adultery could be gathered. One Sameera M.Rathnayake too has given evidence on behalf of the Appellant to show a separate instance an inference of committing adultery could be gathered. The evidence given by D.M.Kalubanda show further three instances an inference of committing adultery could be gathered. It was the contention of the Counsel for the Appellant that looking at all these pieces of evidence the learned Magistrate of Monaragala was satisfied that the Applicant was guilty of committing adultery.

The Learned High Court Judge has come to a finding that although there is evidence to show that the Applicant-Respondent has committed adultery at some stage, the evidence shows that the parties had lived

together and no cogent evidence to prove that the Applicant was living in adultery at the time the application was made for maintenance.

According to Karunawathie the mother of the Appellant-Respondent she has seen the Applicant and the said Rajakaruna twice inside the matrimonial home and once inside a room together. The evidence of this witness shows that she did not like Rajakaruna coming into the house in the absence of the Appellant. She has stated that she could not remember the exact date of the incident. It is clear that the incident actually has happened long before the separation of the parties. According to the evidence of the case the parties continued to live together as husband and wife till December 2010.

The witness Sameera had seen the Applicant and another person walking together from a devala area in the year 2010. He has further stated that he did not inform about the said incident to the Appellant till the year 2011. He has not stated anything else other than stating that he was surprised to see them coming together from a place like that.

The other witness D.M Kalubanda who gave evidence on behalf of the Appellant-Respondent has stated that he had seen the Applicant and the said Rajakaruna travelling together on a motor cycle on three occasions. During cross-examination he has stated that he couldn't remember exact dates but probably that was in the year 2007. It is admitted the parties married on July 2009 and therefore it is very clear that the said incident had taken place before the marriage.

The Learned High Court Judge has clearly analysed the evidence given by the said witnesses and has come to the conclusion that he is satisfied that the Applicant has committed adultery. But the Learned High Court Judge has very clearly held that just before the time the said application was filed by the Applicant there was evidence to prove that the parties were living together and there is no evidence to prove that the Applicant

was living in adultery as contemplated in section 4 of the Maintenance Act.

In Ebert V. Ebert 22 N.L.R 312 it was held that:-

“It is not possible to lay down any general rule, or to attempt to define what circumstances would be sufficient and what would be insufficient upon which to infer the fact of adultery. Each case must depend on its particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts which of necessity are as various as the modifications and combinations of events in actual life.”

In the instant case the Learned High Court Judge has held that the Appellant has failed to lead cogent evidence to prove that the Applicant is “living in adultery”.

The learned Magistrate has held that there is evidence to show that the Applicant is not only guilty of committing adultery, but also that the Applicant is living in adultery. The Learned High court judge in his impugned judgment agreed with the conclusion reached by the learned Magistrate only to the extent that there is evidence to show that the Applicant had at one stage had somewhat an adulterous relationship with her Brother-in-Law. The Learned High Court Judge has held that the evidence in this case established that the Applicant was living with the Appellant in the matrimonial home thereafter and that there is no evidence to prove that she was “living in adultery” immediately prior to or after the date of application. There must be proof not only of the wife’s adulterous conduct but also of such adulterous conduct at or about the time the application is made. This Court cannot agree with the submissions made by the Counsel for the Appellant that there is clear evidence that the Applicant has committed adultery on number of occasions with the aforementioned Rajakaruna.

In my opinion, the Appellant had to prove by leading cogent evidence that the Applicant had committed not one or two acts of adultery, but pursued a course of conduct amounting to "living in adultery". The Appellant attempted to show three isolated incidents to convince Court the Applicant has committed adultery on three occasions. Such isolated incidents are insufficient to get the advantage of the proviso of the section 2(1) of the Maintenance Act. One has to be mindful of the fact that all three witnesses who gave evidence in this case on behalf of the Appellant-Respondent are the relatives of the Appellant-Respondent. One happens to be his own mother. None of the witnesses had given direct evidence regarding sexual intercourse. And it is clear none of the said incidents have contributed to breakdown of the marriage. In my opinion the Appellant has failed to lead cogent evidence and prove that the Applicant was "living in adultery" as contemplated in section 2(1) of the Maintenance Act No. 37 of 1999. The appellant has failed to satisfy court that the Applicant was "living in adultery" or in other words that she is leading a life of continuous adulterous conduct.

The Appellant himself admitted the fact that till 5th December 2010 parties were living together and subsequent to an incident which occurred on that date they were separated. Admittedly the reason for the separation is not committing adultery by the Applicant but some other minor incident. In Reginahamy V. Johna 17 N.L.R 376 where the Magistrate has refused to make an order for maintenance because the applicant had one time been living in adultery, Pereira, J. held that if a husband chooses to let the marriage to remain in spite of adultery on the part of his wife, and his wife from choice or necessity returns to an honourable life, the husband's liabilities unquestionably revive.

Therefore I answer the two questions of law raised in this case in favour of the Applicant-Respondent. I see no reason to disturb the judgment of the Learned High Court Judge. I, therefore affirm the judgment of the

Learned High Court Judge of Avissawella dated 19.03.2015. The appeal is dismissed with costs.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PCJ.

I agree.

JUDGE OF THE SUPTEME COURT

P.S.JAYAWARDENA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT