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

In the matter of an Application for Special Leave to Appeal to the Supreme Court from the Judgment dated 2nd of October 2014 of the High Court Kalutara in case No. HC Kalutara 623/2013 under section 14 (2) of the Maintenance Act No. 37 of 1999

Chandani Jayasinghe
"Samagi", Kalupahana,
Poruwadanda.

Petitioner

SC Appeal 203/2015
SC SPL LA 220/2014
HC-Kalutara 623/2013
MC Horana Case No. 55671

Vs,

Neelahenndi Sisira Kumara De. Silva
"Samagi", Kalupahana,
Poruwadanda.

Respondent

And between

Chandani Jayasinghe
"Samagi", Kalupahana,
Poruwadanda.

Petitioner-Appellant

Vs.

1. **Neelahenndi Sisira Kumara De. Silva**
"Samagi", Kalupahana,
Poruwadanda.

Respondent-Respondent

2. The Attorney General
Attorney General's Department
Colombo 12.

Respondent

And Now Between

Chandani Jayasinghe
"Samagi", Kalupahana,
Poruwadanda.

Petitioner-Appellant-Petitioner

Vs,

Neelahenndi Sisira Kumara De. Silva
"Samagi", Kalupahana,
Poruwadanda.

Respondent-Respondent-Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice Murdu N. B. Fernando, PC
Justice E.A.G.R. Amarasekera

Counsel: **Mr. Saliya Peiris PC with Susil Wanigapura for the Petitioner-Appellant-Petitioner**
Mr. Shyamal A. Collure with A.P. Jayaweera, P.S. Amarasinghe and Ravindra S. de. Silva for the Respondent-Respondent-Respondent

Argued on 07.11.2019, 07.02.2020

Judgment on 26.06.2020

Vijith K. Malalgoda PC J

The Applicant-Appellant-Petitioner (hereinafter referred to as the Petitioner) had filed a Special Leave to Appeal Application before this court after her application for Leave to Appeal made under section 14 (2) of the Maintenance Act No 37 of 1999 was rejected by the learned High Court Judge of Kalutara. On 29th October 2015, the said Special Leave to Appeal Application was supported and the court granted (Special Leave) on the questions of law set out in the paragraph 19 (a), (b) and (c) of the Petition dated 13th of November 2014 which reads as follows;

(a) Did both the learned Magistrate and the learned High Court Judge err in law in failing to consider the inadequacy of evidence to establish that the Respondent–Respondent–Respondent (hereinafter referred to as the Respondent) has sufficiently maintained the children as provided by the section 2 (2) of the Maintenance Act No 37 of 1999 (hereinafter referred to as the Maintenance Act or the Act) and thereby failed to make a maintenance order in respect of the elder child?

(b) Did both the learned Magistrate and the learned High Court Judge err in law in accepting the evidence of witnesses called on behalf of the Respondent, who were interested and partial?

(c) Has the learned High Court Judge failed to consider that the amount of maintenance which has been awarded in respect of the 2nd child is inadequate in the light of the means and circumstances of the petitioner who is caring for the said child?

As revealed before this court, the Petitioner has filed a Maintenance Application in terms of the Section 2 (2) of the Maintenance Act in the Magistrate Court of Horana seeking a maintenance order of Rs 10,000/- for the eldest child and Rs 20,000/- for the youngest child who is suffering from hyperactive disorder and needs special care. The learned Magistrate having considered the

application of the Petitioner, made an interim maintenance order in terms of the section 2 (2) of the Maintenance Act to pay a sum of Rs 5000/- for each child per month.

During the inquiry before the Magistrate's Court, the Petitioner herself and one witness, namely Don Bandusena Wijesuriya representing the Bank of Ceylon gave evidence, and her case was closed. During the Respondent's case, the Respondent and four other witnesses gave evidence. At the conclusion of the inquiry, the learned Magistrate had delivered the judgment making a maintenance order of Rs 10,000/- only with regard to the younger child. The learned Magistrate made no Maintenance order with regard to the eldest child who was only 13 years old at that time.

Being dissatisfied with the said Judgment of the learned Magistrate dated 13th December 2012, the Petitioner had preferred an Appeal to the Provincial High Court of Kalutara by Petition dated 26th December 2012. The learned High Court Judge who considered the said Appeal had dismissed the Petitioner's appeal and affirmed the Judgment of the learned Magistrate.

Being aggrieved by the Judgment of the learned High Court Judge dated 02nd of October 2014, the Petitioner sought Leave to Appeal from the Provincial High Court of Kalutara in terms of Section 14 (2) of the Maintenance Act, but the said Application was refused by the High Court and the Petitioner had come before the Supreme Court by way of a Special Leave to Appeal.

As observed by this court, the entire case for the Petitioner is based on the section 2 (2) of the Maintenance Act which reads as follows;

> *"Where any 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 person 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 circumstance of the child**."*

[emphasis added by me]

When going through the aforementioned provision, it can be identified that in a maintenance application, filed before a Magistrate seeking a maintenance order, the discretion to decide the maintenance allowance for the children is vested upon the Magistrate who acts under the above provision. In addition to this, there is a requirement under the section 2 (2), of the Act, such person against whom the maintenance order is made should have sufficient means to maintain his or her child and then neglects or refuses to maintain the child as the case may be. With regard to the question of sufficient means, it is an admitted fact that both the Petitioner as well as the Respondent were employed as Samurdi Development Officers and drawing a monthly salary. In addition to the above, the Petitioner had taken up the position that a considerable amount from her salary was deducted as a monthly installment for a housing loan she has obtained and the Respondent had additional income by engaged in journalism and photography as part-time jobs.

Even though the Respondent had disputed some of the sources referred to above, I see no reason to consider them in my Judgment since, for me the main question that has to be considered by this court is not, "whether the Respondent had sufficient income to maintain his children" but, "whether the Respondent had neglected to maintain his children."

Accordingly, I will now proceed to consider the main question that is to be considered in the instant case, i.e. whether the Respondent has sufficiently maintained the two children as required by the section 2 (2) of the said Act.

As referred by me in this judgment, the Petitioner gave evidence before the learned Magistrate at the inquiry, that was held under sections 12 and 13 of the Act and summoned another bank official to give evidence on behalf of her.

In her evidence before the Magistrate she explained the expenditure she has to undergo for her two children with special reference to the additional expenditure she has to meet with regard to their youngest son who is taking treatment for Hyperactive disorder including medicine, doctors' charges and salary of an attendant.

Under cross examination, the Petitioner admitted that the Respondent had shared the day to day expenses including the gas bill, electricity and telephone bills and some other expenditures until August 2009 but took up the position that after August 2009 the relationship between her and her husband had deteriorated and thereafter her husband did not spend anything for their family. In April 2010, she decided to file the instant application before the Magistrate's Court. However, she continued to stay in the same house belongs to her husband.

However, when she was further cross examined with regard to the payments of utility bills, she admitted the Respondent making those payment as follows;

> ප්‍ර: ඒ විදුලි බිල් ගෙවීම නතර කල දිනය මතක නැද්ද?
>
> උ: මා නඩත්තු නඩුව ගොනු කලේ 2010 අප්‍රියෙල් මාසයේ. ඉන් පසු ඔහු විදුලි බිල ගෙව්වේ නැහැ.
>
> ප්‍ර: ඒ දක්වා විදුලි බිල ගෙව්වේ පුරුෂයා.?
>
> උ: ඔව්
>
> ප්‍ර: ඒ දක්වා දුරකථන බිල ගෙව්වේ පුරුෂයා.?
>
> උ: ඔව්

[At page 71 of the brief]

When the Petitioner was cross examined with regard to the payment of the children's School transport by her husband, she denied making any payment by her husband as follows;

ප්‍ර: තමා කිව්වා පාසැල් අධ්‍යාපන කටයුතු සඳහා වියදම් වන ප්‍රමාණය

උ: ඔව්

ප්‍ර: ඒ බිල්පත් කවිද ගෙව්වේ?

උ: මම

ප්‍ර: දිගටම ගෙව්වේ තමාද?

උ: 2010 ජනවාරි දක්වා ගෙව්වේ මම

ප්‍ර: කවිද ගෙව්වේ?

උ: මම

ප්‍ර: 2010 ජනවාරි වලට පෙර පුරුෂයා කවදාවත් වාහනවලට වියදම් කලේ නැහැ?

උ: ප්‍රවාහන වියදම් ගෙව්වේ නැහැ.

ප්‍ර: කිසිම මාසයක ගෙව්වේ නැහැ කියලද කියන්නේ?

උ: ඔව්

[At Pages 71-72 of the brief]

When she was further cross examined with regard to the medical expenditure for the youngest child, she admitted that the Respondent accompanied her and the child to several hospitals and met those expenditure. However, when the Petitioner was cross examined with regard her request, her answer was that she needs maintenance to cover the basic needs only. The said question and answer read as follows;

ප්‍ර: තමුන් නඩත්තු ඉල්ලීමට යම් යම් අංග තිබෙනවාද?

උ: මගේ දරුවන්ගේ මූලික අවශ්‍යතා සඳහා පමණයි මා නඩත්තු ඉල්ලා සිටින්නේ නිවසේ වියදම් සඳහා මම ඉල්ලන්නේ නැහැ.

Among the several witnesses summoned by the Respondent to give evidence on behalf of him, the Respondent had summoned his 13 years old eldest son Nadula Tharupathi de Silva to give evidence on behalf of him. During the examination in chief witness admitted the following

"අපි එකට ඉන්න කොටගෙදර අවශ්‍යතා සැපයුවේ තාත්තා. ගෑස් බිල, විදුලි බිල්පත් ගෙව්වේ තාත්තා. තාත්තා සහල්, තුනපහ, මස්, මාළු ගේනවා. අම්මත් එක එක වීවා ගේනවා. පාසල් යාමට අවශ්‍ය පොත්පත් අරන් දුන්නේ තාත්තා. නඩුව තිබුනට මාව සහ මල්ලිව නඩත්තු කරන එක තාත්තා නතර කලේ නෑ. අවශ්‍යතා දිගටම කලා."

[At page 213 of the brief]

With regard to the expenditure for the school transport witness gave the following evidence;

"මම යන්නේ හොරණ රාජකීය විද්‍යාලයට 10 වසරේ ඉගෙන ගන්නවා. මම ඒ විද්‍යාලයට ගියේ ස්කූල් වෑන් එකේ. දැන් යන්නේ පාරේ බස් එකේ. මම 2011 වෙනකම් පාසැල් වෑන් රථයේ ගියේ. ස්කෝලෙ ගිය දවසෙ ඉඳලා යන්නේ ස්කූල් වෑන් එකේ. මේ වෑන් එකට සල්ලි ගෙව්වේ තාත්තා. සමහර වෙලාවල් වලට මගේ අතේ සල්ලි අරිනවා. එහෙම නැතිනම් තාත්තා ඒ ගෙදරට ගිහින් සල්ලි දීලා එනවා. ඒ වෑන් එක අයිති අයගේ ගෙදරට යනවා. ඒ සල්ලි දුන්නට පස්සේ ලේඛනයක් මාක් කරනවා. මේ තියන්නේ එම ලේඛනයේ ඡායා පිටපතක්. 2009 ට අදාල කාඩ් පතේ ඡායා පිටපතක්. මුදල් බාර දුන් අත්සන තාත්තාගේ. බාර ගත් බවට අත්සන තියෙනව. (2010 වර්ෂයට අදාල කාඩ් පත පෙන්වා සිටී) 2010 මැයි දක්වා මුදල් ගෙවලා තියෙන්නේ තාත්තා. ජනවාරි සිට මැයි දක්වා මුදල් ගෙවලා තියෙන්නේ, තාත්තා. ජූනි, ජූලි දක්වා ගෙවලා තියෙන්නේ අම්මා. (2011 කාඩ් පත පෙන්වා සිටී) මේකේ මුදල් ජනවාරි සිට සැප්තැම්බර් දක්වා අම්මා ගෙවලා තියෙනව. ඔක්තෝම්බර් මුදල් ගෙවලා තියෙන්නේ තාත්තා. මම ඉගෙන ගන්නේ 10 වසරේ. 2009 සිට 2010 මැයි දක්වා තාත්තා තමයි මුදල් ගෙවලා තියෙන්නේ වෑන් එකට. මේ නඩුව දැම්මට පස්සේ අම්මා මාස කිහිපයක් ගෙවුවා. දැන් මම යන්නේ පාරේ බස් එකේ. ඒකට සීසන් අරන් දෙන්නේ තාත්තා"

[At page 214 of the brief]

When the above evidence is considered with the evidence of the Petitioner and the Respondent, it appears that the Respondent was looking after the expenditure of home as well as the two children until the maintenance action was filed in April 2010. According to the evidence of Nadula Tharupathi, the eldest son of both the Petitioner and the Respondent, the Respondent continued to look after some of their requirements including the bus season tickets even after the maintenance action was pending before the Magistrate's Court.

The Respondent whilst testifying before the Magistrate, confirmed that he met some of the expenditure at home and most of the expenditure of the children until the instant case was filed before the Magistrate's Court, and started paying maintenance based on the interim order made by the learned Magistrate thereafter.

However, during the arguments before us, the learned President's Counsel who represented the Petitioner, argued the importance of making an order based on the proportionality of the income of both parties when the Petitioner as well as the Respondent are employed and drawing monthly salaries. If one party is purposely ignoring the maintenance of his or her children, an order based on proportionality might help the other party to ease the additional burden on herself or himself but, when going through the evidence led before the Magistrate, at the inquiry held under the provision of the Maintenance Act No 37 of 1999, it is clear that there was adequate evidence to establish that the Respondent too had helped the family, even after the instant application was pending before the Magistrate's Court.

When the Respondent started paying Maintenance as per the interim order, he had stopped making certain payments but, that cannot be considered against him in the absence of any complaint that he failed to obey the court order.

In the case of the ***Sinaval vs. Nagappa (1916) Volume VI Balasingham's Note of Cases 26***, Shaw J observed:

> "Maintenance cases are in the nature of civil proceedings, and the Court of Appeal, although sitting by way of re-hearing, ought to give very great weight to the finding of fact of the Magistrate who has seen the witnesses, and ought not to reverse his decision on a question of fact unless it is clear from the evidence or from some undisputed fact that he has gone wrong"

On perusal of the facts of the instant case, it is observed that there is no necessity to interfere with the findings of the learned Magistrate who has come to a correct finding that the Petitioner has failed to provide adequate evidence to establish that the Respondent has not sufficiently maintained the children as provided by the section 2(2) of the Maintenance Act, at the time the maintenance action was filed before the Magistrate's Court.

In addition, the learned Magistrate has made an Order for the Respondent to pay Rs.10,000/- for the younger child. Such amount of maintenance allowance is not for the total refusal or neglect on the part of the Respondent to maintain the younger child, but to cover the extra expenditure to be incurred by the mother for medical expenditure of the 2nd child.

For the reasons given in my judgment I see no reason to interfere with the findings of both the learned Magistrate and the learned High Court Judge of Kalutara.

The appeal is dismissed. No Costs.

Judge of the Supreme Court

Justice Murdu N. B. Fernando, PC

I agree,

Judge of the Supreme Court

Justice E.A.G.R. Amarasekera

I agree,

Judge of the Supreme Court