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

CA Case No: CA (PHC) APN 86/2009

HC Colombo Case No: HCRA/29/2007

MC Colombo Case No: 3828/03/04

In the matter of an application in terms of Section 4(1)(c) read with Section 2(1) of the Maintenance Act No. 37 of 1999.

Thilaka Wadasinghe Liyanarathnage,

37, Somaweera Chandrasiripura,

Mampe,

Piliyandala.

Applicant

Vs

Hudson Samarasinghe,

255/B/11,

Torrington Gardens,

Torrington Mawatha,

Colombo 7.

Respondent

AND

In the matter of an application in terms of Article 154P of the Constitution read with the High Court of Provinces (Special Provisions) Act.

Hudson Samarasinghe,

255/B/11,

Torrington Gardens,

Torrington Mawatha,

Colombo 7.

Respondent-Petitioner

Vs

Thilaka Wadasinghe Liyanarathnage,

37, Somaweera Chandrasiripura,

Mampe,

Piliyandala.

Applicant-Respondent

AND NOW BETWEEN

In the matter of an application for revision in terms of Article 138 of the Constitution and Section 11(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1999.

Hudson Samarasinghe,

255/B/11,

Torrington Gardens,

Torrington Mawatha,

Colombo 7.

Respondent-Petitioner-Petitioner

Vs

Thilaka Wadasinghe Liyanarathnage,

37, Somaweera Chandrasiripura,

Mampe,

Piliyandala.

Presently at

30/2, School Lane,

Halpita,

Polgasowita.

Applicant-Respondent-Respondent

BEFORE: P. Padman Surasena, J.

K.K. Wickremasinghe, J.

COUNSEL: Kuvea de Zoysa PC with

AAL Sumedha Mahawanniarachchi with AAL Indika Weerasinghe for the Petitioner

AAL R.Serasinghe for the Respondent

ARGUED ON: 15.11.2017

WRITTEN SUBMISSIONS OF THE PETITIONER ON: 15.12.2017

WRITTEN SUBMISSIONS OF THE RESPONDENT ON: 15.01.2018

DECIDED ON: 15.03.2018

K.K.Wickremasinghe, J.

The Applicant-Respondent-Respondent (hereinafter referred to as the 'Respondent') in this case instituted a case in the Magistrates' Court Colombo claiming maintenance for herself and her adult offspring from the petitioner. The petitioner took up the objection stating that the petitioner cannot make an application on behalf of her adult offspring. Such objection was overruled by the Learned Magistrate on the 14th of December 2004 and aggrieved by said order; the respondent filed a revision application in the High Court of Colombo. By judgement dated 29th May 2006, the Learned High Court Judge held that the respondent could not have coupled the son's application with her own.

The petitioner then filed objections challenging the alleged marriage between himself and the respondent on the basis that the Magistrates' Court had previously charged the petitioner with bigamy (in case No: 56041/01/93) and therefore, his marriage to the respondent is a nullity thus not requiring him to provide for maintenance. In order dated 12th February 2007, the Learned Magistrate held that alleged marriage between the petitioner and the respondent is valid and that respondent is entitled to maintain her application. The Learned Magistrate also held that though the petitioner had been convicted of bigamy in the above mentioned case, in the revision application bearing No: HCMCA 815/98, the respondent had been acquitted from the proceedings and an interim payment had been ordered.

The petitioner then filed a revision application in the High Court of Colombo and the Learned Additional Magistrate dismissed the petitioner's application by judgement dated 10th June 2009.

Aggrieved by the said judgement, the petitioner filed a Special Leave to Appeal application in the Supreme Court. Since there was no jurisdiction to hear and determine the application in the Supreme Court, the application so made was withdrawn and the petitioner filed the instant revision application in this court on the 7th of August 2009.

The Learned Counsel for the petitioner submits that the Learned High Court Judge could have revised the order of the Magistrate as no Sinhalese man could have two valid marriages.

In the case of Somawathie Vs Wimalarathna [2008 (1) SLR 384],

the Supreme Court held that; "*If the alleged marriage of an applicant for maintenance is invalid by reason of legal impediment which makes the woman stand in some lesser relationship to the alleged husband than his 'wife', it is plain from the wording of Section 2 of the Maintenance Ordinance that she is not entitled to claim maintenance for herself*".

Thus submitted by the petitioner that if, even when a person deceives another into contracting a bigamous marriage he is not liable to pay maintenance, then the petitioner in the instant case, who did not deceive the respondent and had informed her of his previous marriage thus being acquitted for lack of mens rea, has no reason to pay maintenance since no court can validate a marriage which is a nullity abinitio. Therefore, the respondent lacks locus standi to maintain the application.

But in the abovementioned case, Hon.Justice shiranee Thilakawardane specifically mentioned as follows:-"*The law as it stands, only penalizes the bigamous conduct and fails to take into account of the plight of the victim spouse, namely the innocent spouse in such situations. Not only does it fail to provide substantive protection for the victim spouse, it also supplies the guilty party with advantageous gain by such person's wrongful act. This anomaly militates against the principles of justice and equity as well as the fundamental principle of legal jurisprudence that no man or woman can benefit from his or her own wrong. It is imperative that the law commission of Sri Lanka, in its review of marriage law in Sri Lanka, takes account of this anomalous situation and undertakes effective steps to rectify the same at the earliest, in order to avoid a further miscarriage of justice.*"

The following cases have been submitted by the petitioner;

1. **Rustom Vs Hapangama (SLR 1978-79-80 Vol.1, Page No-352)** the Supreme Court held as follows; "*The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked, the practice has been that these powers will be exercised if there is an*

alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise these powers in revision. If the existence of special circumstances does not exist, then this court will not exercise its powers in revision. The appellant has not indicated to the court that any special circumstances exist which would invite this court to exercise its powers of revision, particularly since the appellant had not availed himself of the right of appeal under section 754(2)which was available to him".

2. Connected Court of Appeal case **Rustom Vs Hapangama and Company [1978-79- (2) SLR 225**], it was held, "*the powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependent on the facts of each case*".
3. **Attorney General Vs Podisingho (51 NLR 385), it was held that,** "*I desire to point out that in exercising its powers of revision; this court is not trammeled by technical rules of pleading and procedure. In doing so, this court has power to act whether it is set in motion by a party or not, and even ex meromotu. Judge of this court has power to call for a record and in proper cases to revise the order of a court of inferior jurisdiction. In doing so, of course, this court will act on the principles laid down by learned judges in the past. Whether the application in revision is irregularly brought before this court or not, once an irregularity has 'come to the knowledge' of this court, it can in a proper case act on such knowledge. I cannot agree with the submission of learned counsel for respondent that 'the law was made for man and not man for the law'. If that means anything, learned counsel would have this court to stand by powerless, while illegal orders are made by Magistrates and District Judges. That is a proportion to which I am unable to assent*".

The respondent's main contention in this case is that the petitioner has failed to adduce the necessary exceptional circumstances to invoke the revisionary jurisdiction of this court. In terms of Section 14 of the Maintenance Act, a person

dissatisfied with an order of the High Court should prefer an appeal to the Supreme Court. However, the petitioner filed a revision application in this court which requires him to adduce exceptional circumstances.

In the case of **Rustom Vs Hapangama and Company [1978-79- (2) SLR 225]** it was held that "*Considering the facts and circumstances of the present case, there were no such exceptional circumstances disclosed as would cause the Appellate Court to exercise its discretion and grant relief by way of revision. Unless there was something illegal about the order made by the Trial Judge of the case required that the Appellate Court would not in the circumstances of this case grant the petitioner the indulgence of exercising its revisionary powers and the preliminary objections must therefore be upheld*".

In the case of **Thilagarathnam Vs Edirisinghe 1982 (1) SLR 56**, the Court of Appeal held that; "*though the appellate court's powers to act in revision were wide and be exercised where an appeal has been taken against the order of the original court or not such powers would be exercised only in exceptional circumstances*".

In the case of **Natalie Abeysundere Vs Christopher Abeysundere and another [1998 (1) 185]**, a five judge bench of the Supreme Court held as follows;

"*The second purported marriage of the respondent during the subsistence of the prior marriage contracted under the Marriage Registration Ordinance is void, notwithstanding the respondent's conversion to Islam*"

The Learned Counsel for the petitioner submits that there is no requirement to plead exceptional circumstances in the petition to the High Court since the Learned Magistrate's impugned order was not appealable. According to Section 14(1) of the Maintenance Act, only an order made by a Magistrate under Section 2 or Section 11 (an order awarding maintenance) is appealable. Leraned counsel for the petitioner further submits that however, the petitioner's revision application to the High Court was not against any such order but against the overruling of the petitioner's preliminary objection that no Sinhalese man can have two valid marriages. If an order made by a Magistrate is not appealable, the only remedy available to the aggrieved party is to file a revision application to the High Court.

In the case of **Rustom Vs Hapangama (SLR 1978-79-80 Vol.1, Page No-352)** the Supreme Court held as follows; "*The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked, the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise these powers in revision. If the existence of special circumstances does not exist, then this court will not exercise its powers in revision. The appellant has not indicated to the court that any special circumstances exist which would invite this court to exercise its powers of revision, particularly since the appellant had not availed himself of the right of appeal under section 754(2) which was available to him*".

In the case of Attorney **General Vs Podisingho (51 NLR 385),** it was held, "*the powers of revisions of the Supreme Court are wide enough to embrace a case where an appeal lay but was not taken. In such a case however, an application in revision should not be entertained save in exceptional circumstances such as (a) where there has been a miscarriage of justice, (b) where a strong case for the interference of the Supreme Court has been made out by the petitioner, or (c) where the applicant was unaware of the order made by the court of trial.*"

In case no **CA (PHC) APN 204/2006, decided on 02/09/2014**, it was held that; "*what is this jurisdiction we are talking about here? That is the power to revise an appellate decision. It has been universally accepted that appeal is a statutory right. The learned President's Counsel for the Petitioner submits that revisionary power is only a prerogative power. It is similar to writ jurisdiction according to the learned President's Counsel for the petitioner. Appeal from courts of first instances to a higher court is a rehearing done on proceedings of evidence and documents. Appeal from an appellate jurisdiction is always with leave to appeal from either from appellate court or the apex court on a substantial question of law or on a question to be decided is of public or general importance. Therefore in my opinion the jurisdiction that we are discussing about is something not known or new to the law. Where did this jurisdiction lie prior to the 13th amendment? Was it the intention of the legislature to introduce a new jurisdiction which was not available prior to the devolution of power? Definitely it was not the case. The conclusion is that there is no room in our court system for a revision over an*

appellate decision. Thus the preliminary objection succeeds and the petition is dismissed without cost".

In **Special LA No. 21/2011 decided on 15.06.2012 Hon Justice Sureshchandra** held that;

"The said submission of the petitioner fails to take into account the provisions of the Maintenance Act No.37 of 1999 which is a later Act than the High Court of the Provinces (Special Provinces) Act No.19 of 1990. The said Maintenance Act has a special provision relating to appeals to the High Court and Appeals to the Supreme Court in s.14(2) as stated above. The application for maintenance by the Respondent was under the provisions of the Maintenance Act as was the appeal to the High Court from the decision of the Magistrates Court. In such a situation an application for leave to appeal to the Supreme Court from the decision of the High Court should also be in terms of the provisions of the said Maintenance Act. According to s.14 (2) as submitted by Counsel for the Respondent there is a difference in the procedure for invoking the appellate powers of the Supreme Court in a matter relating to maintenance. Unlike in any other case where an application for leave to appeal can be made directly to the Supreme Court against the judgment or Order of the High Court, no such direct application can be made to the Supreme Court in respect of an application for maintenance against the Judgment of the High Court. Such an application should be preceded in a maintenance matter by first having recourse to the High Court itself in seeking leave to appeal to the Supreme Court and could apply to the Supreme Court only on a refusal of such application. In the present case no such application for leave to appeal to the Supreme Court had been made by the Petitioner to the High Court of Chilaw.

The maxim 'generalia specialibus non derogant' when applied to the present instance would also show that the general provision for appeals from High Courts to the Supreme Court as provided for by s.9 of the High Court of Provinces (Special Provisions) Act No.19 of 1990 has no application where a special provision is made in a specific statute such as the provision in s.14(2) of the Maintenance Act No.37 of 1999 which was also enacted after the introduction of the general provision in Act No.19 of 1990.

S.14(2) of the Maintenance Act in fact sets out a condition precedent to the invocation of the Appellate powers of the Supreme Court from the judgment of a High Court in that an application for special leave to the Supreme Court should be made to the High Court in the first instance and only on the refusal of such an application can an application for special leave be made to the Supreme Court".

In the instant case, the petitioner has failed to adduce the necessary exceptional circumstances to invoke the revisionary jurisdiction of this court. In terms of Section 14 of the Maintenance Act, a person dissatisfied with an order of the High Court should prefer an appeal to the Supreme Court. However, the petitioner filed a revision application in this court which requires him to adduce exceptional circumstances.

In the case of **Thilagarathnam Vs Edirisinghe 1982 (1) SLR 56**, the Court of Appeal held that; "*though the appellate court's powers to act in revision were wide and be exercised where an appeal has been taken against the order of the original court or not such powers would be exercised only in exceptional circumstances*".

The respondent is the spouse of the petitioner within the meaning of the Maintenance Act No. 37 of 1999.In terms of Section 18 of the General Marriages Ordinance, a marriage that has been registered and entered upon can only be dissolved by the District Court. However, the petitioner had not obtained such a decree so far. The Learned Magistrate had held that the second marriage is valid and in the revision application made to the High Court, the petitioner had been acquitted for lack of mens rea since he had stated that he had heard no news from his 1st wife for 15 years. The Learned High Court judge had, in his order, held that "I see nothing wrong before the eye of the law in contracting the second marriage" and further held that 1st marriage of the petitioner is null and void and the second marriage is valid.

Section 108 of the Evidence Ordinance has been considered in the case of **Lakmini Rathwatte Welgama Vs Wijesundara 1990 1 SLR 59** where it was held that the burden is on the petitioner to establish that there had been no marriage between the petitioner and the respondent and the petitioner has failed to adduce any evidence to that effect.

When the petitioner was charged with bigamy in the Magistrates Court he had taken up the position that the second marriage was valid but in the instant application takes up the position that the second marriage is void. This conduct of the petitioner demonstrates the ulterior motive of the petitioner to avoid the payment of maintenance to the respondent. Anyhow the petitioner has not obtained a decree from the District Court proving that the 2nd marriage is not valid. Therefor the petitioner's 2nd marriage has to be considered as a valid marriage.

Therefore the learned High Court Judge has correctly decided that though the petitioner was charged for bigamy, he was acquitted by the order of his appeal and his 2nd marriage is still valid.

Thus the petitioner is liable to pay maintenance to the respondent wife.

Revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

P. Padman Sresena, J (P/CA)

I, Agree.

PRESIDENT OF THE COURT OF APPEAL