

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

In the matter of an appeal from the
judgment/order of the High Court if
Colombo in terms of Article 154(P) (3) (B)
of the Constitution.

CA Application No: **CA (PHC) 14/2016**

HC Colombo Case No: **HCRA 249/14**

MC Colombo case No:
5924/09/Maintenance

Palihamadinage Chamila Priyanthi
No. 61/9, Rajagiriya Road,
Rajagiriya.

Applicant

Vs.

Arachchige Gamini Gotabaya Ranasinghe
No. 57, Gothatuwa
New Town.

Respondent

AND BETWEEN

Arachchige Gamini Gotabaya Ranasinghe
No. 57, Gothatuwa
New Town.

More correctly
No. 107, Gothatuwa
New Town.

Respondent-Petitioner

Vs.

Palihamadinage Chamila Priyanthi
No. 61/9, Rajagiriya Road,
Rajagiriya.

More correctly
No. 24/1, Sumedha Mawatha,
Mulleriyawa, Angoda.

Applicant-Respondent

AND NOW BETWEEN

Palihamadinage Chamila Priyanthi
No. 61/9, Rajagiriya Road,
Rajagiriya.
More correctly
No. 24/1, Sumedha Mawatha,
Mulleriyawa, Angoda.

Applicant-Respondent-Petitioner

Vs.

Arachchige Gamini Gotabaya Ranasinghe
No. 57, Gothatuwa
New Town.
More correctly
No. 107, Gothatuwa
New Town.

Respondent-Petitioner-Respondent

BEFORE : K.K. Wickremasinghe, J.
Janak De Silva, J.

COUNSEL : J. C. Thambiah, AAL and Lilani Ganegama, AAL for the
Applicant- Respondent-Petitioner
Pradeep Fernando for the Respondent-Petitioner-
Respondent

WRITTEN
SUBMISSIONS : 02. 04. 2018 for the Respondent-Petitioner-Respondent
02. 04. 2018 for the Applicant- Respondent-Petitioner

ARGUED ON : 21. 02. 2018

DECIDED ON : 04. 06. 2018

K.K. Wickremasinghe, J.

The Applicant-Respondent-Appellant (hereinafter referred to as the 'Appellant') filed a maintenance action against the Respondent-Petitioner-Respondent (hereinafter referred to as the 'respondent') on the 10th of September 2013 seeking a sum of Rs. 80,000 per month from the respondent. The Learned Magistrate held with the appellant and ordered the respondent to pay her Rs. 15,000 per month in order dated 27th November 2014. Aggrieved by the said order, the respondent filed a revision application. The Learned High Court judge allowed the revision application and set aside the order of the Learned Magistrate in order dated 29th February 2016. Being aggrieved by the said order of the Learned High Court Judge, the appellant has preferred the instant appeal in this court.

Facts of the case

The appellant (a divorcee with a child) and the respondent had married on or about the 26th of October 2006 and thereafter had refused to maintain the appellant or even pay rent for the premises they were living in the appellant had then filed a maintenance action in the Magistrate's Court. Evidence was led with respect to the assets owned by the respondent and that the appellant had given up her job due to the pressure by the respondent and no income of her own. The respondent maintained that the appellant had been **living in adultery** and therefore not entitled to maintenance by the respondent.

The respondent in his evidence had stated that after his marriage he had rented out a house in Pelawatte for the appellant and her child and had also purchased a motor car for her use. He also stated that the appellant had refused to have sexual intercourse with him until he purchased a house in her name. The respondent has

later on rented out several other houses for the appellant as well and had paid rent each month. He had also provided the appellant with her day to day expenses in addition to the payment of the rent. The respondent, in his evidence-in-chief further stated that even by 2010, the appellant was still refusing to have sexual intercourse with him.

In 2013, the respondent had discovered that the appellant was having an extra marital relationship with the elder son of the landlord, Rasika Premabandu, of the house she was living in at that time in Dodamgahahena. According to witness Piyasiri Premabandu (father of Rasika Premabandu), he had seen with his own eyes his son come out of the annex rented out to the appellant. The appellant had then been evicted and moved to another annex located 2km away, and then he had been informed that his son had been visiting that annex as well. He had then gone with his wife to the annex to find his son's motor bike parked outside and his slippers. He had also seen his son going upstairs at that time.

The Learned Magistrate held that the first incident was direct evidence while the second was circumstantial evidence it was highly improbable that mere fact that a bike and slippers was sighted could not substantiate the act of adultery and awarded Rs. 15,000 a month to the appellant.

The respondent then filed a revision application in the High Court citing inter alia that the appellant was living in adultery and therefore was not entitled to maintenance. The Learned High Court Judge held that the findings of the Learned Magistrate were contrary to the evidence and reversed the findings.

In **Proviso of Section 2(1) of the Maintenance Act No 37 of 1999**, it is stated that a woman will not be entitled to maintenance if she is living in adultery.

The Learned Counsel for the appellant quoting 'Law and the Marriage Relationship' by Shiranee Ponnambalam submits that for a woman to be not entitled to maintenance since she is living in adultery, there should be continuous adultery and not a few stray incidents, and there also has to be a substantial period of time and adulterous activities proven. The burden of proving this is placed on the person alleging such adultery.

It is also submitted that both instances of adultery are highly circumstantial. These circumstantial inferences have been denied by the appellant at all stages and does not establish that the appellant was living in adultery, therefore, the respondent is not released from his duty of maintaining his wife.

The Learned Counsel also submits that the respondent's reliance of the **Ebert V Ebert (22 NLR 310)** to substantiate the respondent's allegation is misconceived in this case as it deals with the husband's adultery (where only evidence of one instance of adultery is sufficient). The case puts forward a three-part test;

- (a) Guilty affection
- (b) Opportunity and
- (c) desertion of the lawful wife.

It is submitted that the appellant is not guilty of any of the above except for a weak inference of opportunity and it is the respondent who is guilty of desiring his lawful wife.

The Learned Counsel for the respondent submits the case of **Ebert v Ebert 22 NLR 310** where the Supreme Court held that evidence of sexual intercourse where the relationship is adulterous is extremely rare. This case goes on to show by necessary implication that it is almost an impossible and uphill task for the

innocent spouse to come up with direct/substantial evidence of the guilty spouse engaging in sexual intercourse in an adulterous relationship. As such betrayal in the said manner of having sexual intercourse with another while in marriage wedlock being a very painful experience to the innocent spouse, it is nothing but a bonus if the innocent spouse can uncover and bring out direct/circumstantial evidence of the guilty spouse living in adultery to the satisfaction of the Court which will then help the innocent party to withhold maintenance. The counsel submits that this has been exhibited in both the Magistrate's Court and the High Court.

The Counsel submits that the finding of the Learned Magistrate that the evidence in the second incident considered as circumstantial is erroneous. Further submitted that in both incidents, the evidence is strong direct evidence since the witness Piyasiri Premabandu states that he saw with his own eyes his son coming out from the annex leased out to the appellant and even in the second incident, he states that he saw his son going upstairs in the appellant's new annex. The Counsel also stresses on the fact that when the witness had followed his son's trail to the new annex, the landlord himself had stated that Rasika Premabandu had visited the annex several times before as well. Thus this is direct evidence that the appellant had taken in Rasika Premabandu several times into the annex proving that she had been leading a life of continuous adultery.

In **Arumugam V Athai 50 NLR 310**, the Supreme Court held that to disentitle an order of maintenance, it is to be proved that the wife is leading a life of continuous adulterous conduct. **Basnayake J** declared that "*'living in adultery' in Section 4 of the Maintenance Ordinance refers to a course of guilty conduct and not to a single lapse of virtue*". Considering available evidence, respondent has not adequately proved that, in fact, the appellant was living in adultery though there is some

evidence to the effect that one Rasika Premabandu had visited her twice. Though Rasika's father claims that the landlord of the appellant mentioned that Rasika was a frequent visitor, the landlord has not given evidence to that effect.

In the case of **Balasingham v Kalaivany (1986) 2 Sri. LR 378**,

“Several decisions of our Supreme Court have considered and constructed the meaning of S. 05 of the Maintenance Ordinance. The effect of these decisions is that where a husband seeks to cancel an order for maintenance in favour of his wife on the ground that she “is living in adultery” he must; to obtain an order of cancellation, establish that,

*(i) 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 living in adultery and committing adultery. Vide **Arumugam v Athai and Pushpawathy v Santhirasegarampillai** and that*

*(ii) the wife was so living in adultery at the time the application for a cancellation of the order was made. Vide **Simo Nona v Melias Singho,***

***Wijesinghe v Josi Nona(supra) and Pushpawathy v Santhirasegarampillai(supra).**”*

In the case of **Selliah v Sinnammah (1947) 48 NLR 26**, 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 that fact’.

In the case of **Reginahamy v Johna (1914) 17 NLR 376**, it was held that

“if a husband choses to let the marriage tie remain in spite of adultery on the part of his wife, and the wife from choice or necessity returns to an honourable life, the husband’s liabilities unquestionably revive.”

Therefore, considering the above we are of the view that the order of the Magistrate is in accordance with the law by allowing the maintenance to be paid to the appellant.

Accordingly the order of the Learned High Court Judge of Colombo is set aside and hereby the appeal is allowed.

Registrar is directed to send a copy of the Judgment to the relevant High Court of Colombo.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree.

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Ebert v Ebert 22 NLR 310
2. Arumugam V Athai 50 NLR 310
3. Balasingham v Kalaivany (1986) 2 Sri. LR 378
4. Pushpawathy v Santhirasegarampillai (1971) 75 NLR 353
5. Simo Nona v Melias Singho (1923) 26 NLR 61
6. Wijesinghe v Josi Nona (1936) 38 NLR 375
7. Selliah v Sinnammah (1947) 48 NLR 26
8. Reginahamy v Johna (1914) 17 NLR 376