

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

In the matter of an application for revision
against the order dated 28.04.2003 in Case
No. 4623/D in the District Court of Negombo.

CA Rev. No. 866/2003

D.C. Negombo 4623/D

Reichmuth Peeter of No. 834,

Chilaw Road, Kattuwa,

Negombo.

Plaintiff – Respondent – Petitioner

Vs.

Kurukulasuriya Shiromi

Chandrika Fernando,

No.233, Kimbulapitiya,

Negombo.

Defendant – Petitioner – Respondent

BEFORE : P.W.D.C. JAYATHILAKE, J

COUNSEL : Manohara de Silva, PC with N. Hippola for
the Plaintiff – Respondent – Petitioner
Rehan Sahabandu PC for the Defendant
Petitioner – Respondent

Argued On : 17.07.2014

Decided On : 25.09.2014

P.W.D.C. Jayathilake J.

Reichmuth Peeter of Chilaw Road, Kattuwa, Negombo the Plaintiff Respondent -
Petitioner (here in after referred to as Petitioner) has filed a divorce case against
Kurukulasuriya Shiromi Chandrika Fernando of No.233, Kimbulapitiya, Negombo,
the Defendant – Petitioner – Respondent (here in after referred to as Respondent)
in the District Court of Negombo in year 2001. The Respondent has made an
application in the said case for *alimony pendente lite* and cost of the case. She has

claimed Rs: 50000/= per month as *alimony* and Rs: 75000/= as the cost of the case. After an inquiry over this application learned Additional District Judge of Negombo has made the order dated 28.04.2003 which has been marked as P7 an annex to the petition of this application. In that order the learned judge has ordered the Petitioner to pay Rs: 75000/= as cost of the case and Rs: 25000/= monthly payment as *alimony pendente lite*. This is an application made by the Petitioner against the said order of the learned judge praying for setting aside and/or revising the order. The Petitioner has stated *alimony* and cost of litigation ordered by the judge are well beyond the means of the Petitioner.

The learned Counsel for the Petitioner has submitted in his written submission that the Petitioner had moved for the withdrawal of the divorce case as he was unable to pay the sum ordered as monthly alimony and cost of litigation. It is stated there in the learned District Judge had dismissed the application for withdrawal of the case as the Petitioner was due to pay a total sum of Rs: 750000/= as at 23.06.2003. The Petitioner has made an application for leave to appeal against the said order to this court and this court has dismissed the application for leave to appeal. Thereafter, the Petitioner has sought special leave to appeal against the order of this court and the Supreme Court has granted leave and the matter had been listed for argument. Thereafter the Supreme Court has allowed an abatement until the judgement in this case is delivered.

The learned Additional District Judge has ordered Rs: 25000/= monthly payment as *alimony pendente lite* on the basis of the monthly income of the Petitioner that is Rs: 500000/=. It has been stated in the order of the learned District Judge, even though the Defendant has mentioned that the monthly income of the Plaintiff is about Rs: 500000/= she has failed to prove it. The learned judge has come to the conclusion on an inference drawn by the court that the Plaintiff's monthly income is about Rs: 500000/= for the reason of plaintiff's failure to prove that he is not getting a monthly income of Rs: 500000/=. Here, a question arises whether it is proper for court to arrive at a conclusion on assumptions. There is another important factor which has to be taken into consideration that is, the maintenance case in which the order for maintenance for the Respondent has been made. It is an admitted fact that there is a maintenance case filed by the Respondent claiming maintenance from the Petitioner and order for maintenance has been made in that case. Though there is no hard and fast rule that *alimony pendente lite* cannot be ordered when there is a maintenance order made under the provisions of the maintenance ordinance, in my opinion there should be exceptional circumstances to make such an order. The Petitioner's being a foreigner is not an exceptional circumstance.

Yet again the reason given to ignore the maintenance order of the Magistrate is that the Petitioner has not proved that the said maintenance order has been made

after an inquiry. Even though the Respondent has stated in her petition that the maintenance order which had been made on 21.06.1999 is insufficient, no application for enhancement has been made in that case up to the time of making the application for *alimony pendente lite* of the divorce case.

As such this court is of the view that the learned District Judge should have made an order for *alimony pendente lite* in the absence of any exceptional circumstance as there was a maintenance order made by the Magistrate. District Court has ordered to pay Rs: 75000/= as cost of litigation. In my opinion the cost of litigation could have been made in consultation with both counsel without going for an inquiry into that matter. Still for all, if the Petitioner wanted to proceed with the divorce case despite the fact that he was dissatisfied with the order for the alimony he could have paid the cost of litigation ordered by the court subject to this revision application as it was a lump sum for the entire proceedings. There is no reason for this court to believe that the Petitioner was not in a position to pay his wife Rs: 75000/= as cost of litigation.

For the foregoing reasons, this court set aside the order of *alimony pendente lite* made by the learned Additional District Judge. As the Petitioner was bound to pay the cost of litigation ordered by the court and the District Court had ordered to pay Rs: 75000/= as cost of litigation 12 years ago, this court decides to change that

order to make the amount as Rs: 150000/=. If the Petitioner fails to pay the cost of litigation to the Respondent within two months from the date of pronouncement of this order in the District Court, the Petitioner's action shall be dismissed.

Order for *alimony pendente lite* set aside.

JUDGE OF THE COURT OF APPEAL