

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

CA (CPA) PHC APN 147 - 2022

HC Kandy Case No.
Rev. 75-2022

MC – Kandy
No. 20/9146- 2022

In the matter of an application for
Revision in terms of Article 154 P
(6) read with Article 138 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka

Bebina Hennadige Thusharika
Fernando
No. 124/9/1, Devi Road,
Watapuluwa, Kandy.

Applicant

Vs.

Amarasinghe Mudalige Chandana
Susantha Amarasinghe,
No. 124/9, Devi Road,
Watapuluwa,
Kandy.

Respondent

AND BETWEEN

Amarasinghe Mudalige Chandana
Susantha Amarasinghe
No. 124/9, Devi Road,
Watapuluwa,
Kandy.

Respondent – Petitioner

Vs

Bebina Hennadige Thusharika
Fernando
No. 124/9/1, Devi Road,
Watapuluwa,
Kandy.

Applicant -Respondent

AND NOW BETWEEN

Amarasinghe Mudalige Chandana
Susantha Amarasinghe,
No. 124/9, Devi Road,
Watapuluwa,
Kandy.

**Respondent - Petitioner -
Petitioner**

Vs

Bebina Hennadige Thusharika
Fernando
No. 124/9/1 Devi Road,
Watapuluwa,
Kandy.

**Applicant - Respondent-
Respondent**

Before : **Hon. M Sampath K. B Wijeratne, J.(CA)**
: **Hon. M. Ahsan R. Marikar, J.(CA)**

Counsel : Upul Ranjan Hewage with Dilmi
Kithulgoda appears for the Respondent –
Petitioner – Petitioner.

Thishaya Weeragoda, Sanjaya
Marambage, K. Dissanayake instructed
by T.Perera for the Applicant –
Respondent - Respondent

Argued on : 27.08.2024

Decided on : 16.10.2024

M. Ahsan R. Marikar, J. (CA)

Introduction

1. The Respondent-Petitioner-Petitioner (hereinafter referred to as the “Petitioner”) had preferred this revision application against the Order made by the High Court Judge on 31st October 2022, dismissing the Petitioner’s revision application filed in the High Court of Kandy.
2. The prayer of the petition dated 21st November 2022 had sought the reliefs which is reproduced as follows;
 - a) Issue notice on the Respondent;
 - b) Revise and set aside the Order of the Learned High Court Judge of the Central Province Holden in Kandy dated 31.10.2022 (“X6”) in the High Court of the Central Province Holden in Kandy in case bearing **No. 323 75/2022**;
 - c) Grant an Order setting aside the Interim Order of the Learned Additional Magistrate dated 20.09.2022 (“X3”) and or all other proceedings in Magistrate’s Court of Kandy case bearing **No. 20 9146/2022**;
 - d) Grant an Order staying the operation of the Interim Order of the Learned Additional Magistrate dated 20.09.2022 (“X3”) in Magistrate’s Court of Kandy case bearing **No. 20 9146/2022** until the hearing and determination of this application;
 - e) Costs and;
 - f) Such and further relief that Your Lordships’ Court shall seem fit.

The facts of the case

3. There is no dispute that the Petitioner and the Respondent are husband and wife and are living apart. The two children for whom the maintenance is being ordered are children of their marriage.
4. The Applicant-Respondent-Respondent, (hereinafter referred to as the "Respondent"), had made an application to the Magistrate's Court of Kandy seeking an Order for the maintenance of her two children.
5. Upon hearing the said application, the Learned Magistrate had ordered a payment of a monthly allowance of Rs. 40,000 for each child.
6. Against the said Order, the Petitioner had filed a revision application before the Provincial High Court of Kandy. The Provincial High Court Judge, without considering the facts, had refused the revision application filed by the Petitioner.
7. Aggrieved by the said Order, the Petitioner had submitted this revision application seeking the reliefs prayed for in the prayer of the petition dated 21st November 2022.

Disputed facts

8. When this matter was taken up for argument, both parties had agreed to conclude the argument by way of written submissions.
9. Upon perusal of the documents and the Orders issued by the Learned Magistrate and the Learned High Court Judge, the Learned Magistrate had ordered an interim payment of Rs. 80,000 for the children's maintenance on the 20th of September 2022.
10. In the said Order, it is specified that each child is entitled to Rs. 40,000.

11. In view of the facts and the documents submitted to address the issues between the parties, the following disputed facts should be considered,

- I. Has the Learned Magistrate made a permanent Order for the maintenance of the children of the Petitioner and the Respondent?
- II. If not, has the inquiry pertinent to the maintenance been concluded before the Magistrate?
- III. If not, can the Petitioner sustain this application?

I. Has the Learned Magistrate made a permanent Order for the maintenance of the children of the Petitioner and the Respondent?

12. Upon perusal of the documents as well as the Orders of the Learned Magistrate and the High Court Judge, there is no doubt that the Petitioner and the Respondent are husband and wife.

13. The two children namely, *Sadupa Bhashwara Amarasinghe* and *Thisadu Dinara Amarasinghe* are the children of the Petitioner and Respondent.

14. Both parties have admitted that they are living separately in the same house, with one residing upstairs and the other downstairs, while the children are living with the Respondent.

15. The Respondent had made a maintenance application to the Magistrate's Court of Kandy. The said maintenance inquiry had not yet commenced. However, the Learned Magistrate had issued an Interim Order for the Petitioner to pay Rs. 80,000 as maintenance for both children.

16. The said Order had been issued after the counsel for the Respondent had stated that the Respondent is spending a sum of Rs. 80,000 to maintain the children.
17. Considering the said position, the Learned Magistrate had ordered the interim payment, and the case had been fixed for inquiry on the 6th December 2022.
18. In the said circumstances, it is evident that the Order made by the Learned Magistrate, as per document marked X3 is not a permanent Order; rather, it is an interim payment allowance that was decided.

II. If not, has the inquiry pertinent to the maintenance been concluded before the Magistrate?

19. Following the Interim Order made on 20th September 2022, the Learned Magistrate had fixed this case for inquiry on the 6th December 2022.
20. As the Petitioner had preferred these revision applications, the maintenance inquiry had been unnecessarily delayed in deciding on the permanent maintenance of the children.
21. Thus, the inquiry pertinent to the maintenance application had not yet been concluded.

III. If not, can the Petitioner sustain this application?

22. The Petitioner, in his petition dated 21st November 2022, had reiterated that he does not neglect or refuse to maintain the children.
23. Further, the Learned Magistrate had failed to consider that the Respondent and children had been living in the same house

while ordering the Petitioner to pay Rs. 80,000 as maintenance for the children.

24. The Petitioner had stated that the Learned Magistrate had not considered any facts when deciding on the interim payment of Rs. 80,000 maintenance.
25. It is evident in document X3 that the counsel for the Respondent had admitted that the Respondent is spending Rs. 80,000 for the children.
26. I would like to state that, the Petitioner had verbally asserted that he was spending Rs. 80,000 for the children and their mother, who are living in the upstairs of the house separately from the Petitioner.
27. Therefore, until the permanent Order is made in this matter, there should be a legally valid Order for the Petitioner to make the payment to the children.
28. If not, in the event the Petitioner fails to spend the amount referred to in X3, grave harm would be caused to the children.
29. Further, the Order made by the Learned Magistrate is not a permanent Order and it is an Interim Order which can be challenged in the maintenance inquiry.
30. Therefore, I do not see any grounds to interfere with the Learned High Court Judge's Order dated 31st October 2022.
31. The Learned High Court Judge had specified that the application made to the High Court by the Petitioner dated 5th October 2022 does not reveal any grounds for a revision application. Further the impugned Order must not only be illegal but should also shock the conscience of the court as decided in the case of ***Secretary Kalutara v Kalupahana Mestrige Jayatissa***¹;

¹ SC Appeals 246,247,249,250/14

“It must be noted that the Respondents had invoked revisionary jurisdiction of this court, which is discretionary remedy. Thus, if relief to be granted, the party seeking the relief has to establish that, not only the impugned Order is illegal, but also the nature of the illegality is such, that it shocks the conscience of the court”

32. Besides these facts I draw my attention to the following decisions;

As per Soertsz. S.P.J. In the case of **Sivasamy v. Rasiah** ² stated as follows;

" These words, correctly interpreted, can only mean that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means by the husband and is not affected by the fact that she has sufficient means of her own. That conclusion emerges all the clearer when we read further down in the section the words of contrast providing for an Order of maintenance for ' his wife ' and for such child ' : The word ' such ' is used as an adjunct to the word ' child ', and not to the word ' wife ' in Order to emphasize the fact that in the case of the child, inability to maintain itself is one of the conditions upon which the father's liability rests. "

And in **H. Ediriweera v K.A.D. Dharmapala** ³ Alles, J articulated as follows;

“.....the mother was possessed of means to maintain the child is a totally irrelevant consideration in so far as the legal liability of the father is concerned to maintain his child.”

² [1943] 44 N. L. R. 241

³ [1965] 69 NLR 45

33. Therefore, it is abundantly clear in the abovementioned case laws that the mother's possession of means to maintain the child is irrelevant.
34. Therefore, the position taken by the Petitioner that the Respondent is a lawyer is irrelevant at this stage to consider the maintenance.
35. On the said grounds, I do not see any merit to interfere with the Order made by the Learned High Court Judge as there are no exceptional grounds to consider under revisionary jurisdiction.
36. Further, it is noted that the Petitioner (after issuance of the Order marked X3) had filed the revision application in both the High Court and the Appellate Court to delay the payment, despite having the opportunity to conclude the maintenance matter during the period in which this case has been delayed.

CONCLUSION

37. In view of the facts submitted, I dismiss the petition dated 21st November 2022 subject to Rs. 125,000 cost payable to the Respondent.

Judge of the Court of Appeal

M Sampath K. B. Wijeratne, J. (CA)

I agree.

Judge of the Court of Appeal