

**SOMAWATHIE**  
**v**  
**WIMALARATNE**

SUPREME COURT  
SHIRANEE TILAKAWARDANE, J.  
DISSANAYAKE, J.  
AMARATUNGA, J.  
S.C. APPEAL NO. 6/2001  
H.C. BALAPITIYA 114/2000  
M.C. ELPITIYA 54578  
NOVEMBER 3, 2006

*Maintenance Ordinance (Cap. 91) Section 2 – Duty cast on the husband by Section 2 to provide maintenance for his wife – If the alleged marriage is invalid by reason of some legal impediment on the part of the husband, can the innocent party (wife) claim maintenance against her husband under Section 2 of the Maintenance Ordinance or under common law? – Putative Marriage – Action for damages for injuria?*

The appellant, claiming to be the wife of the respondent filed an application under and in terms of section 2 of the Maintenance Ordinance in the Magistrate's Court to obtain maintenance from her husband, the respondent. The respondent admitted his first marriage to one Anulawathie and had further admitted that he had been convicted of bigamy. It was common ground between the parties that at the time the respondent got married to the appellant he had been already married to said Anulawathie. The Magistrate Court granted the reliefs prayed for by the applicant – The High Court allowed the appeal of the respondent. The main issue before the

Supreme Court was whether an innocent party to a bigamous marriage can claim maintenance against her spouse who had contracted a bigamous marriage.

**Held:**

- (1) The duty cast on the husband by section 2 of the Maintenance Ordinance is to provide only for his wife, upon proof of the husband's failure or neglect to maintain his wife.
- (2) 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.
- (3) Magistrate had to decide whether there was a valid marriage between the respondent and the appellant creating the husband and wife relationship between them with all its attendant duties and obligations.
- (4) Since a bigamous marriage which was void *ab-initio* did not create any legal result, a Court was not entitled to rely on an admission made by the respondent to invest the respondent's second marriage with any validity it did not and could not have in law.
- (5) The word "wife" used in section 2 of the Maintenance Ordinance does not empower a Court to interpret that word to include a person who stands in a lesser relationship than that of a wife. Hence the appellant has no right to come under section 2 of the Maintenance Ordinance to obtain maintenance for herself. Her remedy, if at all, would be an action for damages for *injuria* or breach of promise against deceiver.

per Gamini Amaralunga, J.

"A putative marriage means a marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render it unlawful" ...

"The rule that a marriage which is null and void *ab-initio* has none of the consequences of a valid marriage, is subject to two exceptions in the case of a putative marriage. The first exception is that children of a putative marriage are considered legitimate and a Court is entitled to declare this status. This exception has received judicial recognition. The other exception is that if the parties to a putative marriage have not entered into an ante nuptial contract, it must be presumed that they intended to be married in community of property."

**APPEAL** from the judgment of the High Court of Balapitiya.

**Cases referred to:**

- 1) *Subramaniam v Pakkylaladchumy* 55 NLR 87.
- 2) *Fernando v Fernando* 70 NLR 534.
- 3) *Ngobeni v Gibitwayo*, 1946(2) PH B 58 W.
- 4) *Locke v Locke*, 1951(1) SA 132 N.
- 5) *Vloak v Vloak* 1953(1) SA 485 W.
- 6) *Marrison v Marrison*, 1978(2) SA 185C.

November 03, 2006

**GAMINI AMARATUNGA, J.**

This is an appeal, with leave granted by the High Court, against the judgment of the learned High Court Judge of Balapitiya allowing the respondent-appellant-respondent's (the respondent) appeal against the Order of the learned Magistrate of Elpitiya directing him to pay Rs. 1500/- per month to the applicant-respondent-appellant (the appellant) as maintenance.

At the time this appeal was argued the learned Counsel for the respondent raised a preliminary objection with regard to the validity of this appeal. This objection was based on the judgment delivered by this Court on 15.6.2006 in SC Appeal No. 44 of 2005, where this Court held that where leave to appeal has been granted by the High Court, the petition of appeal has to be filed in this Court in terms of Rule 28(2) of the Supreme Court Rules of 1990. In the present case, there is no separate petition of appeal and the only petition available in the record is the petition filed in the High Court to obtain leave to appeal to this Court. The learned Counsel for the appellant had no prior notice of the preliminary objection. This Court therefore permitted her to file additional written submissions on the preliminary objection. Since both parties had earlier filed their written submissions on the merits of the appeal, the Court heard arguments of both learned Counsel on the merits of the appeal and decided to consider the merits of the appeal and the preliminary objection together. I therefore decided to consider the merits of the appeal before I deal with the preliminary objection.

The appellant, claiming to be the wife of the respondent, filed an application, dated 22.4.1994, in the Magistrates Court in terms of section 2 of the Maintenance Ordinance (Cap. 91) to obtain maintenance for herself from her husband, who is the present respondent. The respondent who appeared in the Magistrates Court to answer the claim for maintenance admitted his marriage to the appellant. Since the appellant was not prepared to accept the respondent's invitation to come back to live with him, the learned Magistrate had held an inquiry.

The appellant's evidence was that she was earlier married to one Ariyaratna who had later disappeared during the reign of terror that existed in the country in 1989. Thereafter on 26.3.1993 she married the

respondent before the Registrar of marriages and lived in the respondent's house as his wife. About eight months later she came to know that the appellant had earlier married one Anulawathie. Later the respondent started to ill-treat her and assault her. Due to this harassment she left the appellant's home.

In his evidence the respondent had admitted his first marriage to Anulawathie which he had contracted under the name of Geeganage Wimal Senadheera. He had further stated that the said Anulawathie had filed a maintenance case against him and that he had been convicted of bigamy.

At the inquiry, it was the common ground between both parties that at the time of the respondent's marriage to the appellant, the former had already married one Anulawathie. In fact the certificate of that marriage was before Court marked P1.

In terms of section 2 of the Maintenance Ordinance, a Magistrate is empowered to order the husband to pay maintenance upon proof of the husband's failure or neglect to maintain his wife. The duty cast on the husband by section 2 is to provide only for his "wife". If the alleged marriage of an applicant for maintenance is invalid by reason of some 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 that she is not entitled in law to claim maintenance for herself. In *Subramaniam v Pakkiyaladchumy*<sup>(1)</sup>, it has been held that a woman, who contracts a second marriage before the *decree nisi* entered in divorce proceedings is made absolute, cannot claim maintenance from the person with whom she contracted the second marriage.

Section 18 of the General Marriages Ordinance (Cap 112) enacts that:

*"No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."*

The existence of a prior marriage is an absolute impediment to a second valid monogamous marriage contemplated by the General Marriages Ordinance. There was no evidence before the Magistrate – or even at least a suggestion – that at the time of the respondent's marriage to the appellant, his first wife Anulawathie was dead or that the first marriage had been dissolved by the decree of a competent Court.

Thus the legal position apparent from the evidence before the Magistrate was that the respondent's marriage to the appellant, being a bigamous marriage, was void *ab initio*.

The learned Magistrate had not considered this aspect at all. Instead he had relied on the respondent's admission of his 'marriage' to the appellant as a sufficient basis to hold that a husband and wife relationship existed between the parties. The learned Magistrate had held that having first admitted the second marriage, the respondent was not entitled to subsequently contend that the second marriage was invalid. To support his view the learned Magistrate had relied on the doctrine of approbation and reprobation, which is also expressed in the Latin *maxim Allegans contraria non est audiendus*;

He is not to be heard who alleged things contradictory of each other. The relationship of husband and wife is a legal status acquired by the parties when there is a valid marriage. On the evidence available before him the learned Magistrate had to decide whether there was a valid marriage between the respondent and the appellant creating the husband and wife relationship between them with all its attendant duties and obligations. This was a question of law. Since the bigamous marriage which was void *ab initio* did not create any legal result, a Court was not entitled to rely on an admission made by the respondent to invest the respondent's second marriage with any validity it did not and could not have in law. The respondent's so-called admission, when viewed in the light of the evidence of his previous marriage, was nothing more than an admission that he purported to marry the appellant. Its legal effect was a question of law that should have been decided by Court. The learned Magistrate's failure to address his mind to this vital question of law and his decision to act solely upon the so-called admission disregarding the evidence of the respondent's previous marriage completely vitiated his finding that the appellant was entitled to claim maintenance from the respondent.

The learned High Court Judge, having considered the evidence of the respondent's previous marriage has rightly held that the appellant was not the 'legal wife' of the respondent and accordingly set aside the learned Magistrate's order directing the present respondent to pay maintenance to the appellant.

When the present appellant filed a petition in the High Court seeking leave of the High Court to prefer an appeal to this Court, the learned

High Court Judge had directed to forward the record to this Court. The record does not indicate the questions upon which leave to appeal was granted. *When leave to appeal to this Court is granted, it is the duty of every High Court Judge to clearly and precisely specify the questions of law upon which leave to appeal is granted.* In the absence of any such questions specified by the learned Judge, this Court has to presume that leave to appeal had been granted upon all five questions set out in the appellant's application for leave to appeal. Those questions are as follows.

1. Was the interpretation given to section 2 of Act No. 37 of 1999 : correct in law?
2. Did the High Court err in interpreting the word "spouse"?
3. Was the decision to set aside the order of the Magistrate under section 2 of the Maintenance Ordinance correct in law?
4. Was the interpretation given by the High Court to the word cruelty correct in law?
5. Did the High Court err in considering the weight to be attached to the admission of marriage?

Question No. 1 specifically refers to section 2 of the Maintenance Act No. 37 of 1999 and question No. 2 refers to the word 'spouse' appearing in section 2 of the said Act in place of the word 'wife' used in section 2 of the Maintenance Ordinance repealed by the Maintenance Act No. 37 of 1999. The appellant's application for maintenance had been filed under section 2 of the Maintenance Ordinance. Whilst the inquiry was pending in the Magistrate's Court, the new Maintenance Act had come into operation. The new Act, by section 19, repealed the Maintenance Ordinance. Section 20 of the new Act provides that all proceedings instituted under the Maintenance Ordinance and all appeals from orders made under that Ordinance and pending on the day preceding the commencement of the new Act shall be heard and disposed of as though the Maintenance Ordinance had not been repealed. In view of this provision this appeal has to be decided according to the provisions of the repealed Maintenance Ordinance and as such the interpretation of section 2 of the Maintenance Act No. 37 of 1999 and the word 'spouse' appearing in section 2 thereof has no relevance to this appeal. I therefore reject questions No. 1 and 2 as they are irrelevant.

In his judgment the learned High Court Judge had not specifically dealt with the weight to be attached to the respondent's admission of his marriage to the appellant but the learned Judge's conclusion that in view of the respondent's first marriage, there was no valid marriage between him and the appellant clearly shows that the learned Judge did not attach any significance to that bare admission which had no legal basis. I have already pointed out that the respondent's so-called admission had no relevance to the question of law to be decided by the Magistrate. I accordingly answer question No. 5 in the negative.

In considering question No. 3, it is pertinent to state that at the argument before us, the learned Counsel for the appellant did not contend or seek to argue that the respondent's marriage to the appellant was valid. The learned Counsel for the appellant sought to invoke the aid of the common law concept of putative marriage to salvage the case of the appellant.

A putative marriage means a marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render it unlawful. *Black's Law Dictionary* 5th Edition. "The putative marriage is a device *ad misericordiam* to tamper with the chill wind of invalidity to a man or a woman who has entered into a marriage relationship in *bona fide* ignorance of a legal impediment such as a subsisting marriage or a relationship within the prohibited degree." *Hahlo, The South African Law of Husband and Wife*, 2nd Edition, Page 483. The rule that a marriage which is null and void *ab initio* has none of the consequences of a valid marriage, is subject to two exceptions in the case of a putative marriage. The first exception is that the children of a putative marriage are considered legitimate and a Court is entitled to declare this status. This exception has received Judicial recognition in Sri Lanka. See *Fernando v Fernando*.<sup>(2)</sup> The other exception is that if the parties to a putative marriage have not entered into an antenuptial contract of property. This exception has no application in Sri Lanka where the system of community of property is not longer a part of the law relating to married persons' property.

Apart from the above exceptions, there is no exception recognised by common law which enables a Court to regard the innocent female party to a putative marriage as a wife for the purpose of imposing or enforcing a duty of support. Thus the concept of putative marriage cannot be of any avail to the appellant under the present state of the

common law. In addition, the clear and unambiguous word 'wife' used in section 2 of the Maintenance Ordinance does not empower a Court to interpret that word to include a person who stands in a lesser relationship than that of a wife. Accordingly the appellant has no legal right to come under section 2 of the Maintenance Ordinance to obtain maintenance for herself.

The learned Counsel for the appellant submitted that if an obligation to maintain the appellant is not imposed on the respondent he would stand to benefit from his own wrongdoing. However much this Court may dislike the insensitivity and moral depravity of the respondent and the absence of any regard for the consequences of his behavior to the appellant this Court is unable to grant any relief to the appellant in these proceedings. Her remedy, if at all, would be an action for damages for *injuria*. As pointed out by Hahlo, citing South African and English authorities, "if one of the parties took advantage of the other's innocence by inducing him (or her) to enter into a marriage which the deceiver knew, but the deceived did not know to be null and void, the innocent party may have an action for damages for deceit (fraud), *injuria* or breach of promise against the deceiver." *South African Law of Husband and Wife* 5th Edition, page 107.

For the reasons set out above I answer question No. 3 in the affirmative. In view of the conclusion reached on question No. 3, the necessity to consider question No. 4 and the preliminary objection raised on behalf of the respondent does not arise. I accordingly dismiss this appeal without costs.

Hon. Tilakawardane, J. has written a separate judgment dismissing this appeal for the reasons stated therein.

**DISSANAYAKE, J.** - I agree.

*Appeal dismissed.*

#### **SHIRANEE TILAKAWARDANE, J.**

This appeal is against the judgment of the learned High Court Judge of Balapitiya allowing the respondent-appellant-respondent's (the respondent) Appeal against the order of the learned Magistrate of Elpitiya directing to pay Rs. 1500/- a month as maintenance to the applicant-respondent-appellant.

The appellant filed an application under Section 2 of the Maintenance Ordinance No. 19 of 1889 as amended by the

Maintenance Act No. 37 of 1999 for maintenance, against her husband, the present respondent, in application dated 22.04.1994 before the Magistrates Court. The appellant claims that she married the respondent before the Registrar of Marriages, on 26.03.1993, and lived in the respondent's house as his wife. About eight months later she came to know that the respondent has previously married one Anulawathie. Later, the appellant was forced to leave the respondent's home due to the ill treatment meted out to her by the respondent.

The respondent has admitted his marriage to the appellant during the subsistence of his previous marriage to Anulawathie, on account of which he has pleaded guilty to the charge of bigamy. The respondent relies on his conviction for the crime of bigamy to contest the claim for maintenance brought by the appellant. The respondent claims that since his marriage to the appellant has been rendered void by his bigamous conduct, no claim for spousal maintenance could be validly raised against him.

The primary issue before this Court concerns whether an innocent party to a bigamous marriage can claim maintenance against his or her purported spouse under either statute or common law; and what impact does the nullity of a marriage have on a claim for maintenance or support by either party? Analysis of the general principles governing the effect of a void marriage as well as certain common law exceptions thereto would be relevant to the determination of the aforesaid issue.

There is clarity under both statute as well as common law that, the existence of a prior subsisting marriage of either party renders the second marriage void *ab initio*. Section 18 of the General Marriage Ordinance provides that "no marriage shall be valid where either of the parties thereto shall have contracted a prior marriage, which shall not have been legally dissolved or declared void."

A void marriage does not entail any of the legal consequences of a marriage. There are no reciprocal rights and duties of support arising out of such a marriage. The nullity of a marriage is absolute and it may be relied on by either party or by any interested third party even after the death of one or both parties. (Vide, H.R. Hahlo, *The South African Law of Husband and Wife*, 4th Edition, Page 488).

The Maintenance Ordinance, under which the present claim has been filed, contemplates the provision of maintenance to a "wife" claiming under a valid marriage. Neither the Ordinance nor the Maintenance Act of 1999 contemplates the payment of maintenance to a person who stands in a relationship other than that of a wife or spouse. Where the term "wife" or "spouse" has been used with clarity and without ambiguity by the legislature, this court is unable to expand its meaning in order to include those claiming under a void marriage, who do not share a spousal relationship with the person against whom, a claim is made.

Common law does provide a notable exception to the general principle that a void marriage is of no legal effect. Where one or both parties to the marriage are innocent and have entered into the marriage with *bona fide* intent, the court may declare that at the instance of the innocent party certain consequences of a valid marriage may attach to it under the principle of *matrimonium putativum*. (Vide, H.R. Hahlo, *The South African Law of Husband and Wife*, 4th Edition, Page 488).

The court has no power to validate an invalid marriage, but under the circumstances certain consequences of a valid marriage would attach to a putative marriage. However these consequences are limited in that they pertain only to the legitimacy of children born into such a marriage and the presumption regarding community of property, the latter of which has no application in Sri Lanka. Prevalent jurisprudence does not support the extension of consequences, under a putative marriage to permit the granting of maintenance to an innocent party. (Vide, H.R. Hahlo, *The South African Law of Husband and Wife*, 4th Edition, Page 496).

The position appears to be different under English Law. Section 23 of the Matrimonial Causes Act, 1973 provides that where a court is called upon to grant a decree of nullity of marriage, the court may, in its discretion, make financial provisions for either party to the marriage.

The position of the innocent party to a bigamous marriage has also been examined under the common law. The decisions centered largely on whether the guilty party could sue for nullity of the marriage (*Ngobeni v Gibitwayo*<sup>(3)</sup>) or in anyway gain advantage from his or her wrongful act, (*Locke v Locke*<sup>(4)</sup>). Courts have

concluded that a person guilty of bigamous conduct is not precluded from suing for the nullity of his or her second marriage (*Vlook v Vlook* 1953<sup>(5)</sup>; *Morrison v Morrison*<sup>(6)</sup>). However, these decisions were concerned primarily with the determination of the status of the marriage, and not regarding the avoidance of legal duties and liabilities flowing to the guilty party therefrom.

Regrettably though, Sri Lankan statute law at present does not provide for the protection and maintenance of the innocent party to a bigamous marriage. Neither does common law principle of putative marriage come to her rescue given its limited scope. The Appellant in the instant case therefore is compelled to seek remedy in damages on ground of fraud, *injuria* or breach of promise, as no remedy in her favour is available to her under statute or common law.

The law as it stands, only penalizes the bigamous conduct and fails to take 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 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 laws 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.

Appeal is accordingly dismissed. No costs.

*Appeal dismissed.*