"Living in Adultery" as a Ground for Losing the Opportunity to Claim Maintenance: A Critical Appraisal of the Sri Lankan Judicial Standpoint

Ishara Kumudumalee Munasinghe[1#]

[1]*Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka*

·<ishara.munasinghe@kdu.ac.lk>

Abstract - *The common law reciprocal duty of maintaining the spouses has been part of the Sri Lankan legal regime with the incorporation of the maintenance law directions, with the enforcement of Maintenance Ordinance, No. 19 of 1889, which was subsequently repealed by the Maintenance Act, No. 37 of 1999. "Living in adultery" has been recognized as an exemption to qualify to claim maintenance from the spouse as per the provisions of both statutes. Nevertheless, the scope of the term, "living in adultery" has been developed by the domestic judiciary following numerous approaches of construction. This research aims to evaluate the effectiveness of the domestic judiciary in dealing with the concept of "living in adultery". It also analyses different approaches used by the judiciary in interpreting the term and determining whether the burden of proof required to establish "living in adultery" has been consistently applied in accordance with Sections 3, 4, and 5 of the Maintenance Ordinance (1889) and Section 2(i) proviso of the Maintenance Act (1999). The black letter approach and comparative legal research methodologies have been employed in order to achieve the objective of the study. Finally, the study reveals that the judicial determination under both statutes has attempted to construct the phrase "living in adultery" based on the circumstantial evidence provided by each case, yet the level of burden of proof expected to establish the "living in adultery" shall remain unclarified.*

***Keywords*- Maintenance, Living in Adulty, Burden of Proof, Sri Lanka**

I. INTRODUCTION

Roman Dutch Law recognized the duty to support and/or obligation to maintain inherits the nature of reciprocity towards both spouses. According to Voet (1829), lifelong association directs that a needy wife shall be maintained by the husband and pauper husband by his wife. This leads to raise two valid questions as to what extent does the wife's financial status matters to obtain maintenance from the husband and how to recognize the wife's reciprocal duty towards the maintenance of the husband (Ponnambalam, 1981).

Nevertheless, the existing legal regime of Sri Lanka on maintenance is the Maintenance Act, No. 37 of 1999 (hereinafter referred to as MA) which enforced repealing the Maintenance Ordinance, No. 19 of 1889 (hereinafter referred to as MO), while introducing a dynamic set of laws to regulate the prescribed duty and/or obligation arising out of the family relations.

Section 2 of the MA (1999) specified that, the nature of the so-called maintenance obligation towards and between the spouses and the offspring. Further, the section illustrates that, where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse, who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit having regard to the income of such person the means and circumstances of such spouse [MA,1999,s 2 (i)].

Additionally, the proviso of section 2 (i) of MA (1999), clarifies the two exemptions for the legitimacy of the maintenance claim as proving that, however, no such order shall be made, if the applicant spouse is living in adultery [*Ebert v Ebert* (1925) 26 NLR 435, *Biso Manike v Abeysekara* (1961) 60 CLW 108, *Pradeep Weerasinghe v Renuka Dissanayake* (2016), *Chandrakanthi v Gamini Kumara* (2022)] or both the spouses are living separately by, mutual consent [*Micho Hamine v Girigiris Appu* (1912)15 NLR 191, *Maliappa Chetti v Maliappa* (1927) 29 NLR 98, *Fernando v Fernando* (1939) 40 NLR]

It is evident that no consistency is being maintained by the Sri Lankan judiciary in constructing the phrase "living in adultery", as appropriate for the maintenance claims.

The replaced MO (1889) similarly used the term "living in adultery" on a specified few occasions. Whereas, according to section 3 of the MO (1889), if such a person offers to maintain his wife on condition of her living with him, Magistrate may consider any grounds of refusal stated by her and may make an order under (MO,1889, s.2), notwithstanding such offer, if the Magistrate is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

Similarly, no wife shall be entitled to receive a maintenance allowance, if she is living in adultery (MO,1889, s.4), and

even a granted allowance order shall be cancelled upon the proof of her living in adultery (MO,1889, s.5).

Hence, the study intends to uncover the question of the efficacy of the domestic judiciary in dealing with the terminology of "living in adultery", as per the relevant sections of the MO (1889) and MA (1999).

The objective of the study is to appraise the extent of the domestic judicial construction of the phrase "living in adultery" as per the sections of the MO (1889) and MA (1999). In order to achieve its objective, the study shall be anaylized the domestic judicial standpoint of "living on adultery", while appraising the judicial yard stick applied to identify the standards of proof of the same.

This study is based on the black letter approach which critically analyses the provisions and approach of the MO (1889) and MA (1999) of Sri Lanka with the relevant judicial pronouncements. The comparative legal research methodology shall employ as appropriate to understand the extent of the scope of the construction of the "living in adultery" in the maintenance claims made under the two statutes.

II. DEFINITION AND THE LEGAL RECOGNITION OF "ADULTERY"

To begin with, it is vital to explore the general definition of the term 'adultery'. According to Black's Law Dictionary (2019) adultery is "voluntary sexual intercourse between a married person and someone other than the person's spouse."

Nevertheless, the term has been provided with dynamic reflections by global legal scholars and from the statutes enacted by different jurisdictions.

According to Voet, adultery is a "…violation of the couch of another, that is to say, the defiling of the mother of another's household…", "...may be between a married man and unmarried woman, and unmarried man and married woman (Percival Gane, 1829).

It is evident that the incident of adultery shall be read in multiple dimensions or perspectives, which depend on the religious, cultural, and social circumstances of the relevant society (Coutts, 1949).

Rayden (1969) defines adultery in English Law as "consensual sexual intercourse between a married person and a person of the opposite sex, who is not the other spouse, during the subsistence of the marriage".

Adultery is seen in South Africa as "voluntary sexual intercourse between a spouse and a person other than the offender's husband or wife (Hahlo, 1969).

From the Sri Lankan perspective as Dr. Ponnambalan (1982) explained, the essential ingredient of the adultery as it involves sexual intercourse with a person out of lawful wedlock. Consequently, the adulterer must necessarily be a married person irrespective of the civil status of the other. Adultery has been recognised as an incident which has diverse legal standards applicable in different jurisdictions.As an example, the Penal Code of India (1860) recognised adultery as "whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery (The Penal Code of India, 1860, s 497).

The context of adulty has been discussed in the various Indian judicial determinations as to impose the penal sanctions on the wrongdoers in terms of the provisions of the Penal Code of India (1860) [*Empress v. Pitambur Singh* (1879) ILR 5 Cal 566., *Re Rathna Padayachi* (1917) AIR Mad 220., *Chandra Bahadur Subba vs State and Anr* (1978) CriLJ 942., *Revathi v. Union of India & others* (1988) Cri. L. J. 921 SC.].

Though, it is necessary to highlight that, adultery has never been recognized as a criminal offence in Sri Lanka. However, it has been referred to as a ground to prove matrimonial fault in obtaining a divorce under the general law [General Marriage Ordinance, 1907, s 19(1)], which has provided with the legal right to the innocent spouse to claim damages against the adulterous spouse [Code of Civil procedure Act, 1978,s 598, Amerasinghe, 1966 Hahlo, 1969, *Viviers v. Kilan* (1927) AD 449., *Alles v. Alles* (1950) 51 NLR 416., *T Perera v. Halvatura* (1957) 59 NLR 233.] and from the other party involved in the commission adultery [Code of Civil procedure Act, 1978, *Joslin Nona v. Samaranayake* (1948) 49 NLR 381., *Ziegan v.Ziegan* (1891) 1 SCR 3., *Annakedde v.Myappen* (1932) 33 NLR 198.]).

Moreover, obtaining a divorce on the base of adultery under the general law amounts to capturing the influence of the English fault-based approach towards divorce in Sri Lanka than of the South African breakdown approach.

Further, numerous judicial determinations have emphasised adultery as a significant behaviour by the adulterous party which shall be effected to the continuation of the peaceful matrimonial relationship [*Potgieter v. Potgieter* (1970) (4) SA 78 (C).].

Consequently, proof of adultery depends heavily on inferences and circumstances [*Ross v. Ross* 1930 AC 7.]. Documents such as hotel record books, medical confirmation of venereal disease, and proof of adultery in other proceedings are often produced as evidence [*England v. England* (1952) 2 All ER 874.].

III. DISTINGUISHING THE LITERAL AND LEGAL SCOPE OF "LIVING IN ADULTERY"

Perhaps a single instance of commission of adultery shall sufficient enough to establish the ground of adultery in a divorce proceeding. Literally, the term "living in adultery" proposes a continuation of the adulterous behaviour of the spouse or ex-spouse.

The level and the duration of the adulterous behaviour shall be determined based on the circumstantial evidence of the relevant contexts. As per the Indian judicial determinations some of the qualifications of "living in adultery" shall be recognized as follows.

a.Outright adulterous conduct where the wife lives in a semi-permanent union with a man who commits adultery [*Kasturi v Ramasamy* (1979) Cr.L.J. 741 Mad.].

b. Single or occasional lapses of virtue [*Manickam v Arputha Bhavani* (1908) Cr. I J. 741.) and adultery committed prior to the marriage shall not be sufficient facts to exempt claiming maintenance right [*Maharumnishabi v Adul Razak* (1983) 1 Bom.CR 475., *Kali v Kaunsiliya* ILR 26.].

Therefore, the phrase "living in adultery" shall not be explained in plain meaning but mandatory to consider the factual circumstances of the issue ahead of the court house.

IV. APPREHAISING THE JUDICIAL CONSTRUCTION AND THE STANDARD OF PROOF OF "LIVING IN ADULTERY" IN THE SRI LANKAN MAINTENANCE JURISPRUDENCE

The phrase "living in adultery" has been defined and explained by the domestic judicial terminations relating to maintenance claims under the previous and the existing legislations of Sri Lanka shall be classified into two aspects of interpretation of the terminology and the level of proof the same at the maintenance proceedings.

a. Judicial determinations under the MO (1889)

As previously mentioned, sections 3, 4, and 5 of the MO (1889) used the terminology of "living in adultery" which shall further be considered the construction of the same as required in a few significant matters relating to the maintenance.

It was established by the domestic judicial decisions that, "living in adultery" shall be considered as several occasions of commission adultery by the applicant and /or on committing adultery at the time of the maintenance application. The term had demanded the construction of the continuation of the adulterous conduct.

Moreover, it is evident that the judiciary heavily depended on the Indian case law jurisprudence to provide theological interpretation to the phrase "living in adultery", without relying on its literal meaning.

Jayawardene AJ, in *Simo Nona v Melias Singho* (1923) stated that the wife is entitled to maintenance although she had left the husband due to his adulterous behaviours and lived in adultery sometime back and on the basis of that the respondent has failed to prove that the applicant is at present living in adultery following the approaches of *Reginahamy v Johna* (1914) and *Goonewardene v Abeywickreme* (1914), in the outset of that, she had the intention of living together with the husband whereas he did not intended to.

In *Arumugam v Athai* (1948) Basnayake J explained the contents of the phrase "living in adultery" while referring to the two Indian authorities of *Ma Thein v. Mating Mya Khin* (1939) and *Kista Pille v Amirthammal* (1938). According to the Lordship, the word live conveys the idea of continuance, and consequently the phrase ' living in adultery ' refers to a course of guilty conduct and not to a single lapse from virtue.

A similar approach to *Arumugam v Athai* (1948) was adopted by De Kretser J. in *Pushapawathy v Santhirasegarampillai* (1971) while citing the same Indian authorities to define the phrase "living in adultery". *Balasinghem v Kalaivany* (1986), a trial at bar judgment was delivered by Atukorala J based on the issue of application of cancellation of the order granted under section 5 of the MO (1889) due to the living in adultery of the wife. It has been observed that it is a clear distinction between 'committing' adultery and 'living in adultery' which is what section 5 requires. The correct construction is that the wife must have lived in adultery at or about the time of her filing the application and not necessarily on the date of the application itself. Further, continuous adulterous conduct shall be committed shortly before or shortly after the application was made which of the term shortly shall be interpreted in a reasonable approach, which of the reasonable approach depends on the circumstance factors. The interpretation was based on the prescribed two Indian Judaical authorities which had been continuously followed in *Arumugam v Athai* (1948) and *Pushapawathy v Santhirasegarampillai* (1971).

Further, it is vital to observe the level of burden of proof that had been adopted under the sustaining of "living in adultery" as appropriate for maintenance proceedings.

In *Ebert v Ebert* (1925), it was held that to establish adultery it is not possible to lay down a general rule or to attempt to define what circumstances would be sufficient and what would be insufficient upon which to inter the fact of adultery. Each case must depend on its particular circumstances.

Following the approach of *Isabelahamy v. Perera* in *Wijeysinghe v Josi Nona* (1936), Abrahams CJ held that the husband could not have proved thereby more than a single act of adultery, and if he could have done, he could not have proved that the adultery was going on at the date of his application.

Selliah v Simmamah (1947) Dias J stated that it is not required to establish in a maintenance case that the applicant does not live in adultery. The burden of proof of the same is on the person who alleges fraud or immorality to prove it. Section 4 of MO (1889) does not say that the woman must prove that she is not living in adultery which does not place the onus on her. Section 4 enacts that she should not be entitled to maintenance if it is proved that she is living in adultery. In the same way as the burden of proving that the husband is living in adultery under section 3 is cast on the wife.

Arumugam v Athai (1948) Basnayake J stated that a person who asserts that his wife is disentitled by this section to receive an allowance must establish that she is living in adultery or in other words that she is leading a life of continuous adulterous conduct.

b. Judicial determinations under the MA (1999)

Recent two cases on maintenance were expressing the context of phare of "living in adultery" under the MA (1999).

In the case *Pradeep Weerasinghe v Renuka Dissanayake* (2016) it was held that the applicant was unsuccessful to establish "living in adultery", which has been defined as leading a life of continuous adulterous conduct.

In *Chandrakanthi v Gamini Kumara* (2022), Samayawardhena J distinguished the meanings of the phrase as that, the proviso to section 2(1) states does not state: "no such order shall be made if the applicant spouse committed adultery". The Court shall be able to depart from the plain meaning of the statutory text when its literal application would lead to absurdity. If "living in adultery" is strictly interpreted to mean that the Applicant shall be living in adultery on the date of or at the time of filing the application, an astute Applicant living in adultery can temporarily cease such adulterous cohabitation in order to bring his or her application within the ambit of section 2 of MA (1999).

Further, it used the term "living in adultery", not "was living in adultery" or "had been living in adultery". Therefore, it is constructed that, the applicant at the time of making the application was cohabiting with a person other than his or her spouse or "living a life of promiscuous immorality" as a continuing act, as distinguished from one or two lapses of virtue.

Hence it is vital to appraise the judicial approach towards establishing "living in adultery" as per the terms of MA (1999).

Establishing the "living in adultery" shall be based on the cogent evidence that the applicant had committed not one or two acts of adultery but pursued a course of conduct amounting to "living in adultery". It shall not be established based on the isolated incidents of adultery in par with the proviso of section 2 of MA (1999) which was pronounced in *Pradeep Weerasinghe v Renuka Dissanayake* (2016).

Chandrakanthi v Gamini Kumara (2022), the most recent judicial determination was carefully classified as the judicial precedent of all the decided/referred cases mentioned in this study both under MO (1889) and MA (1999) and established the fact that the judicial opinion was that no rule of thumb can be laid down in deciding what constitutes "at or about the time". Proximity in time between living in adultery and filing a maintenance application is a question of fact and each case shall be treated independently.

V. CONCLUSION

Having appraised the Sri Lankan authorities, the following conclusions over the parameters of construction of "living in adultery" shall be generated with reference to the maintenance claims tried under the MO (1889) and MA (1999) in Sri Lanka.

a. No specific statutory interpretation is provided to define either "adultery' or "living in adultery" in Sri Lanka. Therefore, both phrases shall be subjected to the interpretation of the judiciary as per the factual circumstances.

b. "Adultery" shall have been defined in the Sri Lankan authorities by refereeing to both judicial determinations and legislations of the other

jurisdictions. It is evident that the judicial determinations on constructing the phrase "living in adultery' have mostly relied on key Indian authorise and followed the judicial proceeding of the same scope of interpretation.

c. No adequate references to scholarly works have been employed by the Sri Lankan judiciary to unwrap the phrases of "adultery' or "living in adultery", particularly to maintenance claims.

d. Substantive legal argument have emerged that the proof of "living in adultery" under MA (1999) shall be established beyond reasonable doubt as the maintenance claims try at the Magistrate courts. The standpoint of the Sri Lankan judiciary in this regard had not firmly practiced the tool of establishment of "living in adultery" under MA (1999) as beyond reasonable doubt.

However, it was illustrated by the Supreme Court (1986) that in the event of a question of the standard of proof, the Magistrate shall take the yardstick most favorable for either party to the conflict. Subsequently, the aforesaid perspective of the burden of proof of "living in adultery" under MA (1999) shall be reinterpreted with applying the legal formula as explained by Dr. CG weeramatry (1975): proof by clear, strong, and cogent evidence.

e. It is evident that the section 143 of the Evidence Ordinance of Sri Lanka (1895) together with section 3 shall be applicable to establish "living in adultery" as required by the MA (1999), which read as "no particular number of witnesses shall in any case be required for the proof of any fact". As Aluwihare, PC J., explained in *Attorney General v. Devunderage Nihal* (2010), the use of the words "in any case" in the section 143 of EO (1895), the legislature intended to apply this principle across the board to all cases, irrespective of the nature of the case."

REFERENCES

Statutes

Sri Lanka

Code of Civil procedure Act 1978
Evidence Ordinance 1895
General Marriage Ordinance 1907
Maintenance Act 1999
Maintenance Ordinance 1889

India

The Penal Code of India 1860

Judicial Determinations

Sri Lanka

Alles v. Alles (1950) 51 NLR 416.
Annakedde v.Myappen (1932) 33 NLR 198.
Arumugam v Athai (1948) 50 NLR 310.
Attorney General v. Devunderage Nihal (2010) SC/Appeal 154.
Balasinghem v Kalaivany (1986) 1986 SLR 378.
Biso Manike v Abeysekara (1961) 60 CLW 108.
Chandrakanthi v Gamini Kumara (2022).
Ebert v Ebert (1925) 26 NLR 435.
Fernando v Fernando (1939) 40 NLR.
Goonewardene v Abeywickreme (1914)
Joslin Nona v. Samaranayake (1948) 49 NLR 381.
Isabelahamy v. Perera (3 C. W. R. 294).
Maliappa Chetti v Maliappa (1927) 29 NLR 98.
Micho Hamine v Girigiris Appu (1912)15 NLR 191.
Pradeep Weerasinghe v Renuka Dissanayake (2016)
Pushapawathy v Santhirasegarampillai (1971) 75 NLR 353.
Reginahamy v Johna (1914) 17 N.L.R 376.
Selliah v Simmamah (1947)
Simo Nona v Melias Singho (1923) 26 NLR 61.
T Perera v. Halvatura (1957) 59 NLR 233.
Wijeysinghe v Josi Nona (1936) 38 NLR 375.

India

Chandra Bahadur Subba vs State and Anr (1978) CriLJ 942.
Empress v. Pitambur Singh (1879) ILR 5 Cal 566.
Kasturi v Ramasamy (1979) Cr.L.J. 741 Mad.
Kista Pille v Amirthammal (1938) A. I. R. Madras 833 .
Maharumnishabi v Adul Razak (1983) 1 Bom.CR 475.
Kali v Kaunsiliya ILR 26.
Ma Thein v. Mating Mya Khin (1939) R.L.R. 311.
Re Rathna Padayachi (1917) AIR Mad 220.
Revathi v. Union of India & others (1988) Cri. L. J. 921 SC.
Viviers v. Kilan (1927) AD 449.

Other Jurisdictions

England v. England (1952) 2 All ER 874.
Potgieter v. Potgieter (1970) (4) SA 78 (C).
Vorster v. Vorster (1970) 3 SA 289.
Ziegan v.Ziegan (1891) 1 SCR 3

Books

Actio Injuriarum in Roman-Dutch Law (in Ceylon & South Africa). Colombo : Lake House Investments.

Amerasingh, C..F. (1933). *Defamation and other Aspects of the Blacks' Law Dictionary* (2019).11th Edition

Hahlo, H.R. (1969).*The South African Law of Husband and Wife*

Ponnambalam S. (1982) *Law and the Marriage Relationship in Sri Lanka*, Stamford Lake (PVT) LTD, Pannaipitiya

Rayden,W. (1969) *Rayden's Practice and Law of Divorce*, 10th ed. London : Butterworths

Voet. (1829). *Commentary on the Pandects*, Paris ed.Percival Gane translation 7 (Books XLVI-L)

Weeramantry C.G. (1975). *The Law in Crisis: Bridges of Understanding*, London.Capemoss

Journals
Coutts, J.A. (1949).'The Standard of Proof of Adultery', Vol. 65 L.Q.R. 220 at p. 224.

Conference Paper
Ponnambalam,D. (1981) 'Some Anomalous features in the law of maintenance of husband and wife in Sri Lanka'.University o Colombo

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AUTHOR BIOGRAPHY

The author is an Attorney at Law, Senior Lecturer in Law and the Head of the Department, Department of International Law attached to the Faculty of Law, KDU. She holds LLM in International Trade Law (Wales), MHR (Colombo), PGD in HR (Colombo) and LLB (Hons) (Colombo).