# Chong Kean Seng v Wong Pui San [2021] MLJU 2264

Malayan Law Journal Unreported

HIGH COURT (IPOH)

BHUPINDAR SINGH GURCHARAN SINGH PREET JC

RAYUAN SIVIL NO AA-11B-1-01/2020

15 October 2021

*Lai Choe Ken (Elaine Foong Sook Yen with him) (Choong Meng Sze & Lai) for the applicant.*
*R Vigneswaran a/l Raju (Roshini a/p Ramasamy with him) (The Chambers of Waran) for the respondent.*

## Bhupindar Singh Gurcharan Singh Preet JC:

JUDGMENTIntroduction

**[1]**The respondent was awarded RM 20,000.00 as monthly maintenance by the Magistrate Court on 18.12.2019 with effect from August 2019. Being dissatisfied with the decision, the appellant filed an appeal to this court.

**[2]**On 3.9.2020, the respondent filed an application to adduce fresh evidence (enclosure 15). According to the application, the respondent intended to introduce two invoices of consolidated foreign monthly statements as at 31.1.2020 and 29.2.2020. These documents revealed that the appellant had 534, 573 Tungsten Min shares in Australia and the shares were transferred out on 10.2.2020.

**[3]**In the affidavits filed by both parties, they introduced new facts and documents. Suffice to say that I will not be considering these new facts and documents as they are not part of the Record of Appeal ("AR"). Furthermore, no application was made to include extra new documents in the hearing of this appeal. Therefore, the content of the affidavits filed in support of enclosure 15 must be limited for the consideration of the fresh evidence applied.

**[4]**The appellant conceded to the application in enclosure 15 and the application was allowed. A further additional record of appeal was filed containing the two invoices by the respondent.

***Preliminary objection*** *– Whether the contemnor could be heard before the contempt has been purged*

**[5]**Learned counsel for the respondent raised a preliminary objection on the hearing of the appeal. He informed that leave to apply for an order of committal against the appellant was granted on 8.6.2021, as the appellant failed to comply with the Magistrate Court's order dated 18.12.2019. A copy of the leave order was provided to this court (enclosure 46 of AA-78-2-10/2019). Subsequently, on 23.6.2021, a notice of application was filed under Order 52 rule 4 of the Rules of Court 2012 ("ROC 2012") against the appellant. This notice of application is still not served on the appellant.

**[6]**The respondent submitted that the appellant should not be allowed to be heard until and unless he has purged the contempt. As such, the appeal hearing should be held in abeyance until the committal application has been disposed of entirely. This is to ensure that the appellant complies with the Magistrate Court's order and to prevent further disobedience of any directions or orders given by this Honourable Court. The respondent believes that it would be unfair to continue with the hearing of the appeal while the appellant is left freely without obeying the lower court's order. Therefore, the preliminary objection should be allowed so that the respondent's rights to the said maintenance order are protected and not prejudiced. In his submission, the respondent relied on *Shamala a/p Sathiyaseelan v. Dr Jeyaganesh a/l C. Mogarajah And Anor* [2011] 1 CLJ 568; [2011] 2 MLJ 281 and *Wee Choo Keong v. MBF Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 217.

**[7]**The learned counsel for the appellant asserted that the appellant appealed against the decision because he could not pay the amount of maintenance ordered by the learned Magistrate. However, the appellant still paid RM 3900.00 per month to the respondent (both parties did not dispute this fact). The hearing of the appeal must continue in the interest of justice. If the court orders any reduction in the amount of maintenance, the contempt proceedings may be redundant. The preliminary objection by the respondent is substantially prejudicial to the appellant. The appellant prays that the preliminary objection be dismissed and the hearing of the appeal be continued.

**[8]**After considering the submissions by both parties, I dismissed the preliminary objection and proceeded to hear the appeal.

**[9]**It is well established that there must be strict compliance with the procedural rules governing contempt proceedings. Order 52 rule 4(2) of the ROC 2012 reads as follows:

> *"4. Application for order after leave to apply granted* (O. 52 r. 4)
>
> (1) *…..*
>
> (2) *Unless within fourteen days after such leave was granted the notice of application is filed, the leave shall lapse."*

Leave was granted on 8.6.2021 and according to the respondent's written submission, the notice of application was filed on 23.6.2021. Thus, there was a delay of one day and the leave granted under Order 52 rule 3 had lapsed. There is nothing in the respondent's submission to indicate that an application of extension of time was made. The Court of Appeal in *Lee Heng Moy (by Lee Heng Yau as holder of valid power of attorney for the plaintiff) (suing in person and for his children, who are minors, Tan Chee Chin, Tan Ee Ling(f), Tan Ping Quen and Tan Ping Ren) v Christopher Wong Wai Yee (as partner of the law firm practising under the style and name of Messrs Wong & Associates, the law firm representing the first, second, third, fourth, fifth and seventh defendants) & Ors* [2011] 5 MLJ 333, held that:

> *"[19] Expediency is the order of the day.* Order 52 r 3(2) of the RHC *talks about lapsing of the leave if the notice of motion is not set for hearing within 14 days after the leave was obtained. It uses the phrase 'shall lapse'.* ***The usage of the word 'shall' admits of no discretion. It means that it is mandatory****.*
>
> *…..*
>
> *[22] It is our judgment that the appellant has seriously breached* O 52 r 3(2) of the RHC *and the respondents were prejudiced by such breach bearing in mind that in a contempt proceeding the liberty of the individual is at stake. The argument that the appellant merely delayed for eight days cannot be accepted and must be rejected forthwith.* ***When the liberty of an individual is at stake in the context of an application for committal, a delay of even one day is fatal.***
>
> [emphasis added]

It must be emphasised that since the leave had lapsed, the committal proceedings are procedurally flawed. Hence, the appellant has nothing to purge.

**[10]**Assuming that the leave and the filing of the notice of application under Order 52 rule 4 is proper, I will now consider the preliminary objection in light of the submitted cases.

**[11]**Generally, it is accepted that a party in contempt cannot be heard until he has purged his contempt. However, this rule must not be applied inflexibly. The court has to consider whether in the circumstances of each case, the interest of justice is best served by hearing the contemnor or by denying him the right to be heard. In the case of **Wee Choo Keong** *(supra)*, the Supreme Court stated:

> "*We are unable to accept that any exceptions per se exist to the general rule that a party in contempt cannot be heard until he has purged his contempt.* ***We are in favour of the views expressed by Denning LJ in Hadkinson (supra) that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt.*** *This flexible approach to the jurisdiction is based upon a discretion to be exercised in accordance with the circumstances of the case which was accepted by the House of Lords in X Ltd. & Anor. v. Morgan-Grampian (Publishers) Ltd. & Ors.* [1990] 2 All ER."
>
> [emphasis added]

**[12]**The approach stated in the above case was further enlightened by Richard Malanjum CJ (Sabah and Sarawak) (as he then was) in the case of **Shamala** *(supra)*, where His Lordship said:

> *"[26] Learned counsel for the wife submitted that Wee Choo Keong case (supra) stated the law wrongly when it said that 'there are no exceptions to the general rule' and as such it should not be followed. Learned counsel proffered that the new test is whether 'in the circumstances of an individual case the interests of justice would be best served by hearing the party' who is in contempt.*
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> *[27] In view of what was submitted I took the liberty of reading carefully the judgment of the then Supreme Court in Wee Choo Keong case (supra).*
>
> *…..*
>
> *[30] Having therefore carefully considered what was said by the then Supreme Court,* ***I do not think the court adopted, as portrayed, a rigid position 'that a person in contempt should not be heard'.*** It is obvious from the judgment that in coming to its decision the court was well appraised of the views expressed by the learned judges in *Hadkinson v. Hadkinson* [1952] 2 All ER 567*.*
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> *[31] No doubt the court said that it could not accept that any exceptions per se exist to the general rule that a party in contempt cannot be heard until he has purged his contempt. But that was because it had already taken preference of the view expressed by Denning LJ to that of Romer LJ and Somervell LJ.*
>
> *…..*
>
> *[34] Accordingly, I find no good reason to say that the Wee Choo Keong case (supra) is erroneous in law.* ***The then Supreme Court preferred the approach that 'it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt'****."*
>
> [emphasis added]

Therefore, it is the discretion of the court, based on the circumstances of the case whether or not a litigant ought to be heard regardless of his contempt.

**[13]**Reverting to the present case, the only remedy available to the appellant is to appeal against the Magistrate's decision. Before the hearing of the appeal, the respondent filed committal proceedings. Then, the respondent urged this court not to proceed with the appeal until the appellant purged his contempt. On the other hand, the appellant claimed that he was not deliberately violating the order to pay the maintenance. Nevertheless, he still offered monthly maintenance of RM3900 to the respondent. To my mind, in the circumstances of this case, the appellant ought to be heard notwithstanding that leave had been granted for the committal proceedings.

**[14]**Furthermore, the contempt and appeal are premised on the same subject matter. If the appellant is not allowed

to be heard, the appeal will be pending indefinitely. I am of the considered view that the interest of justice is best served by hearing the appellant. A decision on the appeal is in favour of both parties as the matter will be finally settled. The respondent then is at liberty to pursue committal proceedings if the appellant neglects payment of the maintenance ordered.

The appeal

**[15]**The respondent is married to the appellant and blessed with three children aged 15, 13 and 11 years old. She is a nurse at Hospital Fatimah, Ipoh, Perak and contends that her monthly income after deductions is RM 3,133.15 (see page 144 of the AR). The appellant is a businessman. The respondent states that she receives RM 20,000.00 to RM 25,000.00 per month as maintenance from the appellant. According to the respondent, the appellant failed to provide any maintenance after 17.7.2019. Therefore, she filed an application for maintenance for the sum of RM 20,000.00 a month.

**[16]**The application for maintenance was made under section 3 of the Married Women and Children (Maintenance) Act 1950, which reads as follows:

> "***3. Court may make order for maintenance of wife and children***
>
> *(1) If any person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as to the court seems reasonable.*"

It is settled law that in deciding the amount of maintenance, the primary consideration is the income of the husband, his ability to pay the allowance and his financial position. In the case of *Parkunan Achulingam v. Kalaiyarasy Periasamy* [2004] 7 CLJ 175; [2004] 6 MLJ 240, the court held:

> *"In determining the amount of maintenance to be paid, the assessment is based primarily on the means and the needs of the parties. The needs of the party seeking maintenance is the crucial factor for providing the maintenance. In deciding the quantum of maintenance, the capacity of the husband, his ability to pay and the realities of the husband or parties financial position should be taken into account."*

**[17]**The below table illustrates the appellant's income from the year 2016 to 2019.

| Year | Monthly Income *(based on the monthly salary payment voucher and income tax returns)* | Aggregate Income *(based on the income tax returns)* |
|---|---|---|
| 2016 | RM 16,595.00 | RM 199,149.00 |
| 2017 | RM 11,955.00 | RM 143,463.00 |
| 2018 | RM 13,662.00 | RM 163,955.00 |

| Year | Monthly Income *(based on the monthly salary payment voucher and income tax returns)* | Aggregate Income *(based on the income tax returns)* |
|---|---|---|
| 2019 | RM 4,346.50 | |

*(for monthly income: see Exhibit CKS 1, pages 70 – 75 of the AR)*

*(for aggregate income: see pages 95 – 107 of the AR)*

**[18]**It is pertinent to note that the income of the appellant from May 2019 to October 2019 is RM 4,346.50 per month. The learned Magistrate in accessing the amount of maintenance failed to give due weight and consideration to the current income of the appellant. As such, the learned Magistrate had not considered the appellant's ability to pay an enormous sum beyond his means. Even if the monthly income for the year 2018 is used as a guide, the amount of maintenance awarded is much more than the appellant's monthly income. Definitely, the maintenance ordered by the learned Magistrate is not in proportion to the means of the appellant.

**[19]**According to the appellant's affidavit affirmed on 18.11.2019, the amount of RM 20,000.00 banked into the respondent's account was not purely for maintenance. The money was also allocated for the payment of all the properties, including the properties in the name of the respondent. Paragraph 6 of the said affidavit is produced as follows:

> *" 6….. Saya kini tiada kemampuan untuk membayar nafkah keluarga sebanyak RM 20,000.00 sebulan kepada Plaintif. Hal ini adalah disebabkan oleh kerosotan ekonomi yang telah menjejaskan prestasi dan keuntungan perniagaan saya dengan teruk. Dalam keadaan yang begitu teruk, saya masih perlu membayar bayaran bulanan hartanah–hartanah yang disenaraikan dalam ekshibit Plaintif bertanda "W-5" tersebut. Selanjutnya, nafkah keluarga sebanyak RM 20,000.00 dibayar kepada Plaintif sebelum ini adalah termasuk segala kos–kos hal ehwal rumah, pembelanjaan anak–anak serta pembayaran bulanan hartanah–hartanah tersebut termasuk hartanah atas nama Plaintif….."*
>
> [emphasis added]

**[20]**This fact was never denied by the respondent. There are six properties in the name of the appellant and four properties in the name of the respondent (see Exhibit W-5 page 32 of the AR). The respondent's monthly expenditure is listed in Exhibit W-4, including the payment for three properties (see page 30 of the AR). It is to be noted that the appellant was paying for all the properties. Therefore, in accessing the amount of maintenance to be allotted to the respondent, the learned Magistrate failed to consider the fact that the RM 20,000.00 payout was inclusive for payment of all the properties.

**[21]**The learned Magistrate in her judgement stated "Mahkamah ini meneliti fakta bahawa defendan dalam tindakan ini mempunyai hartanah-hartanah yang mencecah jutaan ringgit Malaysia". In spite of stating that the appellant has properties worth millions of ringgits, what needs to be looked into is the repayment of loans for the said properties.

The documents pertaining to debts and the monthly loan repayment for five of the appellant's properties are from pages 78 to 85 of the AR. However, the appellant did not disclose the document relating to one property, A18-09 Tropics @ Tropicana City. The total liability of the appellant should have been considered in assessing the amount of maintenance to be fixed. The learned Magistrate had omitted to take into account these vital documents that are relevant in determining the maintenance amount.

**[22]**The respondent applied RM 20,000.00 as maintenance for herself and the children. Learned Magistrate after hearing the application, granted the amount requested without any solid justification. No reference was made at all to the items listed in Exhibit W-4 in her judgment. A quick perusal of Exhibit W-4 will disclose that certain items listed therein ought to be disregarded. I do not intend to delve into the details of Exhibit W-4, but the learned Magistrate should have discounted the expenditure of RM 3,000 for meals and RM 6,350.00 for a car loan because of the appellant's current income.

**[23]**It is well established that maintenance does not mean mere subsistence. In awarding maintenance, the same standard of living enjoyed by the respondent during the marriage must be taken into consideration. However, it is subject to the earning capacity and the financial position of the appellant. Most importantly, the sum allotted is for fair and reasonable expenses (see *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 CLJ 105; [2008] 4 MLJ 863).

**[24]**The appellant averred that his business was severely affected due to the economic slowdown, which resulted in a substantial loss of profit. In her judgment, the learned Magistrate observed that "Mahkamah ini tidak melihat apa-apa bukti sokongan yang menunjukkan perniagaan defendan semakin merudum". With due respect, the learned Magistrate failed to consider that the reduction in the appellant's monthly salary in 2019 supports the fact that the business was not doing well.

**[25]**In arriving at her decision, the learned Magistrate formed the following conclusion:

> *"Adalah tidak dinafikan apabila seorang isteri mendapat tahu suaminya berkelakuan curang terhadapnya dan dalam kes kita ini, defendan dikatakan mempunyai hubungan dengan satu (1) perempuan lain sudah pasti menyebabkan hati dan perasaan si isteri terluka."*

The learned Magistrate misdirected herself by considering the above facts. The appellant has denied having an affair in his affidavit. In addition, the messages in Exhibit W-14 are written in the Chinese language and the translation in English is not certified by any authorised interpreter (see pages 205 to 208 of the AR). To be precise, there is no acknowledgment at all by the translator. Therefore, these are facts that need to be proved in a trial.

**[26]**At this juncture, it is appropriate to cite the case of *Lee Chin Guan v. Pang Kim Joon* [2017] 1 LNS 1988, where Hayatul Akmal Abdul Aziz JC (as she then was) referred to the book "*The Law Reform (Marriage and Divorce) Act 1976, Commentary and Cases by Nuraisyah Chua Abdullah, Sweet & Maxwell Asia*" where it stated:

"*The rationale behind the provision of maintenance is to prevent the destitution of the wife and children. It is not to penalise one spouse and reward the other*…".

**[27]**As explained above, the learned Magistrate failed to evaluate all the evidence in this case correctly. Therefore, the decision of the learned Magistrate warrants an appellate interference.

**[28]**It must be pointed out that both parties have failed to provide full and frank disclosure in this case. The respondent did not produce her salary slip to be verified against her actual income. Similarly, the appellant had failed to disclose any income from his properties. On top of that, he did not reveal the source of revenue for the additional money paid to the respondent exceeding his monthly income. Therefore, I am unable to accept per se the income declared by the appellant (**see Koay Cheng Eng (supra)**).

Conclusion

**[29]**Based on the above reasons, the appeal is allowed. The decision of the Magistrate is set aside. The appellant is to pay monthly maintenance of RM 5,000.00 to the respondent with effect from August 2019, which to my mind, is fair and reasonable. If there are any arrears due to the respondent, the amount outstanding shall be paid within 14 days of this order. Parties to bear their respective costs.

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