

YEE CHI KHIONG @ ALLAN v LIM SUI SIANG

CaseAnalysis

| [2021] MLJU 319

Yee Chi Khiong @ Allan v Lim Sui Siang [2021] MLJU 319

Malayan Law Journal Unreported

HIGH COURT (KOTA KINABALU)

LEONARD DAVID SHIM JC

DIVORCE PETITION NO BKI-33-118/10 OF 2014

8 January 2021

Alice Imelda Chin (The Chambers of Alice Imelda Chin) for the petitioner.

Chung Kai Lun (Shelley Yap) for the respondent.

Leonard David Shim JC:

GROUNDS OF DECISION(Enclosure 57)

[1]This is an application by the Husband Petitioner under S.83 of the Law Reform (Marriage and Divorce) Act 1976 to rescind or to vary the subsisting order for maintenance dated 19.6.2019 on the ground that there has been a material adverse change in the financial circumstances of the Petitioner.

[2]The factual background as stated in the Petitioner's Affidavit in Support wherein the Petitioner asserted as follows:

1. The Respondent and the Petitioner were lawfully married to one another on 23.12.2006. There is no child of the marriage.
2. At all material times, the Petitioner's only source of income of RM10,000 per month is derived from the business operation of Ban Soon Kiong Sdn Bhd ("the Company") of which the Petitioner is a Director. The Company's nature of business is assembling and retailing of air conditioners, electrical goods and home appliances.

Yee Chi Khiong @ Allan v Lim Sui Siang [2021] MLJU 319

3. When the Petitioner commenced this divorce petition on 27.10.2014, his financial standing at the time allowed him to propose a sum of RM5,000 per month for the maintenance of the Respondent. At the material time, the Petitioner's main liability was to pay his housing loan of RM1,887 per month in respect of his residence which is charged to Malayan Banking Berhad ("the 1st Legal Charge") Given the Petitioner's income of RM10,000 per month, he still had RM3,000 more or less for his own monthly living expenses after deducting the housing loan of RM1,887 and the maintenance of RM5,000 for the Respondent.
4. By consent, the marriage was dissolved on 18.04.2016. The Petitioner had consented then to pay maintenance to the Respondent in the sum of RM5,000 per month commencing the month of May 2016.
5. Due to a material adverse change in his financial circumstances, the Petitioner had on 25.02.2018 applied to this Court for an order to vary the sum of maintenance payable to the Respondent. This Court had thereupon granted that the sum of maintenance payable to the Respondent be varied from RM5,000 to RM4,000 per month commencing July 2019 (the subsisting order).
6. Due to a further material change in his financial circumstances, the Petitioner is applying to this Court once again for an order to vary or rescind the Subsisting Order.
7. As shown in the the Petitioner's Previous Affidavit in support, the Company's business used to be reasonably good from 2012 to 2015. Since the year 2016 however, there has been a material change in the business of the Company. The Company has been suffering loss and continues to suffer loss:

Year assessment Loss

2016 RM299,749

2017 RM111,567

2018 RM253,252

8. In January 2015, the Petitioner had re-mortgaged his house ("the 2nd Legal Charge") to obtain a wider margin of loan facility to sustain the going concern of the Company's business. The loan repayment of this 2nd Legal Charge was RM2,979 per month which was intended to be borne by the Company. Thereafter, as the Company was financially strained and could not settle the monthly loan repayment of the 2nd Legal Charge, the same has to be borne by the Petitioner. Consequently, the Petitioner have had to bear the burden of the 1st Legal Charge (currently RM1898) and the 2nd Legal Charge (currently RM2,928).
9. For the year ending 2019, the Management Accounts of the. Company recorded a loss of RM327,414.
10. The Petitioner aver that the Company has become financially drained. The Covid-19 pandemic has further caused a business downfall for the Company.

Yee Chi Khiong @ Allan v Lim Sui Siang [2021] MLJU 319

11. The Company has not been able to settle its debts due to its suppliers and is now facing legal actions by the same.
12. The Company has not been able to pay the Petitioner's salary since February 2020.
13. The Petitioner do verily aver that it is practically impossible for him to comply with the Subsisting Order. To that end, the Respondent has on 03.08.2020 issued a Notice of Demand to the Petitioner.
14. The Petitioner do verily aver that he have disclosed herein all relevant information regarding his present financial status. Save as stated therein, he do not own any other asset and investment.
15. At 40 years of age, the Respondent is a Director, shareholder and Manager of Apex Cool Sdn Bhd, which nature of business is similar to that of the Company. The Respondent's business is very successful. The Petitioner put the Respondent to strict proof of her financial standing.
16. The Petitioner genuinely believe that at all material times, the maintenance sum of RM4,000 per month is more than sufficient to sustain the Respondent's living expenses. The Petitioner contends that, the said maintenance constitute an enrichment on her part as the Respondent is at all material times financially independent and self-sufficient

The Law

[3]S.83 of the Law Reform (Marriage and Divorce) Act 1976 (the LRMD Act) provides:

"83. The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances."

[4]In the case of *Tan Sin Wah v Yeow Siow Lin* [2015] 7 CLJ 533, His Lordship, Mohd Nazlan Ghazali JC held:-

*"Further, and more importantly, the applicant, as the party making the application carries the evidential burden of satisfying the court, on balance of probabilities, that there is a material change in circumstances since the decree nisi order of 24 August 2007 that would justify the court in making the variation in maintenance on the terms applied for. It should be pointed out that s. 96 of the Law Reform (Marriage and Divorce) Act 1976 (and the similar provision on maintenance for ex-wife found in s. 83 of the same Act) does not stipulate that the change in circumstances is related only to the party making the application. The change may therefore also concern other parties affected by the relevant child maintenance order. In addition it does not matter if the order was a decree nisi only, for as long as it is a subsisting order for maintenance, in situations stated in ss. 83 and 96 (see *YCC v. LSY* [2007] 7 CLJ 207)."*

[5]As the Petitioner had previously obtained the said Subsisting Order, the Respondent submitted that the Petitioner carries the evidential burden of satisfying the court, on balance of probabilities, that there is a material change in circumstances since the said Subsisting Order was granted on 19.06.2019.

[6]The Respondent raised a preliminary objection to this application on the ground that as these issues had already been litigated before the High Court in which the same had allowed the Petitioner to reduce his monthly maintenance payable to the Respondent from RM5,000.00 to RM4,000.00, the Petitioner should not be allowed to relitigate the same issues again as his basis to vary the said Subsisting Order in the present application as they are now res judicata.

[7]In support of the preliminary objection the Respondent relied on the Supreme Court's decision in the case of **Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd** [1995] 3 MLJ 189, His Lordship, Peh Swee Chin FCJ, inter alia, held:-

"(1) When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between such parties. An estoppel per rem judicatum has been created as a result.

(2) There are two kinds of estoppel per rem judicatum, ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently."

[8]In order for the doctrine of res judicata or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree. See *Kandiah Peter Kandiah v Public Bank Berhad* [1993] 4 CLJ 332.

[9]In *SSS v JTSV* [2020] 10 CLJ 107, the High Court held:

"(1) Orders and judgments in matrimonial proceedings are final. Parties are prevented by the doctrine of res judicata from re-litigating any claim or matter that has already been litigated. Although there is implied a 'liberty to apply' in every court order/judgment, such liberty to apply does not affect the finality of the order/judgment. Just because the right to vary orders for spousal and child maintenance and child custody in matrimonial proceedings is codified in the LRA and not just implied or expressly reserved by the parties in orders or judgments as a 'liberty to apply', it does not mean that orders in matrimonial proceedings are any less final than orders in civil, criminal or commercial proceedings. (paras 30, 36 & 39)

(3) The divorce proceedings were not an 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act' as provided under s. 8 of the Amendment Act. Section 8 of the Amendment Act does not allow for the variation application. Furthermore, s. 95 of the LRA, as amended by the Amendment Act, did not apply to the instant case since the decree nisi had been granted before the Amendment Act came into force and the variation application was filed after the Amendment Act came into force. The amendment to s. 95 of the LRA was not a 'material change in circumstance' justifying a variation of the order for maintenance of CLS under s. 96 of the LRA." (paras 47-49 & 51)

[10]In the present case, there is no dispute that S.83 is in force or applicable at the time of the said consent order. S.83 of the LRMD Act expressly provides that the Court may at any time and from time to time vary or rescind any subsisting order for maintenance where there is misrepresentation, mistake of fact or any material change in the circumstances.

[11]As this is a fresh application made under s.83 of the LRMD Act on the ground of further material change of circumstances which was mainly attributed to the effect of the Covid-19 pandemic, this Court finds that this application is not barred by *res judicata* and the preliminary objection is dismissed.

[12]It is not disputed that the maintenance in the sum of RM5,000.00 was proposed by the Petitioner and accepted by the Respondent and the Consent Order or Decree Absolute including the maintenance order in the sum of RM5,000.00 was granted by the Court on 18.4.2016.

[13]About 3 years later on 25.02.2019, the Petitioner had applied to this Court to vary the Order for Decree Absolute relating to the RM5,000 monthly maintenance payable to the Respondent (“the Previous Application”). The ground of the Previous Application was that the Company has suffered and continued to suffer adverse material change in its income, and consequently, the Petitioner’s increased liability has caused a material adverse change in his financial circumstances. Upon the hearing of the Previous Application, this Court had on 19.06.2019 ordered that the monthly maintenance payable to the Respondent be reduced to RM4,000 per month commencing July 2019 (“the Subsisting Order”).

[14]As a general rule, a consent order even in a divorce matter must be rarely disturbed unless there are **exceptional circumstances** and that too clearly stated in the Affidavit to warrant the intervention of the Court for the benefit of the minor children. See *Lau Hui Sing v. Wong Chou Yong* [2008] 9 CLJ 232.

[15]As the previous application to rescind or vary the consent order for maintenance was allowed by this Court in which the maintenance was reduced from RM5,000.00 to RM4,000.00 per month, the Petitioner must adduce cogent evidence to prove on a balance of probabilities that there is a material change in circumstances or there are exceptional circumstances.

[16]The main reason put forward by the Petitioner is that his company, Ban Soon Kiong Sdn Bhd has been suffering loss and continues to suffer loss. As the said company is a separate legal entity, the alleged loss suffered by the company cannot be equated to the alleged loss of the Petitioner’s personal income. However, the Petitioner did not exhibit his recent and/ or latest income tax return to substantiate his contention of a further material change in circumstances in relation to his alleged loss of income.

[17]As alluded above, the Court rarely disturb a consent order even in a divorce matter. The Petitioner had

Yee Chi Khiong @ Allan v Lim Sui Siang [2021] MLJU 319

exhibited the tax returns on his personal income for the years 2012-2013, 2015-2017 which shows that the Petitioner's income had steadily increased and there is no adverse change in the financial circumstances of the Petitioner. The Petitioner's failure to disclose his income tax returns from the year 2018 onwards leaves this Court in doubt as to the true state of the Petitioner's financial circumstances.

[18]After a careful reading of the Notice of Application, Affidavits and Submissions filed by the parties, this Court finds that the Petitioner have not adduced sufficient evidence on a balance of probabilities to prove that there has been a material change in circumstances.

[19]Based on the aforesaid reasons, Encl. 57 is dismissed. As both parties have partially succeeded in their respective contentions, I make no order as to costs.

End of Document