

TOC v TOD
[2016] SGHCF 10

Case Number : HCF/Originating Summon No 12 of 2016
Decision Date : 27 May 2016
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Chia Chwee Imm Helen and Eleanor Mok (Chia-Thomas Law Chambers LLC) for the applicant; Kamalarajan M Chettiar (Rajan Chettiar LLC) for the respondent.
Parties : TOC — TOD

Family Law —Consent order —Variation

Family Law —Maintenance —Child

27 May 2016

Choo Han Teck J:

1 The applicant is now 44 years old. She married the respondent (now 37 years old) on 16 March 2007 in Singapore. The applicant is a Singapore citizen. She used to work as a childcare teacher but counsel informed during the hearing that she has recently left the employment. The respondent is a UK citizen and a research scientist. Their only child, a daughter, is 7 years old and lives with the applicant.

2 The applicant filed for divorce on 29 September 2010. The interim judgment was granted on 26 July 2011 by District Judge (“DJ”) Sowaran Singh. DJ Sowaran Singh recorded a consent order by which the respondent agreed to pay to the applicant a lump sum of \$80,000 for arrears in maintenance of the daughter and of the applicant, maintenance of the applicant, and division of matrimonial assets. Further, from 1 May 2011, the respondent will pay to the applicant \$1,500 a month for the maintenance of the daughter. Under the consent order, the parties have joint custody of their daughter, while the applicant has care and control and the respondent has access on Wednesdays from 6pm to 9.30pm and Saturdays from 11am to 6pm. At the time of the consent order, the daughter was 3 years old.

3 On 30 September 2015, the applicant applied for the consent order to be varied. She asked for the monthly maintenance of her daughter to be increased from \$1,500 to \$3,000, with retrospective effect from 1 April 2011. DJ Eugene Tay increased the monthly maintenance to \$1,800, with effect from 1 March 2016. His order was made on 17 February 2016.

4 The applicant had to file any notice of appeal against DJ Eugene Tay’s decision by 2 March 2016 if she had wanted to appeal. But she did not do so. She then applied five days later, on 7 March 2016, for this court to grant leave for her to file her notice of appeal out of time.

5 Whether or not an extension of time for the filing of a notice of appeal would be granted depends on the length of the delay, the reason(s) for the delay, the chances of success at appeal if time for appealing is extended, and the degree of prejudice which the respondent might suffer if the extension of time were allowed: see *Anwar Siraj v Ting Kang Chung John* [2010] 1 SLR 1026 at [29].

In the present case, the delay was five days. Any prejudice that the respondent may suffer if I were to allow the present application can be adequately remedied by an award of costs and/or damages. However, the applicant failed to provide valid reasons for the delay. Counsel informed that after the hearing before DJ Eugene Tay, the applicant gave "initial instructions" for an appeal to be filed. Counsel explained that she then had to meet with the applicant to explain to her the orders made by DJ Eugene Tay, to advise her on "the issue of appeal", and to confirm the instructions. No explanation was given to this court on why this meeting did not take place until 2 March 2016, *ie* on the last day permitted for the filing of the appeal. Counsel also offered no reason as to why they could not, after confirming the applicant's instructions on 2 March 2016, file the notice of appeal on the same day.

6 Even if I were to allow the present application, the applicant has a very low chance of success at the appeal. She is seeking to vary the terms of a consent order. Generally, a consent order is an order of court entered by agreement between the parties with the approval of the court. The order so reached by agreement has a binding effect on the parties who implicitly, have no right of appeal. The recourse to any unhappy party is to apply to have the consent order set aside.

7 The considerations by the court in determining the question of setting aside a consent order are different from the considerations that apply in an appeal. When a party wishes to deviate from or not comply with a consent order, he has to persuade the court with very strong reasons why the order ought to be set aside. A consent order is essentially a contract and courts do not re-write contracts for the litigants. The role of the court is to interpret their agreement or in appropriate instances (such as frustration or illegality) set aside the contract. However, when marriage fails, not everything is destroyed. In its ruins many things remain viable and they value and share-out those remains in their own way. Every family is different.

8 In matrimonial cases, the Women's Charter (Cap 353, 2009 Rev Ed) ("WC") was first amended in 1980 to allow a court to vary consent orders relating to the maintenance of a child or of a former wife. Sections 73 and 119 of the WC are reproduced below:

Power of court to vary agreement for maintenance of child

73. The court may, at any time and from time to time, vary the terms of any agreement relating to the maintenance of a child, whether made before or after 1st June 1981, notwithstanding any provision to the contrary in that agreement, where it is satisfied that it is reasonable and for the welfare of the child to do so.

Power of court to vary agreements for maintenance

119. Subject to section 116, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after 1st June 1981, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement

In *AYM v AYL* [2014] 4 SLR 559, the Court of Appeal held (at [16]) that s 73 of the WC is broad enough for a material change in the circumstances of the parents to form a basis for varying a consent order for the maintenance of a child.

9 The introduction of ss 73 and 119 in the WC might have led some parties to think that a consent order may be varied as if it were not made by consent. That would be wrong. In *AYM v AYL* [2013] 1 SLR 935, the Court of Appeal stated (at [15]) that even in a matrimonial context, the court ought to, as far as possible, give effect to the idea of freedom of contract and the related concept of

sanctity of the couple's agreement, although specific vitiating factors (such as misrepresentation, mistake, duress, undue influence, unconscionability as well as illegality and public policy) may operate to unravel an otherwise binding agreement. In *Nalini d/o Ramachandran v Saseedaran Nair s/o Krishnan* [2010] SGHC 98, Tay Yong Kwang J held (at [14]) that a consent order for division of matrimonial assets should not be as easily revised as an order made without incorporating the spouses' prior agreement. In my view, the same principle applies in relation to consent orders for maintenance. Although s 73 of the WC confers upon a court the power to vary the terms of a consent order relating to the maintenance of a child when there is a material change in the circumstances of the parents, that power must be exercised sparingly. The facts concerning the present case would not have merited an exercise of the court's power under s 73 of the WC, even if the case had gone on appeal. In the court below, the applicant did not provide evidence of any material change in circumstances since the consent order was made in 2011 that would justify a variation of the order for maintenance for the daughter to be increased from \$1,500 a month to \$3,000 a month. The record shows that DJ Eugene Tay would have dismissed the application but he varied the amount from \$1,500 to \$1,800 a month only because the respondent offered to pay the higher amount for the maintenance of his child. I do not think that the difference between the amount claimed (\$3,000) and the \$1,800 is sufficiently material to justify this matter proceeding further.

10 A consent order is a useful instrument to get parties to settle and end protracted and expensive litigation. Matrimonial disputes can be emotional and acrimonious especially when they concern children of the marriage. Court orders have the imprint of a victor and a vanquished although they ought not to be seen like that. Parties to matrimonial litigation can be too emotional to see it differently. Hence, a consent order arrived at after negotiations between the parties are desired above litigated orders. The willingness of the parties to negotiate an amicable settlement is an important general consideration. Otherwise, one party may lead the other to believe that the order will end their dispute, and after extracting the consent, proceed to vary it. This is precisely what the applicant is seeking to do in this case. In her affidavit dated 3 September 2015 for the purpose of the hearing below, the applicant stated that she had agreed to the sum for maintenance in 2011 as she "did not want to unravel any good terms for settlement". Having secured terms that were favourable to her, the applicant is now hoping to tilt the balance of benefits further in her favour by seeking a court order to vary the terms of the agreement that she had freely entered into with her former husband. The important elements in ss 73 and 119 are that there must be a material change in the circumstances and that it is reasonable for the welfare of the child. In determining whether the facts fit these criteria, the court may consider whether the application is made too soon after the consent order or that the variation sought ought reasonably to be within the contemplation of the parties when they made their agreement. That is to say, when concluding their negotiated order, the parties ought to have regard to the fact that a child's needs will change over time. One way is to agree that no variation may be made earlier than a specified date. This will indicate that the terms under the consent order had been reached with a moratorium duly considered.

11 For the reasons above, I dismissed the application. The parties are to bear their own costs.