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[1997] MLJU 250

SRIDARAN A/L KUBELAN v PATHMAVATHY A/P GOVINDAN

HIGH COURT (KUALA LUMPUR)
MOHD NOOR AHMAD J
DIVORCE PETITION NO S-1-33-648 OF 1991
30 September 1997

George Varugheese (Thomas, Bala & Associates) for the petitioner.

Yvonne Kalathini Raj (Jerald Gomez & Associates) for the respondent.

JUDGMENT

This is an application by the Respondent for the following ancillary reliefs.

- (1) for the maintenance of herself and her son,
- (2) for the division of matrimonial assets i.e. a single storey terrace house at no. 2086, Jalan 5E/12, Taman Ehsan, Kepong (hereinafter referred to as 'the Property'), and
- (3) for the payment of arrears of maintenance for one year pursuant to the Magistrate's Order of 15.11.88 in the sum of RM 3,600.00.

On the other hand, the Petitioner prayed for the monthly maintenance of RM 300.00 as ordered by the Magistrate be reduced to RM 100.00 or to a reasonable amount.

2. The parties were married on 27.6.85 and blessed with a son who is now 10 years old and is attending a primary school. They lived separately since March 1986 and the son all along stays with the Respondent. On 15.11.88, a maintenance order was made by the Magistrate's Court requiring the Petitioner to pay

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(i) the sum of RM 300.00 per month as maintenance for the Respondent and the son and (ii) the backdated arrears of maintenance of one year in the sum of RM 3,600.00. On 22.4.93, by mutual consent, the marriage was dissolved and custody, care and control of the son was given to the Respondent.

3. It is rather unfortunate that the decree of divorce was made without the proper provision for the Respondent and the son having been made as required under the provisions of section 52 (e) of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as 'the Act') as established in the Court of Appeal case of CHING SENG WOA H @ CHENG SONG HUAT v LIM SHOOK LIN (P) (1997) 1 AMR 214. Be that as it may, it is still not too late to salvage the situation.

4. From the oral, affidavit and documentary evidence I am satisfied that -

- (1) The maintenance order by the Magistrate was made when the son was two years old, the Respondent was unemployed and the gross salary of the Petitioner was less than half of what he is earning today, i.e. in

- April 1989 the gross salary was RM 789.77 and now is RM 1,797.00.
- (2) The Property was purchased after the parties lived separately by the sole effort of the Petitioner. [1997] MLJU 250 at 3
- (3) The backdated arrears of the maintenance of RM 3,600.00 as ordered by the Magistrate was never paid by the Petitioner. The Petitioner's employer did not deduct the sum from his salary for the purpose. The deduction of an additional sum of RM 25.00 per month from his salary from March 1989 to February 1990 was in respect of the arrears of maintenance for December 1988 after the maintenance order was made.

5. My views are as follows -

Re maintenance of the Respondent and the son -

On the facts of the case, the provision of section 83 of the Act is applicable, which reads -

"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."

The Respondent itemised the following as the monthly and yearly expenses for herself and the son.

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Insurance Economilife for child	RM 61.55	
Food and marketing for both	RM 350.00	
Toiletries	RM 80.00	
House rent, water and electricity	RM 300.00	
Child's school bus fare	RM 40.00	
Child's pocket money	RM 20.00	
Medical expenses	RM 50.00	
Books and entertainment for child	<u>RM 50.00</u>	RM 891.55pm
Yearly expenses:- Deepavali	RM 200.00	
Uniform, school fees, school bus, shoes, bag etc	<u>RM 200.00</u>	
	RM 400.00pa	RM 33.33pm
		RM 924.88pm

In short, the maintenance required is RM 924.88 per month. The Respondent's testimony on those items is not challenged. The Respondent and the son are living in Puchong within the vicinity of the metropolis. Having regard to the present day cost of living in the metropolis, without the need for the Respondent to submit any documentary proof thereto I am satisfied on the balance of probabilities that the items are essentials and the respective expenses are reasonable. I am also satisfied that there had been material change in the circumstances since the making of the maintenance order by the Magistrate, that is to say,

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- (1) the son is now 10 years old and is attending school.
- (2) the Respondent is now working as a temporary helper in a kindergarten and earns RM 450.00 per month, and
- (3) the Petitioner's income has increased more than double.

Taking into account of the Respondent's income and the present monthly maintenance of RM 300.00, there is still a shortfall of RM 174.88. Therefore, in my view the shortfall must come from the Petitioner. I decline to take the figure of RM 600.00 as the Respondent's potential earning power because that income was earned by her as a fulltime maid in a house in Damansara Heights before the marriage when she was young and single. Now, she is 41 years old with a son to look after. Whereas in the case of *THEVATHASAN v THEVATASAN* (1960) 26 MLJ 255, the Court held that the potential earning power of the respondent must be taken into consideration because the respondent ought to go out to work in her own interest since she was a young woman with no children. It was said in the case -

"Here it must be pointed out that the Court of Appeal in England stated in the case of *Rose v. Rose*, that the question whether the potential earning capacity of a wife is to be taken into account in assessing maintenance depends on the facts of each case and no general rule can be laid down. In the same case Denning L.J. said (at page 313):

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".... If she (i.e. the wife) is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, then her potential earning capacity ought to be taken into account"

I also take note of the fact that the take home pay of the Petitioner is only RM 305.42 after deductions for housing loan and Income Tax and contributions towards EPF, SOCSO, the TNB Co-operative, Persatuan Teknik and Death Benefit and repayment of advances given for the purchase of electrical goods. However, I decline to take into full consideration of those deductions because they are mostly for the Petitioner's benefits. His obligations towards the maintenance of the Respondent and the son should override his interests. If necessary, he has to sell the Property in order to fulfil the obligations towards them.

Re division of the Property -

Although the Property was acquired during the marriage, there is not an iota of evidence that it was meant to be the matrimonial home. It was purchased after the parties had lived separately by the sole effort of the Petitioner, and the Respondent and the son never lived therein. On the facts, it not incumbent upon me to have regard to the extent of the contributions made by the Respondent to the welfare of the family by looking after the house or caring the

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family and the needs of the son as envisaged by section 76 (4) (a) and (b) of the Act because the Respondent had never at any time looked after the house, and if at all the Respondent had cared for the family during the brief moment that they lived together, to my mind, her contribution in that respect would have been or will be adequately compensated by the monthly maintenance already paid and to be paid to her by the Petitioner. And with regard to the needs of the son, I am of the view that his needs has been catered for or will be taken care of by the monthly maintenance already paid and to be paid by the Petitioner. In *TOON BOON LEE v YEOH AH BENG* (1986) 2 MLJ 276, a case relating to resulting trust, where the property acquired by the sole effort of the husband was registered in joint names, the Court ordered the transfer of the half undivided share or interest of the wife in the property to the husband because the property was never used as the matrimonial home of the parties since the time of its purchase. The Court noted that the proceedings therein are not matrimonial proceedings under the Women's Charter wherein the Courts are given special summary powers of dealing with matrimonial assets and that the special powers are not relevant when considering questions relating to resulting trusts. Be that as it may, in the present matrimonial proceeding before me, I must stress that in the exercise of my powers of dealing with the Property I am not in anyway influenced by the decision of that case and my decision

arrived at as I did is

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based purely on the facts of the present case. I decline to follow the decisions in JACQUELINE BEY v EDMOND LEE YOK LUNG (1988) 2 MLJ 355 and WACHTEL v WACHTEL (1973) 1 All ER 829 because those case are more concerned with the issue whether the husband should be ordered to pay a lump sum of maintenance without crippling his earning power; and in the former case there were probabilities that the husband purchased the house as the matrimonial home, but unfortunately before the husband was posted back to Singapore from Brunei, the marriage broke up. It is to be noted that in the course of the hearing the Respondent abandoned her claim on the Property. As no order has been made or judgment recorded on the issue, I am at liberty to consider the matter in this judgment.

Re backdated arrears of maintenance -

On the evidence I am satisfied that the arrears of maintenance was never paid by the Petitioner for the reason as stated in paragrph 4 (3) above.

6. The Respondent in the Written Submission of the Counsel also claims for the division of the EPF contributions and the vehicle.

Re EPF contribution -

As this claim is not pleaded and no application has been made to amend the pleading to include the claim, I decline to consider the claim.

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Re vehicle -

As evident in exhibit PG - 1 to enclosure (27), the Petitioner has been the registered owner of a Proton Saga bearing registration no. WCY 9448 since 23.4.93. The Petitioner contended that although the vehicle is registered in his name, the initial down payment and the monthly instalments on the hire-purchase were/are paid by his cousin one Sarojini Devi a/p Dannapal. The cousin is a salesperson who requires the vehicle to conduct her business; however as she does not have a driving licence, at her request, the vehicle was registered under his name. Copies of the application form for a banker's cheque fo the initial down payment and the hire purchase agreement were produced (see exhibits SDD - 1 and SDD - 2 to enclosure (30)). Although the exhibits are not properly marked I exercise my discretion to accept the defective affidavit because of the importance of the documents on this issue. In the absence to the contrary I am satisfied on the balance of probabilities that the contention can be believed. Therefore, the vehicle is not a matrimonial asset.

7. Therefore, the following orders are hereby made -

- (1) The maintenance order for the Respondent and the son is increased from RM 300.00 to RM 480.00 per month effective from 1.1.98. The TNB is required to deduct the amount from the Petitioner's salary.
- (2) The prayer for the division of the Property is dismissed.
- (3) The Petitioner is to pay to the Respondent the backdated arrears of maintenance in the sum of RM 3,600.00 as ordered by the Magistrate within 14 days from the date of this order.
- (4) The claims for the division of the EPF contributions and the vehicle are dismissed.
- (5) The Petitioner's application for the reduction of the maintenance as ordered by the Magistrate is dismissed.
- (6) Costs to the Respondent.

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Made on this 30th day of December, 1997 at Kuala Lumpur.