Tan Sue-Ann Melissa v Lim Siang Bok Dennis
[2004] SGCA 27

Case Number : CA 111/2003

Decision Date : 28 June 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Lawrence Fong (Dominion LLC) for appellant; S Thulasidas (Ling Das and Partners) for respondent

Parties : Tan Sue-Ann Melissa — Lim Siang Bok Dennis

Family Law – Maintenance – Wife – Application to vary consent order – Former husband consenting to pay sum of money as maintenance on assumption that his earnings would subsequently increase – Wife aware of assumption – Husband subsequently unable to meet payments as assumption proved to be unachievable despite reasonable efforts – Whether this amounted to material change in circumstances entitling court to vary maintenance order – Section 118 Women's Charter (Cap 353, 1997 Rev Ed)

28 June 2004

Yong Pung How CJ (delivering the judgment of the court):

1 This was an appeal against the decision of Lai Kew Chai J ("the judge") to vary a consent order of court dated 24 April 2002 ("the second Consent Order") requiring the respondent to pay the appellant, his former wife, maintenance of $2,000 per month. Exercising his power to vary a subsisting order for maintenance under s 118 of the Women's Charter (Cap 353, 1997 Rev Ed) ("the Women's Charter"), the judge reduced the amount of maintenance payable to $1,100 per month on the basis that the respondent had shown a material adverse change in circumstances. At the end of the hearing before us, we dismissed the appeal.

The factual background

2 The parties were married on 17 May 1990. They ended their union some eight years later on 30 July 1998. There are no children of the marriage.

3 Pursuant to the *decree nisi* dissolving the marriage, a consent order of court was recorded on 27 January 1999 ("the first Consent Order") laying out the parties' arrangements with respect to the ancillary matters of division of matrimonial assets and maintenance. On the issue of maintenance, the respondent was ordered to pay a sum of $2,200 per month to the appellant from January 1999 to June 2000 and a sum of $2,500 per month from July 2000 onwards. At the time of the recording of the first Consent Order, the respondent was earning more than $7,000 per month as a partner in the law firm, M/s Chan Kwek & Chong.

4 On 27 March 2001, the respondent applied to court to revise the terms of the first Consent Order, which application was opposed by the appellant. By this time, the respondent's financial position had deteriorated considerably owing to the occurrence of a series of unfortunate events that ensued shortly after the recording of the first Consent Order. The respondent's financial woes began when he sustained a serious back injury in June 1999 which led to his departure from the legal profession three months later. The respondent then remained unemployed for close to one year from November 1999 to August 2000, following major surgery to his spine in October 1999. It was only in September 2000 that he commenced work as a corporate manager at Earth Essence Holdings Pte Ltd ("Earth Essence") at a gross monthly salary of $4,000 and a take-home pay of $3,200. It was against

this factual backdrop that the respondent sought an adjustment of the first Consent Order.

5 The parties had already filed all their respective affidavits in the matter when they decided to enter into a fresh agreement ("the agreement") instead. The respondent's obligations under the new arrangement included:

(a) the payment of the sum of $2,000 a month to the appellant as maintenance with effect from 1 May 2002; and

(b) the payment of the sum of $10,000 on 31 December 2002 and another $10,000 on 31 December 2003 to the appellant in full and final settlement of the amounts due in the division of the matrimonial assets.

The above variations to the first Consent Order were encapsulated in the second Consent Order of 24 April 2002, which formed the subject matter of the present appeal.

6 Unfortunately, the respondent's financial standing had not improved by April 2002. In fact, the respondent was jobless for two months from January 2002 when Earth Essence fell upon hard times and sought the respondent's resignation. When the second Consent Order was made in April 2002, the respondent had just resumed the practice of law after a break of more than three years in M/s Ling Das & Partners (the respondent's solicitors in the present appeal) at a monthly salary of $3,000.

7 For the next 13 months, the respondent endeavoured to discharge his obligations under the second Consent Order. However, it soon became apparent that the respondent had made a commitment which he could not fulfil. From as early as June 2002, the respondent had to constantly request that the appellant afford him more time to come up with the monthly payments.

8 Not surprisingly, the respondent struggled to meet the $2,000 maintenance on his income of $3,000 per month. Contrary to his initial expectations that his income would improve substantially upon re-entering the legal profession, the respondent's salary remained virtually stagnant. In fact, he was earning only $3,500 a month at the time the appeal was heard before the High Court in September 2003. The respondent explained that owing to the September 11 crisis, the SARS outbreak and the generally unfavourable economic conditions, he was unable to generate the income he had initially anticipated. His performance was also hampered by his back injury from which he never completely recovered. To his dismay, he found that he could only work three to four days a week on average.

9 The respondent also gave evidence that he had borrowed $28,000 from the partners of M/s Ling Das & Partners to assist him in the payment of the monthly maintenance and the $10,000 instalment due on 31 December 2002. On the evidence, the respondent had chalked up a debt of more than $80,000 to several credit card companies and the law firm's partners by the time of the appeal before the High Court.

10 As the respondent could not afford to allow the existing arrangement to continue, he filed an application (by way of Summons in Chambers No 50300 of 2003) on 29 May 2003 for an order that he be allowed to cease paying the appellant altogether. In the alternative, he asked that the amount of monthly maintenance payable be reduced to $500.

11 The respondent's application was heard by District Judge Tan Peck Cheng on 18 July 2003. When the district judge dismissed his application, the respondent appealed to the High Court.

The decision of the High Court

12 The appeal was heard on 10 September 2003. At the conclusion of the hearing, the judge allowed the respondent's appeal in part and ordered that the maintenance payable under the second Consent Order be varied from $2,000 to $1,100 a month. The judge was of the view that, on the evidence, the respondent could only afford to pay the reduced amount of $1,100 every month. In arriving at this conclusion, the judge accepted the respondent's assertion that even though he had willingly agreed to pay the appellant $2,000 a month, this was by no means a reflection of his earning capacity. The respondent's solicitors' letter of 22 April 2002 to the appellant's solicitors clearly provided that the respondent's promise to pay the monthly maintenance of $2,000 was "not to be regarded as a reflection of [the respondent's] earning capacity or income". Instead, it was to be looked upon as a sum the respondent was prepared to pay towards a global settlement of the ancillary issues of maintenance, arrears of maintenance and division of matrimonial property.

13 The judge's decision to allow the variation of the terms of the second Consent Order centred largely on his finding that the respondent had, with the best of intentions, erroneously anticipated that his income would return to its prelinjury level (*ie* about $7,000 per month) after he had fully recovered from his spinal injury and resumed practice. In the judge's opinion, given that such assumptions and optimistic forecasts were made known to the appellant before the second Consent Order was made and the fact that those assumptions and predictions subsequently proved to be unachievable, despite the respondent's reasonable exertions, these amounted to a "material change in circumstances" under s 118 of the Women's Charter. Consequently, the court was entitled to vary the maintenance order.

14 In addition, the judge expressed his opinion that the appellant should look for some gainful employment, instead of carrying on with her small business that had never quite taken off. In the circumstances, the judge indicated that the appellant should cut back on her monthly expenditure which was estimated at $2,215, in particular the high rental fee of $1,215 per month that she was paying.

The appeal

Whether the judge had erred in finding that the respondent had shown a material change in circumstances

15 The main thrust of the appellant's appeal was that the judge had erred in finding that the respondent had established a material change in circumstances, entitling the court to make any adjustment to the second Consent Order that it deemed appropriate. Under s 118 of the Women's Charter, the court may at any time vary or rescind any subsisting order for maintenance 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 circumstances.

16 In support of the appellant's contention that the judge had wrongly exercised his power under s 118 of the Women's Charter, counsel for the appellant advanced the following grounds of appeal:

(a) that the judge had erred in taking into account factors that were present before or at the time of the second Consent Order; and

(b) that the judge had erred in considering the respondent's own assumptions of his earning capacity when the parties had already agreed that the new agreement was to be without regard

to the respondent's earning capacity or income.

Whether the judge had erroneously taken into account factors that were present before or at the time of the second Consent Order

17 Counsel for the appellant submitted that in order to succeed in his application to vary the second Consent Order, the respondent had to show that there had been a material change in circumstances *since* the time of the second Consent Order (*ie* 24 April 2002). Counsel maintained that the judge had erred in taking into consideration factors that were present *before* or *at* the time of the second Consent Order. These included, among others, the respondent's debt position, the periods of unemployment, his low monthly salary of $3,000 as an advocate and solicitor in M/s Ling Das & Partners, his medical condition and his inability to generate sufficient work during the economic downturn. As these factors existed prior to or at the time the parties entered into the agreement that formed the basis of the second Consent Order, counsel argued that the respondent could not depend on them to establish a subsequent change in circumstances.

18 In contrast, counsel for the respondent maintained that the respondent was entitled to draw on these background facts and incidents to support his application. Relying on the fact that the agreement between the parties had been made without reference to the respondent's income or earning capacity, counsel submitted that the agreement "preserve[d] the respondent's position" with respect to all the events that had occurred since 1999.

19 In our opinion, the appellant's criticism of the judge's decision was unjustified for the simple reason that the judge had not relied on these facts to infer a material change in circumstances. The judge had merely looked to these events to ascertain the background circumstances leading up to the making of the second Consent Order in April 2002. In particular, the judge had relied on them to shed some light on the respondent's state of mind at the material time. Looking at the totality of the evidence before the court, the judge was convinced that the respondent had "with the best intentions in the world" overestimated his future earnings on his return to the practice of law and had thereby made a commitment which he could not fulfil. In other words, the material change had not stemmed from the events prior to the making of the second Consent Order, but had arisen from the fact that the respondent's assumptions regarding his prospective earning capacity, which were communicated to the appellant, subsequently proved to be unattainable despite reasonable efforts on the part of the respondent. Therefore, the judge had not drawn on inappropriate factors to establish the change in circumstances.

20 Consequently, the only issue that remained for us to determine was whether the judge was nevertheless correct in finding a material change in circumstances on the facts. The crux of the appellant's case was that there had been practically no change in circumstances, let alone a material change, to justify an adjustment of the maintenance order. In this regard, counsel for the appellant submitted that the judge had erred in considering the respondent's own assumptions of his earning capacity in arriving at his decision.

Whether the judge had erred in considering the respondent's own assumptions of his earning capacity in finding that there had been a material change in circumstances

21 Counsel for the appellant asserted that the judge had erred in finding that the respondent's assumptions of his earning capacity were operative on the parties' minds when they were negotiating the terms of the agreement that formed the basis of the second Consent Order. According to counsel, such a finding was irreconcilable with the parties' understanding that the agreement was to be without regard to the respondent's earning capacity or income.

22 Counsel for the appellant drew our attention to the letter from the respondent's solicitors dated 22 April 2002 (see [12] above). Relying on the proviso in the letter, that the arrangement between the parties was "not to be regarded as a reflection of [the respondent's] earning capacity or income", counsel maintained that the respondent's expectations of his future earning capacity or income were completely outside the purview of the agreement. After reviewing the evidence in its entirely, we rejected this contention. We were of the view that this proviso merely corroborated the respondent's assertion that the only reason he committed himself to paying two-thirds of his monthly income as maintenance was because he had in good faith anticipated, albeit wrongly, that his earnings would increase considerably in the coming months. In our opinion, this was the only plausible reason for the respondent's actions given his financial standing at the material time. As the judge noted, the respondent was simply not in a position to pay the maintenance of $2,000 per month.

23 We also disbelieved the appellant's claim that the respondent's expectations regarding his future income were never made known to her before the second Consent Order was made. Having revisited the records, we accepted the respondent's evidence that he had found it difficult to pay the maintenance since 1999, and that he had informed the appellant of his problems as well as of his desire to meet his obligations towards her as best as possible. Given that the appellant knew all along the financial difficulties faced by the respondent, the appellant must have been aware that the respondent anticipated a significant jump in his earnings when he made the promise to pay her $2,000 a month. Hence, we found no reason to disturb the judge's finding that the appellant was aware of the respondent's assumptions and optimistic forecasts at the material time.

24 Another argument canvassed on behalf of the appellant was that the proviso effectively prevented either party from applying to vary the second Consent Order unless there had been a material change in circumstances *other than* changes in the respondent's earning capacity or income. Counsel for the appellant seemed to suggest that this was reasonable, since the appellant would similarly be disallowed from asking for an increase in the amount of maintenance in the event that the respondent's earning capacity or income rose considerably. We found this argument to be without merit. It is well established that a consent order for maintenance can be varied like any other court order: *Lee Hong Choon v Ng Cheo Hwee* [1995] 2 SLR 663. Furthermore, no term of such an agreement can totally undermine the powers conferred on the courts under the Women's Charter, including the power to vary a subsisting consent order for maintenance under s 118. That the courts have an extensive power in this regard is further demonstrated by s 119 of the Women's Charter, which provides that the court may vary the terms of any financial arrangement entered into between spouses notwithstanding any stipulation to the contrary.

25 Finally, having established that the respondent's assumptions of his earning capacity were operative on the parties' minds at the relevant time, we turned to the question of whether such subjective beliefs and expectations could amount to a "material change in circumstances" in the event that they turned out to be unachievable.

26 We concurred with counsel for the appellant that in the normal course of events, the subjective expectations and hopes of the respondent could not amount to a "change" within the meaning of s 118 of the Women's Charter when they did not eventually materialise. A positive change in either the needs of the former wife or the ability of the former husband to meet those needs is usually required, before the courts will step in and affect the *status quo*. Generally, the phrase "material change" is understood in the light of the factors that determine the initial award of maintenance.

27 However, it is important to bear in mind the rationale behind the law imposing a duty on a former husband to maintain his former wife. Essentially, the aim is to even out any financial

inequalities between the spouses, taking into account any economic prejudice suffered by the wife during marriage. In the present case the respondent husband agreed to pay the appellant wife $2,000 per month as maintenance in the expectation that his financial position would improve. As stated above, this assumption was made known to the respondent and it formed the basis of the agreement between the parties, leading to the making of the second Consent Order. In such circumstances, where the expectation did not materialise (and this was not in doubt), it was our opinion that it would only be just that that fact should and could be treated as a "material change" in the context of the case. To hold otherwise would be grossly unfair.

28 For the foregoing reasons, we were unanimously of the view that the judge was right in holding that there had been a material change in circumstances. We therefore found his decision to allow the appellant's application fully justifiable. Accordingly, we dismissed the appeal.

Appeal dismissed.