

ATS v ATT
[2013] SGHC 156

Case Number : DT No 3595 of 2009 (SUM No 1613 of 2012 & SUM No 5404 of 2012)
Decision Date : 20 August 2013
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Alagappan Arunasalam (M/s A Alagappan Law Corporation) for the plaintiff;
Prabhakaran s/o Narayanan Nair (Derrick Wong & Lim BC LLP) for the defendant.
Parties : ATS — ATT

Family law – Custody – Variation

Family law – Maintenance – Variation

Family law – Matrimonial assets – Variation

20 August 2013

Belinda Ang Saw Ean J:

Introduction

1 The Defendant, ATT (“the Husband”) has appealed against the decision of this court given on 18 March 2013 in Summons No 1613 of 2012 (“SUM 1613”) and Summons No 5404 of 2012 (“SUM 5404”). For a proper understanding of these applications, a short chronological account of the history of the previous proceedings is necessary.

2 ATS, the Plaintiff wife (“the Wife”) and ATT were divorced on 6 October 2009, and ancillary orders were made on (a) 6 August 2010 relating to custody, care, control of and access to the three children of the marriage (“the 6 August 2010 Order”), and (b) on 22 March 2011 relating to maintenance for the Wife and children, and the division of the matrimonial assets (“the 22 March 2011 Order”) (see *ATS v ATT* [2011] SGHC 213 (the “HC Judgment”). The Husband appealed against the 22 March 2011 Order in Civil Appeal No 51 of 2011 (“CA 51”). The Court of Appeal heard the appeal and orders were made on 6 February 2012. The appellate court’s written grounds were released on 3 April 2012 (see *ATT v ATS* [2012] 2 SLR 859 (the “CA Judgment”).

3 On 11 July 2011, before CA 51 was heard, the Husband filed Summons No 3004 of 2011 (“SUM 3004”) to vary the 6 August 2010 Order. It is worth noting that the Husband was agreeable to the Wife’s application for joint custody and care and control to the Wife, and for that reason he did not appeal against the 6 August 2010 Order in CA 51. [\[note: 1\]](#) By his application in SUM 3004, the Husband wanted to take over care and control of the children with reasonable access to the Wife. SUM 3004 was dismissed on 18 August 2011.

4 After the Court of Appeal’s decision on 6 February 2012, the Husband filed SUM 1613 on 30 March 2012 in a second attempt to vary the 6 August 2010 Order relating to care and control for the same reasons supporting SUM 3004. This point was acknowledged by the Husband’s counsel at the hearing of SUM 1613. In addition, the Husband applied to reduce the maintenance ordered on 22

March 2011 which the Court of Appeal had upheld on 6 February 2012. The Husband's application for the Wife to sign an Insurance surrender form for a life policy [number redacted], and a bank loan fact sheet, and to return both to him were new prayers.

5 On 19 October 2012, the Wife filed SUM 5404 for, *inter alia*, orders for the sale of a matrimonial property, a semi-detached house ("DDD"); have the Husband settle all outstanding liabilities in the UOB account [number redacted], and to thereafter close it; and have the Husband pay the Wife her share of the rental for an apartment ("MMM").

SUM 1613

Variation of Order for Care and Control

6 In SUM 1613, the Husband applied for a variation of the 6 August 2010 Order to have care, control of the three children of the marriage transferred to him. The Husband blamed the Wife for not assisting or facilitating compliance with the access Order. As such, his involvement in the children's personal lives and education had been affected. He alleged that he did not know where the Wife and the children were staying after they moved out of the DDD property, and that he has had little contact with the children. The Husband felt he was being "cut off", and argued that the best way to maintain a positive relationship with the children was for him to have care and control of them with reasonable access to the Wife. [\[note: 2\]](#) In short, the Husband's application to vary the 6 August 2010 Order was primarily based on his alleged inability to exercise his right access to be with his children. [\[note: 3\]](#) As I have alluded earlier, this very same reason was relied upon to seek a variation of the 6 August 2010 Order in SUM 3004. [\[note: 4\]](#) In that application, the Husband had stated that he was unable to exercise his right of access to be with his children and had complained that the Wife was not complying with the access order. [\[note: 5\]](#)

7 The Wife argued that the Husband's application for variation was without merit. She rejected the Husband's allegation that she was frustrating the access order, and maintained that it was the Husband who was responsible for the deterioration of his relationship with the children, citing his lack of attention to them during access hours, and unaccommodating attitude in respect of their schedules. [\[note: 6\]](#) In 2012, the children were 17, 14 and 10 years old and each had their own school schedules and non-school activities. With a view to facilitate the access order, on 14 January 2011, I directed the Wife to provide the Husband with the children's schedules for their extra-curricular activities, tuition, and enrichment classes. [\[note: 7\]](#) As late as 18 March 2013, there were no complaints that my direction of 14 January 2011 was not complied with.

8 The Husband had also exhibited his text messages ("SMS") to show the difficulties he had faced in meeting the children in SUM 3004. I gathered from the children's replies that part of the Husband's problem stemmed from the children's desire to meet their father together thereby rendering it all the more difficult to find a mutually convenient date for all. The Husband's difficulties, as the Wife explained, were compounded by the fact that the children did not enjoy a close or meaningful relationship with their father. [\[note: 8\]](#) Her explanation was corroborated by the SMS sent between the Husband and the children, from as early on as April 2011. The Husband's allegation that the Wife was frustrating the access order was not borne out in the evidence before me.

9 The Wife and Husband had also accused each other of not allowing the children to spend time at the paternal grandfather's wake, [\[note: 9\]](#) and of gambling-related issues that were allegedly having a negative influence on their eldest son. [\[note: 10\]](#) I found that the parties were mired in a "blame

game” with much “finger-pointing” to denigrate each other. In the final analysis, there was little or no evidence of the sort needed to legitimately support an application to vary an order for care and control.

10 An order for care and control may be varied for misrepresentation, mistake of fact or if there was a material change in circumstances (see s128 of the Women’s Charter (Cap 353, 2009 Rev Ed) (the “Women’s Charter”). The grounds of misrepresentation or mistake of fact are not applicable here. The only basis for varying the 6 August 2010 Order would be a material change in circumstances. Notably, the burden is on the applicant (*ie*, the Husband) seeking a variation to prove that there has been a material change in circumstances. In this case, the Husband was unable to point to evidence that would constitute a material change in circumstances. His complaint was that he was not able to make full use of the access order, a point that the Wife did not dispute. However, non-compliance with an access order as he had described could hardly be a recognised ground for a variation of the care and control order.

11 When considering s 128, it is also important to take into account s 125 which states that the welfare of the child is a “paramount consideration”. Tan Lee Meng J’s comments in *APK v APL* [2011] SGHC 255 on the welfare of the child are apposite:

17 In custody cases, the court’s paramount consideration is the welfare of the children. In *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430, the Court of Appeal stressed (at [25]) that the court “should look at all the circumstances of the case and come to a decision on the issue of custody, always bearing in mind that the welfare of the child should be given paramount priority”.

...

19 The party who applies for a variation of a custody order on the basis of a material change in the circumstances has the burden of proving such a change. Furthermore, *even if there has been a material change in the circumstances, the primary consideration remains the welfare of the child.* ...

[emphasis added]

12 In a veiled attempt to bolster his application for care and control, the Husband disclosed that he had employed a maid whom he believed would be able to assist “in the domestic affairs such as the cleaning of the house, cooking and doing the laundry”, while he would be responsible for the general welfare of the children. [\[note: 11\]](#)

13 The Husband did not explain how the care arrangement he had outlined briefly in his affidavit was in the best interests of the children. The Wife had been the primary care giver of the children from young and there was no evidence that the Wife was not a good mother to the children. This paucity of evidence is hardly surprising seeing that the motivation for the application was the Husband’s wish to spend time with his children and his own “strong [belief]” that his relationship with his children would improve if they lived with him. [\[note: 12\]](#) Unfortunately, his wish and belief cannot transform into something that fitted the statutory grounds prescribed in s 128 of the Women’s Charter.

14 For these reasons, there was no basis to vary the order relating to care and control of the children.

Variation of maintenance order

15 The Husband also sought to vary the maintenance order made in the 22 March 2011 Order on the ground that he was unable to afford paying the maintenance order. The law on the variation of a maintenance order is trite. It is clear in s 118 of the Women's Charter that the Husband has to prove a material change in circumstances to justify a grant of a variation order. I concluded at the end of the hearing that the Husband's application for variation failed in the absence of evidence demonstrating a material change in circumstances.

Husband's full and frank disclosure

16 As a preface, it must be kept in mind that an adverse inference had been drawn against the Husband in the HC Judgment, and this was affirmed in the CA Judgment at [24] because of his failure to make full and frank disclosure of his assets and means. At [9] of the HC Judgment, this court found that the Husband's documents did not support his version of the evidence, and an inference was drawn that there were undisclosed assets such that his net worth was more than the total amount disclosed in his affidavits. In relation to the issue of maintenance, the Court of Appeal stated at [28]:

... In any event, the Husband's submission on the issue of maintenance was also hampered by the adverse inference which had been drawn against him due to *his* failure to fully disclose his true earning capacity (see [24] above). All matters considered, including the needs of the Wife and the children and the capacity of the Husband to pay, we were not minded to disturb the sum awarded by the Judge as maintenance.

[emphasis in original]

17 Before me, the Husband stated that he was now giving full and frank disclosure by producing more notices of assessment from the income tax authorities, [\[note: 13\]](#) CPF statements, bank statements, [\[note: 14\]](#) a loan agreement with his trading company [\[note: 15\]](#) and its financial statements. [\[note: 16\]](#) The disclosure of additional documents was to prove his financial status at the point in time when both judgments were written, and the documents disclosed would show that he would have been unable to afford the total ordered maintenance sum of \$8,400 a month. He alleged that he had fallen into arrears for several months, but eventually paid up as he felt threatened by the Wife's enforcement proceedings for the arrears. [\[note: 17\]](#) The Husband stated that he did not have any money for himself and was living on overdrafts and money borrowed from friends and family. [\[note: 18\]](#)

18 The veracity of the Husband's explanation on the arrears of monthly maintenance was exposed by the inconsistencies in his affidavits. In the Husband's affidavit dated 30 March 2012, he stated that he could not pay, but he paid the arrears when he was faced with the prospect of going to jail. [\[note: 19\]](#) In his third affidavit dated 14 November 2012, the Husband told a different story that had nothing to do with his impecuniosity. He said: [\[note: 20\]](#)

...I have paid all the maintenance that was properly due and payable. I disputed certain items and did not pay. When the court ruled against me, I paid up. Even now, I am paying the sum of \$8,400.00 punctually. I have no intention of punishing the children as they are innocent parties caught in a cross-fire between the parties.

[emphasis added]

19 In any case, his application in SUM 1613 to vary the maintenance order by disclosing documents he ought to have produced was in reality nothing short of an abuse of process as it was an illicit attempt to re-open the order to re-argue the correctness of the initial maintenance sum ordered and the decision of the Court of Appeal that upheld the maintenance order of 22 March 2011.

20 In any event, there was no evidence of a material change in circumstances to warrant a variation in the maintenance order. The disclosed financial statements of the Husband's trading company were for 2007 to 2010 with no information on subsequent years to suggest a case of material change in his circumstances. Similarly, the notices of assessment, showed the Husband's historical financial position in 2004 to 2009. While there was evidence of a loan from the company, the Husband did not explain how the monies were applied. Likewise, the bank statements showed that he had negative balances in two accounts, and two overdrafts, but these statements were not explained in either of his affidavits, and at the hearing before me on 14 January 2013.

Wife's maintenance

21 On the Wife's maintenance specifically, the Husband alleged that the Wife had not made any attempt or effort to seek employment, and the court ought to take her earning capacity into account when considering the maintenance for the Wife. He also argued that the Wife was capable of supporting herself and the children on her earnings from her investments. The Husband was, therefore, seeking a reduction in the Wife's maintenance from a monthly sum of \$2,500 to \$1,000 for personal expenses only, and for the reduced maintenance to the Wife at \$1,000 to stop completely after six months.

22 It is apt to point out that this same argument about the Wife's earning capacity was canvassed before the Court of Appeal and it was addressed in the CA Judgment. In CA 51, the Husband had argued that the Wife had significant income earning capacity, in her forties, and still employable. Besides, she had enough liquid assets that were generating income for her. The CA held at [28]:

While the Wife is a diploma holder in her 40's, she has care and control of three school-going children, especially the two younger ones who are aged 13 and 9. Moreover, the Wife has been out of the job market for some 13 years, making it unrealistic or impractical to expect her to immediately pick up from where she left off before she became a homemaker, even with the assistance of a maid. ...

23 This is yet another instance of the Husband's illicit attempt to revisit an issue that the Court of Appeal had made a specific ruling on a short while ago. The Husband was unhappy that the Court of Appeal had found that the Wife was to be given maintenance even though she had not sought gainful employment. However, his dissatisfaction and unhappiness is not a legitimate reason for varying the Wife's maintenance.

Insurance policy

24 In SUM 1613, the Husband also applied to have the Wife sign an insurance surrender form for a named policy [number redacted] as he wanted to surrender it. He argued that the beneficiary of the policy was the Wife and he did not want to continue paying for a policy which would ultimately benefit his ex-wife. Accordingly, the Husband wanted the Wife to sign the surrender form.

25 The Husband's application failed. The subject policy was purchased in 1996 and hence was

impressed with a statutory trust in favour of the Wife under s 73(1) of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) (the "CLPA"). The Husband could not rely on ss49L and 49M of the Insurance Act (Cap 142, 2002 Rev Ed), which allows the policy holder to revoke the nomination of a beneficiary of a statutory trust created under s73(1) of the CLPA, because the relevant sections came into force in 1 September 2009 and were applicable to policies purchased only after the effective date.

SUM 5404

Rental of MMM property

26 In SUM 5404, the Wife applied for her share of the rental collected from the MMM property in the sum of \$34,636.60. The Husband and Wife were joint owners of this property, and they rented it out after moving out in 2001 to the DDD property. In the 22 March 2011 Order, I ordered that the Husband transfers all his rights, title, and interest in the property. [\[note: 21\]](#) On 4 August 2011, an order for collective sale of MMM was made, and the property was subsequently sold for \$2.8m. [\[note: 22\]](#)

27 In the CA Judgment, the Court of Appeal overruled this part of my decision and held at [29] that the three immovable properties were to be divided in the ratio of 55:45 in favour of the Husband. As such, the Wife claimed that she was entitled to \$34,636.60 being 100% of the rental from March 2011 to January 2012, and thereafter 45% of the rental from February 2012 to early May 2012 less 9 months of mortgage instalments paid by the Husband. The Wife explained that the Husband had been withholding rental from her since the 22 March 2011 Order. The Wife alleged that during the period of March 2011 until 8 May 2012, the Husband had collected and kept the rental which amounted to \$53,898. [\[note: 23\]](#)

28 The Husband accepted that the total rental for that period was \$53,898. [\[note: 24\]](#) However, he refuted any payment of rental to the Wife. He argued that the Wife was only entitled to 45% of the proceeds accruing from the sale of MMM, and that the Wife had already received her share of the sale proceeds. He also added that in any event, the rental collected were utilised to reduce the mortgage loan of MMM. [\[note: 25\]](#)

29 The Husband's argument that the Wife was only entitled to the sale proceeds of MMM was untenable as it did not respond to the question of whether the Wife was entitled to the rental. The Court of Appeal had clearly stated that the three properties, including MMM, were to be divided in the ratio of 55:45 as they were within the pool of matrimonial assets. This meant that any rental accruing from MMM while it was still held in their names were to be divided in that ratio as well.

30 In relation to the Husband's argument that the rent he collected was used to service the mortgage loans for MMM, he was not able to produce evidence to support his allegation. His affidavit filed for SUM 5404 also provided no details of the outstanding mortgage loans, and no supporting evidence. In fact, his affidavit was a mere three pages, with no documentary evidence to support any allegations and/or claims that he was making. Additionally, the Husband was unable to provide any evidence to show that the rental amount was \$3,650 a month for the period of March 2011 to 8 May 2012. As he did not dispute that the total amount collected was \$53,898, as alleged by the Wife, I accepted that figure.

31 Although the Wife initially claimed that she was entitled to 100% of the rental collected from March 2011 to January 2012, she later conceded that given the CA Judgment, her reduced claim was

45% of all rental collected from March 2011 to 8 May 2012, being \$12,554.10 to take into account the Husband's payment of the mortgage. [\[note: 26\]](#)

32 I note that the evidence on the last day of the collection of rental was not clear from the Wife's affidavit. However, from the email correspondence the Husband, the Wife and one Daniel Ng had with a tenant, I noted that the last day of tenancy could have been 7 May 2012, [\[note: 27\]](#) and very close to the last day of the Wife's claim (*ie*, 8 May 2012). I therefore accepted the last day of rent as 8 May 2012. The Wife argued that rent should be payable from March 2011, and I accepted that as the starting date as the Husband did not dispute the Wife's allegation that he had withheld rent from her from the date of the HC Judgment.

33 In view of the Husband's inability to account for the total rental collected less the mortgage instalments (\$53,898 – \$11,700 = \$42,198), and that the Wife had stated in her affidavit that her claim for \$12,554.10 had factored in 9 months of mortgage instalments paid by the Husband at \$1,300 per month, thereby reducing the amount of rent that she was claiming, I ordered that the Husband pay the Wife the sum of \$12,554.10 being the Wife's share of the balance rentals collected by the Defendant for MMM within one month from the date hereof. [\[note: 28\]](#)

34 I pause here to comment that the Husband's payment of the mortgage instalments would have been taken into account as his direct contribution in the division of MMM, and such mortgage payment would have been accounted for in the 55% of the sale proceeds of the property that the Court of Appeal had awarded him. As such, the Wife was actually entitled to the full 45% of the rental.

Selling of DDD property

35 The Wife alleged that she had proposed to sell the semi-detached property, but the Husband was still solely and exclusively occupying the property and had refused to sell it. However, at the hearing on 14 January 2013, the Husband was agreeable to the sale of the property and for the sale to be handled by both parties. He asked the court to decide the timeline. As such, I ordered that:

- (a) By consent the property known as the DDD property be sold.
- (b) Either party may buy over the other's share in the property based on a 6/2/2012 valuation as per para 29 of the CA's decision dated 3/4/2012. Parties are to exercise this Option to purchase within 4 weeks from the Order herein. A joint valuer be appointed to determine the value of the property as at 6/2/2012 before exercise of the Option.
- (c) If either party decides not to exercise the Option in para (b) above, the property is to be sold in the open market within 6 months from the date hereof. In the event [i] a joint valuer be appointed to determine the value of the property and (ii) the property is to be sold above valuation. (iii) both parties are to handle the sale of the property.
- (d) Whether it is a sale pursuant to paras (b) or (c) above, parties are to comply with para 29 of the CA's decision dated 3/4/2012 in respect of any outstanding loans as well as refunds of CPF contributions plus interest.
- (e) Liberty to apply. [\[note: 29\]](#)

36 When the parties appeared before me on 18 March 2013, the Wife had sought a variation of

this order made on 14 January 2013 because the Husband was uncooperative. The Husband had written to the Wife to state that he would buy the Wife's share in the property as per part (b) of the order on 15 February 2013, but this date the option has since lapsed. [\[note: 30\]](#) The property was thus to be sold in the open market as per part (c) of the order.

The bank loan fact sheet

37 The bank loan fact sheet which the Husband had applied for the Wife to sign and return to him in SUM 1613 was the UOB account [number redacted] that the Wife was referring to in SUM 5404. At the hearing on 14 January 2013, the Husband withdrew this part of his prayer in SUM 1613, hence I ordered that by consent, the Husband would settle and pay all outstanding liabilities under the UOB account [number redacted] and close the said account within seven days from the Order.

Conclusion

38 For the reasons above, I dismissed the Husband's application SUM 1613, and allowed the Wife's application SUM 5404 in part.

39 As for the issue of costs, I ordered that:

- (a) the Husband pay the Wife the costs of SUM 5404, fixed at \$4,000; and
- (b) the Husband bear the costs of SUM 1613, fixed at \$2,000,
- (a) which sums are to be deducted from the Husband's share of the nett sale proceeds of the DDD property.

40 It should be recorded that the main prayers in SUM 1613 were spurious: they had unnecessarily taken up the court's time and they had served no useful purpose. Given the history of the proceedings, the Husband's applications thus far to vary the orders in relation to care and control and maintenance could be classified as an instance of an abuse of the court's process identified by V K Rajah JA in *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 at [34].

[\[note: 1\]](#) Notes of Arguments, 18/8/11, p 2.

[\[note: 2\]](#) Husband's Affidavit, 30/3/12, [5]-[9].

[\[note: 3\]](#) Notes of Arguments, 14/1/13, p 4.

[\[note: 4\]](#) Notes of Arguments, 18/8/11, p 1-2.

[\[note: 5\]](#) Wife's Affidavit, 6/11/12. [12].

[\[note: 6\]](#) Wife's Affidavit, 6/11/12 [14], [18]-[19].

[\[note: 7\]](#) Notes of Arguments, 14/1/13, p 6.

[\[note: 8\]](#) Wife's Affidavit, 6/11/12, [30].

[\[note: 9\]](#) Husband's Affidavit, 27/9/12, [2]; Husband's Affidavit, 14/11/12, [11]; Wife's Affidavit, 6/11/12, [21]-[22].

[\[note: 10\]](#) Wife's Affidavit, 6/11/12, [23]-[24]; Husband's Affidavit, 14/11/12, [12].

[\[note: 11\]](#) Husband's Affidavit, 30/3/12, [10].

[\[note: 12\]](#) Husband's Affidavit, 30/3/12, [11].

[\[note: 13\]](#) Husband's Affidavit, 30/3/12, TCH-2.

[\[note: 14\]](#) Husband's Affidavit, 30/3/12, TCH-6.

[\[note: 15\]](#) Husband's Affidavit, 30/3/12, TCH-3.

[\[note: 16\]](#) Husband's Affidavit, 30/3/12, TCH-4.

[\[note: 17\]](#) Husband's Affidavit, 30/3/12, [14].

[\[note: 18\]](#) Husband's Affidavit, 30/3/12, [22].

[\[note: 19\]](#) Husband's Affidavit, 30/3/12, [14].

[\[note: 20\]](#) Husband's Affidavit, 14/11/12, [22].

[\[note: 21\]](#) HC Judgment, [2].

[\[note: 22\]](#) CA Judgment, [24].

[\[note: 23\]](#) Wife's Affidavit, 19/10/12, [36]-[37].

[\[note: 24\]](#) Notes of Arguments, 18/3/12, p 7.

[\[note: 25\]](#) Notes of Arguments, 18/3/12, p 8; Husband's Affidavit, 14/11/12, [7].

[\[note: 26\]](#) Notes of Arguments, 18/03/13, p 9.

[\[note: 27\]](#) Wife's Affidavit, 19/10/12, p 44-46.

[\[note: 28\]](#) Notes of Arguments, 18/3/13, p 9.

[\[note: 29\]](#) Notes of Argument, 14/1/13, p 2-3.

[\[note: 30\]](#) Notes of Argument, 18/3/13, p 10.