AYL *v* AYM
[2013] SGHC 237

Case Number : Divorce Suit No 1660 of 2010 (Summonses Nos 20761 and 10208 of 2011)

Decision Date : 11 November 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Nigel Pereira and Ang Siok Hoon (Rajah & Tann LLP) for the plaintiff/wife; Anamah Tan and Andrew Lee Tong (Ann Tan & Associates) for the defendant/husband.

Parties : AYL — AYM

Family Law – Maintenance – Variation of consent order

[LawNet Editorial Note: The appeal to this decision in Civil Appeal Nos 116 of 2013 and 20 of 2014 was allowed in part by the Court of Appeal on 26 August 2014. See [2014] SGCA 46.]

11 November 2013

Choo Han Teck J:

1 In these grounds I explain my decision in the parties' divorce that the defendant/husband makes a lump sum payment to the plaintiff/wife of $1 million by way of maintenance. That sum comprises $250,000 as maintenance for her and $750,000 as maintenance for their three children. The wife is 49 years of age and the husband is 61. They were married on 3 October 1987 in England. Their children are presently 20, 13 and 10 years of age. The wife initiated divorce proceedings on 8 April 2010. The divorce was uncontested. The parties reached agreement on the ancillary matters of custody and care and control of the children, division of matrimonial assets, and maintenance of the wife and children. This agreement was given effect in an order made by consent (the "Consent Order") that formed part of the interim judgment granted by the Family Court on 13 July 2010. The interim judgment was made final on 13 October 2010.

2 The following year, two applications were made several months apart, one by each party, to vary certain terms of the Consent Order. The husband's application was the earlier one, Summons No 10208 of 2011 in the Family Court dated 14 June 2011. His application sought to vary terms pertaining to maintenance and the division of a particular matrimonial asset, *viz*, a piece of landed property (the "Property"). The wife's application was dated 9 December 2011 and this was Summons No 20761 of 2011 in the Family Court. Her application sought to vary terms pertaining to maintenance only. By 16 September 2011, a few months before the wife made her application; the Family Court had heard and decided the husband's application. On the issue of the Property, the Consent Order provided that should it be sold for more than $2.5 million, the wife would keep 70% of the sale proceeds. The husband sought to vary this to an equal split of the proceeds, arguing that the rise in the value of the Property since the Consent Order was made justified such variation – at the time the husband made his application, it appeared that the Property had a value of $5.5 million, as compared to the $3 million to $3.75 million contemplated at the time that the terms of the Consent Order were agreed. The Family Court disagreed and declined to grant what the husband sought, ordering that the division of the sale proceeds be in accordance with the Consent Order and that the Property be sold by March 2012. As for the issue of maintenance, it is not necessary to go into the intricacies of what

the husband entreated the court to do and what orders the court made.

3 The husband was dissatisfied with the Family Court's decision in his application. He appealed to the High Court by way of Registrar's Appeal from Subordinate Courts No 168 of 2011 ("RAS168/2011") and this came before me. He was likewise dissatisfied with my decision and appealed further to the Court of Appeal by way of Civil Appeal No 21 of 2012 ("CA21/2012"). Both these appeals concerned the two issues of maintenance and the division of the Property. I should mention here that the wife's application was not heard pending these appeals. I issued written grounds of decision and so did the Court of Appeal; these are *AYL v AYM* [2012] SGHC 64 and *AYM v AYL* [2013] 1 SLR 924 respectively. On the issue of the Property, the order made by the Family Court was upheld by me and then by the Court of Appeal. The wife therefore stood to receive 70% of the $5.1 million that the Property was eventually sold for. This was the end of the matter on the issue of the Property.

4 On the issue of maintenance, in RAS168/2011 I ordered that the husband pay $750,000 as lump sum maintenance for the wife and children, but the Court of Appeal subsequently set aside this order and remitted the matter to me to determine the appropriate amount of maintenance to be paid. Since the wife's application had not yet been heard, and since her application concerned the issue of maintenance only, the Court of Appeal further directed that I hear her application together with the remitted matter, which was essentially the part of the husband's application pertaining to maintenance. Accordingly I heard parties on the issue of maintenance on 1 and 29 July 2013. Before me, the parties took positions that were different from those they had taken in their respective applications. In her application the wife sought $1.845 million as lump sum maintenance for the children and $750,000 as lump sum maintenance for herself, but at this hearing before me she sought $750,000 as lump sum maintenance for the children and $250,000 for herself. I granted what the wife sought at the hearing before me and ordered on 12 August 2013 that the husband pay her a total of $1 million as lump sum maintenance for her and the children.

5 The husband was dissatisfied with this decision. But he adopted the position that he could appeal as of right against one aspect of the decision only, and that was in respect of my order on the mode of maintenance, *ie*, whether it should be a lump sum payment or periodical payments. As to the other aspect of the decision, which was my order as to the amount of maintenance, his position was that he required leave to appeal this aspect, which he sought from me. It appeared that the reason for this supposed distinction was as follows. The question of mode of maintenance arose from the wife's application, or put another way, the wife's application was to vary the mode of maintenance. Since this application had not previously been heard by any court, when I heard the application it was in exercise of my original jurisdiction. Hence my decision in the wife's application was appealable as of right, which meant that my order as to mode of maintenance was appealable as of right. By contrast, the question of the amount of maintenance arose from the husband's application. Since I heard the husband's application in my appellate jurisdiction, leave to appeal was required in respect of my order as to the amount of maintenance. The wife was content to acquiesce in the husband's position.

6 On reflection, I have some doubt as to whether this position is correct. I am not sure that such a clean distinction can be drawn as to say that the question of mode of maintenance arose wholly from the wife's application whereas the question of amount arose wholly from the husband's. It seems to me that each application raised the question of amount as well as mode of maintenance. It may be that the wife's application was appealable as of right, but my decision in the husband's required leave to appeal. However, this might not be the same as saying that my order as to mode of maintenance was appealable as of right but my order as to amount required leave to appeal. It seems to me at least arguable that the only tenable view is that both orders must stand on the same footing, *ie*, either both are appealable as of right or both require leave to appeal. Nevertheless, I was content to proceed on the basis of the position adopted by the husband and accepted by the wife. On that

premise, I declined to grant him leave to appeal against the amount of maintenance that I ordered. I did not think that there was any *prima facie* error or question of general importance such as would make it apt to put the issue of amount of maintenance before the Court of Appeal.

7 What all this means is that the husband's appeal against my decision is only on the question of mode of maintenance. On this question, the reasons why I ordered a lump sum payment rather than periodical payments are as follows. First, the wife and children have since moved to Australia as they are free to do, and in my judgment a lump sum payment is appropriate to facilitate the "clean break" sought to be achieved by their geographical relocation. Second, being satisfied that on at least one occasion the husband failed to meet his periodical maintenance payment obligations, I am of the opinion that a lump sum payment is appropriate to remove the possibility of the husband similarly falling into arrears at some future point, since the relocation to Australia makes it more difficult for the wife to take enforcement measures in the event of such default. Third, I am not convinced that the husband is unable to make a lump sum payment, in the absence of parties' disclosure of their assets. They were not obliged to make such disclosure, since they managed to reach agreement on the ancillary matters, and hence the husband cannot be faulted for not making such disclosure, but because such disclosure has not been made I cannot say that the husband's financial situation is so dire that a lump sum payment would be an intolerable hardship. I should add that, as a threshold matter, I found that the wife's and children's relocation to Australia, and the husband's failure to make the periodical maintenance payments required under the Consent Order, constituted a "material change in the circumstances" sufficient to invoke my discretion to vary the terms of the Consent Order as to mode of maintenance.

8 Although I declined leave to appeal on the question of amount of maintenance, I shall state my reasons nevertheless. As a threshold matter, both parties took the position that the amount of maintenance should be varied. In my view, this position was correct in that I did possess the discretion to order such variation on the basis that there was a "material change in the circumstances" occasioned by the wife receiving more money, in absolute as opposed to percentage terms, from the sale of the Property than she would have expected to receive when the Consent Order was made. That is to say, when the parties agreed on the terms in the Consent Order, the contemplated selling price of the Property was between $3 million and $3.75 million. This would have yielded for the wife at most $2.625 million, being her 70% share of the sale proceeds. But the Property was ultimately sold for $5.1 million, increasing her 70% share of the proceeds to $3.57 million. This would have given her an increased capacity to maintain herself and the children, and accordingly this called for a reduction in the amount of maintenance payable by the husband. But it must be remembered that the increase in value of the Property improved not only the wife's but also the husband's financial situation, in that his 30% share of the proceeds is by reason of that increase likewise larger than originally anticipated. Hence I did not think that this change in the circumstances called for a significant reduction in the amount of maintenance.

9 The husband argued that there was an additional "material change in the circumstances" that warranted a reduction in the amount of maintenance. This was the failure of the company called TripleR Group Pte Ltd which he had set up together with a business partner in 2007 following the termination of his last employment. According to him, the business of TripleR was intended to be the removal of excess rubber trees in Indonesia, the processing of those trees and the sale of the resultant timber. I accept that when parties agreed on the terms of the Consent Order, TripleR had just secured funding by way of a US$1.2 million loan from investors based in Jersey. I am prepared to accept his affidavit evidence that TripleR had also by this time purchased a rubber tree mill in Indonesia and equipment such as saws and a car. I accept that TripleR has since failed in the sense that the Jersey-based investors have recalled the loan and there is nothing left of the approximately $2 million worth of capital that the husband and his business partner invested at the outset. Given all

this, I accept that the failure of TripleR is to be considered a "material change in the circumstances". However, I did not think that it was a change of such magnitude as to warrant a significant reduction in amount of maintenance. This is because TripleR was, in the first place, neither a flourishing company nor one that looked to have substantial potential when the terms of the Consent Order were agreed. At that time, TripleR was generating zero revenue and had not generated any revenue since its inception a few years ago. The husband might have genuinely believed that TripleR would be profitable given enough time, but the reasonableness of such a belief is not borne out by the objective evidence. I am of the view that the failure of TripleR has not resulted in a significant diminution of the husband's resources from the time when the terms of the Consent Order were agreed. Therefore the failure of that company does not call for a significant reduction in the amount of maintenance.

10 In determining the amount of maintenance, the usual approach, broadly speaking, is to balance the needs of the wife and children on one hand with the means of the husband on the other. This approach, however, depends on parties having disclosed their assets. In the present case, the ancillary matters having been dealt with by consent, there was no such disclosure of assets, and for that reason the usual approach was, in my view, not feasible. I considered that the appropriate method in this case was to begin with the terms of the Consent Order. As I have said, I was minded to order variation in the mode of maintenance, *ie*, from periodical payments to a lump sum payment. The first step was to determine roughly how much lump sum maintenance would be appropriate were I minded to vary only the mode of maintenance but not the amount. This would be calculated by taking the monthly payment amounts under the Consent Order (since these should not be varied), multiplying it by a suitable multiplier reflecting the notional number of years for which the payments under the Consent Order would have to be made, and applying a discount to take into account the benefit of having the use of all of a lump sum at one go as compared to periodical payments.

11 As to maintenance for the wife, under the terms of the Consent Order the husband was to have paid $3,990 per month. Multiplying this by a multiplier of 26 years derived using the formula in *Wan Lai Cheng v Quek Seow Kee and another appeal and another matter* [2012] 4 SLR 405 at [89], and applying a discount of 20%, by my reckoning $995,000 would have been a fair amount to order as lump sum maintenance to the wife were I to vary the mode but not the amount. The Consent Order also obliged the husband to pay $2,670 per month per child, except that upon each child commencing tertiary education at any university the maintenance payable for that child would be varied to an amount to be agreed but not below $1,350 per month. Assuming that each child commences tertiary education at the age of 19, and that the maintenance payable thereafter is the minimum of $1,350 a month, and again applying a discount of 20%, by my calculation $533,000 would have been a fair amount to order as lump sum maintenance in lieu of the periodical payments for the children that the Consent Order obliged the husband to make. There was the further matter of the children's school fees, which under the Consent Order the husband was required to pay in full to the children's schools. When the terms of the Consent Order were agreed, the children were studying at United World College in Singapore, which charged school fees of around $8,000 per term. With three terms per school year this worked out to $24,000 per year per child. Assuming that their studies at this institution would cease at age 19, the two younger children would need their studies funded for nine and six years, which meant that, in effect, the husband in undertaking to pay these school fees undertook to pay about $360,000. Applying a discount of 20%, $288,000 would have been a fair amount to order as lump sum maintenance in lieu of the husband's obligation to pay the children's school fees. Hence, in my judgment $821,000, being $533,000 plus $288,000, would have been a fair amount to order as lump sum maintenance to the children.

12 In short, the above method yielded a total sum of $1.816 million — $995,000 for the wife and $821,000 for the children — that would have been an appropriate sum to order as lump sum

maintenance had I varied the mode of maintenance but found that there was no "material change in the circumstances" calling for a reduction of the amount of maintenance payable under the terms of the Consent Order. The second step was, given the "material change in the circumstances" that I had accepted, to enquire what would be an appropriate subtraction from the $1.816 million that would have been fair had there been no variation to the amount. As I have said, the two changes in circumstances identified above — the increase in value of the Property and the failure of TripleR — did not call for a significant reduction in the amount of maintenance. I therefore thought that the amount that the wife sought, a total of $1 million being $750,000 for the children and $250,000 for herself, was entirely reasonable. Accordingly, I granted what she sought. The husband argued that he should pay less by way of school fees for the children in Australia on the ground that they could be sent to less-expensive state schools rather than the private school which they attended. But I rejected this argument because the fees charged by the Australian private school were not very much more than the fees charged by United World College in Singapore, which the husband was prepared to pay under the Consent Order.

13 Pending the husband's appeal, I ordered that the sum of $500,000 which he had placed in escrow remain thus in escrow, and that there be a stay of execution in respect of the remaining $500,000. In my view, there were circumstances which justified granting a stay of execution pending appeal. These included the relocation of the wife and children to Australia, which could complicate the return of money to the husband should his appeal be successful and so render the appeal nugatory; the fact that the wife was not likely to be in urgent need of funds given her receipt of her 70% share of the proceeds from the sale of the Property; and the fact that $500,000 remained in escrow free from the risk of the husband dissipating that sum.