

Tan Siew Eng @ Tan Siew Eng Irene (m.w.) v Ng Meng Hin
[2003] SGHC 27

Case Number : Div P 601061/2001,RAS No 720054 of 2002
Decision Date : 18 February 2003
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Aru Suppiah Thevar (Arul & Co) for the Petitioner/Respondent; Dorothy Chai (Hilborne & Co) for the Respondent/Appellant
Parties : Tan Siew Eng @ Tan Siew Eng Irene (m.w.) — Ng Meng Hin

Family Law – Matrimonial assets – Division – Settlement agreement – Repudiation – Whether repudiation valid – Whether settlement agreement binding

Family Law – Matrimonial assets – Division – Settlement agreement – Repudiation of settlement agreement – Whether court should nevertheless take into account terms of settlement agreement when deciding ancillaries

Background

1. The parties whom I shall refer to as husband and wife, were married on 4 June 1977. They have two children. On 24 November 1999 the husband petitioned for divorce in Divorce Petition No 3110 of 1999 on the ground of unreasonable behaviour. The wife filed an Answer on 27 December 1999. On 5 September 2000 the parties entered into an agreement in full and final settlement of the divorce and ancillary issues ('the Settlement Agreement'). The husband contended that the wife subsequently repudiated the Settlement Agreement of 5 September 2000 and that he had accepted the repudiation. The wife disagreed. The husband withdrew his Petition on 11 January 2001. The wife then commenced the present divorce proceedings on 31 March 2001 based on the ground of adultery. The husband filed an Answer and Cross-Petition and the wife filed a Reply and Answer to Cross-Petition to which the husband filed a Reply to Reply and Answer to Cross-Petition. However, the wife's petition was eventually heard on an uncontested basis on 30 November 2001, after the parties withdrew their respective Answer and Cross-Petition and Reply and Answer to Cross-Petition and all other pleadings relating to the Petition. A Decree Nisi was granted dissolving the long marriage of 24 years and the ancillaries were dealt with separately.

2. The hearing of the ancillaries was on 10 July 2002. The husband's position was that he was not bound by the Settlement Agreement as the wife had repudiated it and he had accepted her repudiation. The wife's position was that she had not repudiated the Settlement Agreement and the parties were bound by it. Also, the Settlement Agreement was just and equitable and the court should give effect to its terms.

3. The District Court concluded that it should have regard to the Settlement Agreement when exercising its discretion on the division of the matrimonial assets under s 112 of the Women's Charter. The Grounds of Decision suggest that this was because it also concluded either that the wife had not repudiated the Settlement Agreement or, even if she had, the husband and the wife had nevertheless

elected to proceed on the basis of the Settlement Agreement subsequently. The District Court also considered the terms of the Settlement Agreement to be just and equitable and upheld it.

4. The husband then appealed to the High Court and his appeal was heard by me. His contention was similar to that before the District Court:

(a) That the wife had repudiated the Settlement Agreement and he had accepted the repudiation,

(b) That the court should not have regard to the Settlement Agreement and in deciding on the division of matrimonial assets and maintenance, the wife should be granted something much less than what had been agreed under the Settlement Agreement.

The wife took the same position as had been taken before the District Court. After hearing arguments, I concluded that the wife had repudiated the Settlement Agreement which the husband had accepted and that the parties had not subsequently elected to proceed on the basis of the Settlement Agreement. However, I was of the view that the terms of the Settlement Agreement were just and equitable and made an order along the lines of the Settlement Agreement. The husband has appealed to the Court of Appeal.

Did the wife repudiate the Settlement Agreement and if so, did the parties nevertheless agree to proceed on the basis of the Settlement Agreement?

Clauses 1 and 2 of the Settlement Agreement dated 5 September 2000 stated:

'(1) The Husband shall withdraw Divorce Petition No. 3119 [this should read as 3110] of 1999 and he shall allow and consent to the Wife proceeding on a Cross-Petition under Divorce Petition No. 3119 [this should also read as 3110] of 1999 to dissolve the marriage pursuant to Section 95(3)(a) of the Women's Charter (Cap 353) on the ground of adultery committed by the Husband and that she finds it intolerable to live with him. The Wife shall withdraw her Answer filed in the said action and she shall seek the leave of the Court to perform the foregoing within 10 days of the execution of this Agreement.

(2) The Husband and Wife agree that the terms and conditions as set out in this Agreement shall be incorporated into a consent order and be presented to the Subordinate Courts for its approval at the hearing of the Wife's Divorce Petition.'

6. However, about one month later, on 10 October 2000, the wife's Counsel said at a pre-trial conference that the wife still loved the husband and did not want to divorce him. The husband's petition was then adjourned to 26 October 2000. On 26 October 2000, it was adjourned to 10 November 2000 and then rescheduled to 14 and then to 21 November 2000.

7. Then on 21 November 2000, the wife's Counsel said at a pre-trial conference that the wife had changed her mind, did not wish to abide by clause 1 and did not wish to petition for divorce. Accordingly, the husband's solicitors Hilborne & Co wrote on 9 December 2000 to her solicitors A. Ang Seah & Hoe to state this development, alleging that she had repudiated the Settlement Agreement and accepting her repudiation. However, the husband proposed that he would withdraw his petition in view of the wife's unstable temperament and file a fresh petition based on four years' separation after 2 January 2003.

8. The wife's solicitors did not at that material time dispute Hilborne & Co's letter of 9 December 2000. Instead, they wrote a letter dated 21 December 2000 which suggested some new terms of settlement which I need not elaborate on. This was ignored by the husband and on 11 January 2001, he withdrew his petition as his solicitors said he would.

9. Subsequently, the wife's new solicitors Harry Elias Partnership ('HEP') wrote on 17 January 2001. The letter stated:

'We act for Mdm Irene Tan and have been instructed to take over conduct of the above matter from M/s A.Ang, Seah & Hoe.

We are instructed that our client had never any intention of repudiating the said agreement and is in fact willing and ready to comply with the terms as set out in the same. We are further instructed that there was a miscommunication between our clients and her previous solicitors.

We note that your client had withdrawn his Divorce Petition No. 3110 of 2000 at the last Pre-Trial Conference on 11 January 2001.

Our client proposes that she now files a fresh Petition with the Court based on your client's adultery pursuant to the terms of the said Agreement and that the ancillaries be settled by way of a consent order incorporating the terms set out in the said agreement.

Please let us know if your client is agreeable to the above. Parties have spent much time and effort negotiating before reaching an agreement as stated in the said agreement. It would be a pity if matters remain unresolved. We hope your client will set aside his prejudices and give the settlement a chance to complete. We reiterate that our client is eager and most willing to proceed as per the terms of the said agreement. There is no intent on her part to repudiate.'

Hilborne & Co replied to say that they were taking the husband's instructions.

10. On 15 March 2001, HEP wrote again to reiterate the wife's position that there was a binding

agreement and no intention on her part to repudiate the Settlement Agreement. There was again no substantive response from Hilborne & Co.

11. Eventually, HEP filed the wife's divorce petition based on the husband's adultery and by a cover letter dated 3 May 2001 forwarded the papers to Hilborne & Co for them to serve on the husband.

12. Apparently HEP also sent a fax dated 22 May 2001 to Hilborne & Co although the latter said they did not receive it. The material parts of that fax said:

'We refer to the telephone conversation between your Ms Dorothy Chai and our Ms Wendy Maricich today.

We confirm that your client will be in Singapore on 1st June 2001 to accept service and that you will forward us the endorsed documents by 4th/5th June 2001. We also confirm that your client will not be contesting the divorce.

...'

13. The Acknowledgment of Service was returned with a cover letter dated 5 June 2001 from Hilborne & Co to HEP. The letter stated:

'We refer to your Divorce Petition.

We write to inform that we had effected service of the process papers on our client today at our office. We return herewith the Acknowledgment of service to evince the same.

Further to the aforesaid, we also write to inform that our client is willing to consent to your client's petition for divorce on the condition that she deletes line 2 to 5 of paragraph 11(b) and paragraph 11(c) of your client's Divorce Petition. Please revert with your client's confirmation that she is willing to do so.

With reference to the ancillary issues, our client reserves his rights therein.'

14. By a letter dated 7 June 2001, HEP replied. The material part of their letter stated:

'As the divorce is filed pursuant to an agreement between parties, we would normally advise client to consent to the deletion. However, our main concern is that there may not be enough facts for the Court to grant the Decree Nisi and the Divorce Petition may be dismissed. Under the

circumstances, we feel that there should not be any deletion. You will note that in our Divorce Petition, there is not even a prayer for costs. In the interest of settling matters expeditiously, could you kindly advise your client to re-consider.'

15. Then, by a letter dated 6 July 2001, HEP wrote to Hilborne & Co to forward a copy of Notice of Ceasing To Act As Solicitors and, I presume, the wife eventually instructed new solicitors.

16. Eventually, the parties agreed to settle the wife's petition regarding the dissolution of the marriage but not the ancillary issues. As I have said, on 30 November 2001, a Decree Nisi was granted which would be made absolute in three months. The ancillaries were adjourned to be heard in chambers. On 10 July 2002, the District Court made its decision.

17. The District Court noted that the husband's solicitors did not dispute the correspondence from HEP and the District Court placed weight on the husband's intended consent to the wife's petition as recorded in the correspondence of HEP. Although clause 1 of the Settlement Agreement provided that the wife should present a cross-petition under the husband's original petition, the District Court was of the view that the wife could only file a fresh petition instead of a cross-petition since the husband was to withdraw his original petition under clause 1.

18. I was of the view that the unilateral assertion by HEP that the divorce petition was filed pursuant to the Settlement Agreement could not amount to an agreement by the parties to proceed on the basis of the Settlement Agreement. I was also of the view that the District Court had read too much into the husband's intended consent to the wife's petition. His intended consent did not mean that he was also proceeding on the basis of the other terms of the Settlement Agreement, which he had validly terminated because of the wife's repudiation. Indeed, the letter dated 5 June 2001 from Hilborne & Co had said that the husband was willing to consent to the petition for divorce subject to certain conditions. That letter also said specifically that the husband was reserving his rights regarding the ancillary issues.

19. The District Court also relied on para 1 of the husband's Answer and Cross-Petition in which the husband had admitted to para 7 of the wife's petition. The said para 7 had stated, inter alia, that the husband's petition was withdrawn pursuant to the Settlement Agreement. Accordingly, the District Court took the view that para 3 of the husband's Answer and Cross-Petition which stated that the Settlement Agreement had been repudiated by the wife could not alter the position.

20. Even if the District Court was correct in relying on para 1 of the husband's Answer and Cross-

Petition, notwithstanding that it had been withdrawn, Ms Dorothy Chai submitted that the District Court did not give due weight to other factors:

(a) The husband had stated in his Memorandum of Appearance that he was (then) contesting the wife's petition.

(b) Paragraph 3 of the husband's Answer and Cross-Petition had stated that the Settlement Agreement had been repudiated by the wife

(c) Paragraph 7(l) of the husband's Answer and Cross-Petition had also stated that the wife had repudiated the Settlement Agreement by not proceeding with her divorce proceedings and that she wanted more money from him

(d) The husband had filed a cross-petition for divorce.

(e) The husband's cross-petition sought a division of matrimonial assets.

21. I was of the view that the factors in para 20(a) to (d) were valid while para 20(e) was neutral. As for the withdrawal of the husband's Answer and Cross-Petition, this was only to facilitate the obtaining of a Decree Nisi and did not represent his agreement on the ancillary issues which was vigorously contested by both sides.

22. Furthermore, in so far as the District Court had relied on the husband's admission to para 7 of the wife's petition, para 7 stated:

'7. That apart from Divorce Petition No. 3110 of 1999 which was withdrawn pursuant to an Agreement made between parties dated 5th September 2000 and Maintenance Summons No. 3243 of 2000 which was withdrawn on 1st September 2000, there are no other proceedings in Singapore or elsewhere or to any property by or on behalf of either parties to the marriage.'

23. In the light of the other factors, it seemed to me that when the husband was admitting to the said para 7, he was admitting that there was no other proceeding and not that his original petition had been withdrawn pursuant to the Settlement Agreement

24. In the circumstances, I was of the view that the husband had not agreed to proceed on the basis of the Settlement Agreement although the wife wanted to do so, after changing her mind again. Accordingly, I decided that the wife had repudiated the Settlement Agreement which repudiation had been accepted and the husband did not subsequently agree to proceed on the basis of the Settlement Agreement.

Division of matrimonial assets and maintenance

25. As regards the division of matrimonial assets, s 112(2) Women's Charter (Cap 353) sets out the matters which the court should have regard to from (a) to (g). The matter stated under s 112(2)(e) is:

'any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce.'

Furthermore, the matters set out in s 112(2)(a) to (g) are not comprehensive as s 112(2) starts by stating that the court is to have regard to 'all the circumstances of the case' including the matters stated in (a) to (g).

26. As for maintenance, s 116 Women's Charter states that an agreement to pay a capital sum in settlement of all future claims to maintenance shall not be effective until it has been approved by the court. So, even if the Settlement Agreement had not been terminated, it would still not have been legally binding on the parties until approved by the court.

27. The matrimonial assets disclosed and their respective values (rounded to the nearest dollar) were:

- (a) Matrimonial home at No. 1 Jalan Siantan (in the wife's sole name) - \$2,400,000
- (b) Block 4 #12-414 A Pandan Valley (in the husband's sole name) - \$800,000
- (c) A factory at 20 Jalan Permas, 9/10 Permas Jaya 81750 Plentong, Johor Bahru (in the husband's sole name). After its sale, and payment of a loan, the balance (using an exchange rate of RM1 to S\$0.5042) was - \$256,400
- (d) A house in Indonesia - \$178,145
- (e) A BMW 5 series car No. SCN 2273 in Singapore - \$100,000
- (f) A 1989 Mercedes E230 car No. B8KM in Indonesia - \$16,363
- (g) A 1989 BMW 3.18 car No. B710MH in Indonesia - \$8,909
- (h) A golf membership in Joondalup, Perth, which had no value as it was suspended - -
- (i) A golf membership in Modernland Gold Club in Indonesia - \$8,182

\$3,767,999

28. Under the Settlement Agreement:

(a) The husband would relinquish all claims to the matrimonial home at No. 1 Jalan Siantan, which was registered in the wife's name (clause 7).

(b) The husband would transfer all his rights and interest in the Pandan Valley property to the wife (clause 3 to 6).

(c) The factory at Johor Bahru would be sold, and, after payment of a loan to the wife's sister, the balance would be given to the daughter of the marriage Joyce Ng Kit Mei as a lump sum maintenance to finance her tertiary education (clause 10 to 11). The balance was \$256,400.

(d) The husband was to transfer all his rights and interest in the BMW 5 series car in Singapore to the wife (clause 8 and 9).

In addition, the husband was:

(e) to provide maintenance of \$700 a month for the daughter from 1 September 2000 to 1 January 2001 (four months) (clause 12)

(f) to pay the wife a sum of \$75,000 as a goodwill gesture but this was to be paid in instalments (clause 13).

29. It is important to bear in mind that the Settlement Agreement was in full and final settlement of all issues between the parties and, in particular, the husband's duty to maintain the wife and the two children and the distribution of matrimonial assets (clause 18).

30. Ms Chai submitted that if the court was to make an order for division of matrimonial assets along the lines set out in the Settlement Agreement, this would mean that the wife would get 94.4% while the husband would receive only 5.6% of the matrimonial assets. This would be because the husband would receive the house in Indonesia, the Mercedes and the BMW 3.18 in Indonesia and the Modernland golf membership amounting in aggregate to \$211,599 only.

31. She submitted that the wife should be given 50% of the matrimonial assets with no maintenance.

As for the daughter, the husband was prepared to provide \$1,000 a month for her even though she was more than 21 as she was undergoing tertiary education in Sydney. There was no suggestion by Ms Chai about maintenance for the son Eugene, who is about three years older than the daughter Joyce, and there was no issue about maintenance for him. On the other hand, as I have said, the wife wanted the terms of the Settlement Agreement to be upheld.

32. I saw no reason why the wife should not be entitled to maintenance. Indeed, in para 28 of the husband's first affidavit signed on 27 March 2002, he had proposed a lump sum maintenance for the wife and daughter and even \$1,000 a month for the son. Once maintenance is factored in, Ms Chai's submission that the husband was getting only 5.6% lost much of its force. In other words, the wife was not getting 94.4% for division of matrimonial assets alone. She had also agreed not to make any claim for maintenance.

33. Secondly, Ms Chai's submission assumed that the husband had disclosed all his assets.

34. The husband is a Malaysian residing in Indonesia for the past 30 years while the wife took care of the family in Singapore. He claimed to be working as a Technical Advisor with PT Romena Pratama in Indonesia and that in view of the economic crisis, he did not receive any monthly salary from 1 May 2001 but would instead get a commission of 10% from the net profit on any sale or project which he brought in. In para 14 of his first affidavit signed on 27 March 2002, he claimed that he had not earned a single cent since May 2001 as he was not able to clinch a deal. He has a family in Indonesia (para 4 of his first affidavit).

35. In his second affidavit signed on 18 April 2002, the husband said that during the late 1980s and early 1990s, he was moonlighting as a timber broker, apart from his job with Indonesian companies P.T. Lestari Jaya Utama and then P.T. Cakra Alam. He said that his income then was substantial and he transferred between \$300,000 to \$400,000 each year to the parties' joint bank account. This totalled about \$1 million. Some of the monies were used to buy the matrimonial home. He also invested in a company in Singapore and an amusement centre in China but these businesses sustained substantial losses because of a worldwide and an Indonesian economic, currency and political crisis during the early 1990s. The Indonesian government had also tightened up on timber concessions which led to his losing his income as a timber broker. He claimed that the early to mid 1990s was the darkest period in his life and things were difficult for both of them i.e the Petitioner wife and him. However, the wife found out he had a joint account with Overseas Union Bank Limited with his brother and gave him hell. In order to shut her up, he transferred the monies there to the joint account he had with the wife in July 1992. The amount transferred was about S\$280,000 for safe-keeping. In or about 1997, he transferred about \$400,000 in cash and shares to the wife for safe-keeping. In para 57 of his second affidavit, he said he was relying on a lady friend's inheritance and earnings to maintain their household in Indonesia.

36. In response, the wife said in para 8 of her third affidavit filed on 29 April 2002, that although the husband claimed that the first five years in the 1990s was the darkest period in his life, he had incurred substantial expenses then, which I list below:

- (a) bought a golf membership in Octville Golf Country Club for RM45,000 on 22 December 1990,
- (b) spent \$900,000 in cash to purchase the matrimonial home on 25 February 1991,
- (c) spent \$239,454.10 for interior decoration of the matrimonial home on 25 December 1991,
- (d) bought a golf membership in Joondalup, Perth, for US\$9,100 in December 1993,
- (e) sent their son to Toronto for grade 13 in 1995 which cost \$40,000 per annum with subsequent expenses from 1996 for university education also in Toronto.

She also added that he had bought a new BMW 5 series for \$250,000 in December 1996.

37. The husband did not deny these expenses in his (fourth) affidavit filed on 13 June 2002. Instead, he said that at no time did he say he did not have any money during the first five years in the 1990s (see para 11 of that affidavit).

38. I would add that although the husband had said in para 27 of that same affidavit that the wife had yet to declare her assets, his Counsel Ms Chai had said, during submissions before the District Court, that no discovery was sought because the husband was not interested in whatever the wife had in her possession (see p 11 of the Notes of Argument). Furthermore, the wife's Counsel Mr Arul submitted that the husband also did not seek information about such assets before entering into the Settlement Agreement.

39. In the circumstances, I reached the same conclusion as the District Court that the husband had not disclosed fully all his assets.

40. If the first five years of the 1990s was the darkest period of his life because of his failed ventures, he would not have incurred the expenses stated by the wife and even beyond 1995. I accepted that he was and is a capable businessman and his fortune was not as adversely affected as he wanted the court to believe. Also, he was not merely the Technical Advisor that he sought to

portray.

41. The fact that he did not attempt to ask the wife to set out her assets before entering into the Settlement Agreement or even during submissions before the District Court suggested that he was not concerned about them because he had more elsewhere for himself and his other family. This was especially so bearing in mind that he had alleged that he had transferred sums of money and shares to the joint account or to the wife for safe-keeping (see para 35 above). The fact that he had had a joint account with a brother also demonstrated that not all his assets had been or were necessarily in his sole name and in the joint names of the wife and himself only.

42. In the circumstances, although I had concluded that the Settlement Agreement was no longer contractually binding on the parties, I was of the view that I could and should still take it into account. After all, the general guiding principle is a division that would be just and equitable in all the circumstances. Both parties had stressed that the Settlement Agreement had been reached after extensive negotiations. This was not a case where either party had claimed to be misled into entering into the Settlement Agreement, although the husband stressed that he had entered into it to escape from the mental distress caused by the wife and despite advice from his own solicitors. However, I was of the view that while the husband may have genuinely wanted to escape from the mental distress caused by the wife, he was and is a tough and shrewd businessman who would not have put himself in such a disadvantageous position of keeping only 5.6% of the matrimonial assets for himself and his other family in Indonesia. Furthermore, the advice of his solicitors then would have probably been on the assumption that he had disclosed all his assets.

43. In the circumstances, I was of the view that the terms in the Settlement Agreement were just and equitable and I made an order following the terms of the Settlement Agreement, where they were still applicable, and taking into account any payment which the husband had already made thereunder before he terminated it.

44. I would also mention that the wife's affidavits contained unnecessary allegations attacking various members of the husband's family like his sister and other family members (see, for example, her third affidavit para 4 and 29). The wife had also apparently made derogatory or threatening remarks to the husband's counsel (see the letter dated 30 April 2002 from Hilborne & Co to her solicitors Arul & Co exhibited in the fourth affidavit of the husband filed on 13 June 2002). Such conduct is unwarranted and I hope it will not occur again.

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