



IN THE HIGH COURT OF MALAYA AT GEORGE TOWN

IN THE STATE OF PENANG

[DIVORCE PETITION NO. PA-33-208-06/2017]

**In the matter of sections 53, 88
and 89 of the law reforms
(Marriage and Divorce) Act 1976.**

**In the matter of the Divorce and
Matrimonial Proceedings Rules
1980; and**

**In the matter of the Rules of
Court 2012**

Between

Chang Dan

(China Passport No: G05985739)

... Petitioner

And

Kwan Chii Shyan

(NRIC No: 730402-07-5027)

... Respondent

GROUND OF DECISION

The Application

[1] On 20.7. 2018 the parties recorded a consent order as per an agreement in this divorce petition. The Respondent is now



seeking an order by way of a notice of application in the concluded petition to set aside the consent order (“the consent order”) which is perfected and in force pursuant to O. 92 r. 4 Rules of Court 2012 [Enclosure 24]. Upon the consent order being set aside it is prayed that the divorce proceedings between the parties be re-opened and is reheard by this Court.

- [2] The consent order states that the marriage between the parties is dissolved and makes very detailed provisions for the custody and maintenance of the two children of the marriage as well as the distribution of the matrimonial assets.
- [3] The Respondent has advanced three grounds in Enclosure 24 to set aside the consent order. The grounds are:
- (a) the Respondent did not meet the learned Judge who recorded the consent order during the process of mediation;
 - (b) the Respondent did not give his consent to record the consent order either to his own solicitor, Messrs Amareson & Meera or the solicitors of the Petitioner, Messrs Ooi Siew Kim & Co; and
 - (c) the Respondent did not have any knowledge of the consent order until 12.3.2019 when he obtained a copy of the order from Messrs Amareson & Meera.
- [4] Notwithstanding, the Respondent was represented at the divorce proceedings he now alleges that he did not give consent to his counsel to record the consent order. The Respondent relies on this Court’s minutes and the contents of the consent order in support of his application which merely shows that counsels appeared before the learned Judge and recorded the consent

order by producing an agreement by which terms the parties agree to settle the divorce proceedings.

[5] The cause papers concerning Enclosure 24 were left at the last known address of the Petitioner. On the return date of the application and thereafter the Petitioner did not appear.

[6] On the return date of the notice of application, I had adjourned the matter to allow counsel to submit on the following question:

Whether the perfected consent order in the instant case could be set aside by a notice of application under the inherent jurisdiction of the court or only by a fresh action brought for that purpose.

[7] In response to the above question, the Respondent, contended that the decision of Peh Swee Chin FCJ in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Berhad* [1998] 2 CLJ 75 allows for the setting aside of a consent order by way of notice of application in the same divorce proceedings instead of a fresh action. He highlighted in bold the sentences that he claimed supported his contention in the following passages:

When a judgment in the High Court has been perfected in the manner described in the above passage, a party to the judgment generally and subject to the same passage, or any other written law, and apart from any appeal, cannot re-open the matter finalised in the judgment by seeking to alter it or amend it for the court would be *functus officio* by virtue of the ratio of *Hock Hua Bank v. Sahari bin Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of

unlimited civil jurisdiction in the course of contentious litigation

...

It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, one must do so **within the same proceedings or action in which the same order was obtained** and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from *Hock Hua Bank v. Sahari bin Murid*, as mentioned later in this judgment in connection with a consent judgment.

Decision of the Court

[8] It is to be observed that the passage in **Badiaddin** relied by the Respondent was in the minority judgment by Peh Swee Chin FCJ. The majority judgment was delivered by Mohd Azmi FCJ which stated as follows:

For my part, I must hasten to add that **apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court *ex debito justitiae*** to a category of cases involving orders which contravened “any written law”, the contravention

should be one which defies a substantive statutory prohibition **so as to render the defective order null and void on ground of illegality or lack of jurisdiction**. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. **The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice**. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[9] In any event, the proposition in the minority judgment of Peh Swee Chin FCJ does not assist the Respondent. The statement relied by the Respondent is made in a situation where a person seeks to show that an order is invalid in some other proceedings. It is in this context it is stated that the invalidity of an order cannot be attacked in the other proceedings without first filing proceedings to set aside the order in proceedings in which the order was given.

[10] In my judgment, this Court became *functus officio* when it recorded the consent order entered into between the parties to the divorce proceedings. Both parties were represented by solicitors. The parties had clearly undergone a mediation process and appeared before the learned Judge to record the consent order. The parties presented to the learned Judge an agreement by the parties for a consent order to be recorded as settlement to conclude the divorce proceedings.

[11] The consent of the parties are expressed and communicated to the court through their lawyers. If there is no free consent of one or either parties then the consent order can be challenged on the same grounds as vitiating an agreement.

[12] However, in respect of setting aside consent judgments or consent orders which is the question before this Court, the following principle laid down by the Federal Court in *Khaw Poh Chhuan v. Ng Gaik Peng & Ors* [1996] 1 MLJ 761 is instructive:

It is well established that a perfected consent order can only be set aside in a fresh action filed for the purpose: see eg *Huddersfield Banking Co Ltd v. Henry Lister & Sons Ltd* [1895] 2 Ch 273. The consent order was given in Originating Summons No 209/1973. It is now sought to have it set aside in the subsequent and separate civil suit concerned in the instant appeal. The civil suit is of course the fresh action for the purpose of setting aside the consent order.

[13] The principle was reiterated by Peh Swee Chin FCJ in His Lordship's minority judgment in **Badiaddin** as follows:

The grounds referred to for setting aside a consent order of a judgment by consent are grounds which basically relate to consensus *ad idem* or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgment by consent is undoubtedly based on an agreement of both parties where consent to the agreement must or should have been free in the first place. If the agreement upon which a consent order or judgment by consent is based, is vitiated by any ground recognized in

equity as vitiating such free consent, such as fraud, mistake, total failure of consideration (see *Huddesfield Banking Co v. Henry Lister* [1895] 2 Ch 273 and the cases cited therein), then such a perfected consent order or judgment by consent could be set aside in a fresh action filed for the purpose. Grounds which would vitiate such free consent should also include misrepresentation, coercion, and undue influence and other grounds in equity.

[14] Thus, there is a distinction made between setting aside orders by way of a fresh action on the grounds stated in *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143 with setting aside a consent judgment or consent order on the grounds stated in **Khaw Poh Chhuan** on the other hand.

[15] I hold that in this case the ground raised by the Respondent does not fall within the ambit of the limited grounds and exceptional circumstances for setting aside an order of court under the inherent jurisdiction of the court under O. 92 r. 4 Rules of the Court 2012 to prevent injustice and abuse of the process of the court (see *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1; *Sia Cheng Soon & Anor v. Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351).

[16] The setting aside of a consent judgment or consent order could only be made by filing a fresh action on any ground recognized in equity as vitiating such free consent such as those used to set aside an agreement. The setting aside of a consent order is after all a setting aside of the agreement entered into between the parties.



[17] In the circumstances, I hold that the consent order dated 20.7.2018, alleging absence of free consent can only be set aside by way of a fresh action brought for that purpose.

[18] For the above reasons, Enclosure 24 is dismissed.

(AMARJEET SINGH SERJIT SINGH)

Judicial Commissioner

High Court of Penang

Dated: 23 JULY 2019

COUNSEL:

For the petitioner - Tidak Hadir; Ooi siew kim & co PENANG

For the respondent - Shamsar Singh & Gunamalar; Gunamalar Law Chambers

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Berhad [1998] 2 CLJ 75

Khaw Poh Chhuan v. Ng Gaik Peng & Ors [1996] 1 MLJ 761

Hock Hua Bank Bhd v. Sahari bin Murid [1981] 1 MLJ 143

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1

Sia Cheng Soon & Anor v. Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753



[2019] 1 LNS 1203

Legal Network Series

Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors and other applications [2013] 4 MLJ 351

Legislation referred to:

Rules of Court 2012, O. 92 r. 4