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WONG CHENG PING

v.

CHIN GUAN SENG

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HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM JC
[DIVORCE PETITION NO: S8-33-670-2008]
23 MARCH 2010

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FAMILY LAW: *Divorce - Decree nisi granted - Application for setting aside of decree nisi - Whether valid grounds shown for setting aside - Absence of statutory provision for rescinding or setting aside a Decree Nisi that already has been made absolute - Whether application may be made under Rules of the High Court, 1980 O. 32 r. 6 and O. 92 r. 4 - Setting aside not allowed - Law Reform (Marriage and Divorce) Act 1976, s. 61*

D

FAMILY LAW: *Divorce petition - Respondent's answer not filed - Decree nisi given in respondent's absence - Application to set aside decree nisi filed after decree had been made absolute - Setting aside not allowed*

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The divorce petition in this case was originally filed in the Muar High Court on 30 November 1998 as DP 33-172-1998. The Muar High Court dissolved the marriage on 22 July 1999 by granting a *decree nisi* together with ancillary reliefs. On that date of hearing the respondent was absent even though he was served with the complete cause papers on 6 February 1999. The *decree nisi* was made absolute

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on 21 October 1999. On 21 June 2007 the respondent filed the present application (encl. 26) under O. 32 r. 6 and/or O. 92 r. 4 of the Rules of the High Court, 1980 ("RHC") praying, *inter alia*: (i) that the *decree nisi* dated 22 July 1999 and the certificate making the *decree nisi* absolute dated 21 October 1999 be set aside; or (ii)

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the terms of the said *decree nisi* order regarding the custody and maintenance of the children be set aside; and (iii) that the divorce petition be fixed for further hearing and the respondent be given leave to file an answer to the divorce petition. The respondent claimed that he was not aware of the making of the *decree nisi* as

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he was not present in court when the decree was made. The petitioner disputed this. It was submitted on behalf of the respondent that the *decree nisi* was irregular or wrong because it was granted in the absence of the respondent.

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Held (dismissing the respondent's application with costs):

(1) The RHC 1980, including O. 32 r. 6 and O. 92 r. 4 are of general application and apply generally to all civil proceedings. However, if there are other rules made for a specific purpose under any other written law then the RHC 1980 shall not have effect. The Law Reform (Marriage and Divorce) Act 1976 ("the Act") is a written law enacted for the specific purpose of providing for marriage and divorce matters of non-Muslims. (paras 27 & 28)

(2) Section 61 of the Act is enacted for the specific purpose of providing for the status of a *decree nisi* that has been granted by the court under the Act and it even provides, *inter alia*, the rule or procedure for rescinding, or setting aside, the *decree nisi* in a situation where no application has been made to make the *decree nisi* absolute. There is no provision in the Act for rescinding or setting aside a *decree nisi* that already has been made absolute. It appears to be the intention of Parliament to preserve the integrity and finality of a *decree nisi* that already has been made absolute after three months. As such, parties are not allowed to freely apply to the court at any time to rescind or set it aside unless for very good reasons or in exceptional circumstances. (paras 30, 31 & 32)

(3) The *decree nisi* was granted since the respondent was absent and no answer had been filed by him. The *decree nisi* had already been made absolute. The effect was that the petitioner and the respondent were already divorced. It would require a very good reason for such divorce status of the parties to be reversed or disturbed. The respondent did not given any good reason to the court as to why he did not file his answer to the divorce petition, or why he was not present in court on 22 July 1999. (para 34)

(4) The status of a *decree nisi* granted in a divorce petition that is heard in open court is totally different from that of an order made *ex parte* in chambers for an interlocutory matter that is filed by way of a SIC. A *decree nisi* granted in open court should not be easily set aside under O. 32 r. 6 of the RHC in view of the specific provisions of s. 61 of the Act. (para 35)

(5) Even if the respondent is allowed to apply to set aside a *decree nisi* that already has been made absolute, then under O. 42 r. 13 of the RHC the respondent is required to make his application to set aside or vary the *decree nisi* within 30 days of

A the receipt of such order or judgment by him. Enclosure 26 was only filed on 22 June 2007 *ie*, about 7 years 9 months after 30 August 1999, which was an unduly long delay. (paras 35 & 36)

B **(6)** The powers of the court under O. 92 r. 4 of the RHC to invoke its inherent jurisdiction to prevent injustice should be used very carefully and in exceptional circumstances where an application, such as the one in encl. 26, should be made within a reasonable time, and certainly not more than 7 years later. (para 43)

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Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Macquarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor and Another Appeal [2007] 6 CLJ 176 CA ***(refd)***

D *Perwira Affin Bank Bhd v. MDV Technical Services Sdn Bhd [2008] 4 CLJ 66 HC* ***(refd)***

RHB Bank Bhd v. FGG Wood Mouldings Industries Sdn Bhd & Ors [2001] 3 CLJ 661 HC ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16

E *CA* ***(refd)***

Yeop Chooi Peng v. P Manogram V Packirisamy [1988] 1 LNS 85 HC ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, ss. 61, 96

Rules of the High Court 1980, O. 1 rr. 2(1), (2), O. 32 r. 6, O. 42 r. 13,

F O. 92 r. 4

For the petitioner - Aida Fatimah Dato' Abd Jabar, Legal Aid Bureau
For the respondent - YS Yip; M/s Josephine LK Chow & Co

Reported by Amutha Suppayah

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JUDGMENT

Yeoh Wee Siam JC:

H **Appeal**

[1] This is an appeal filed by Chin Guan Seng @ Tan Guan Seng, the respondent husband ("the respondent") against my decision made in chambers after the hearing on 9 February 2010

I regarding the summons in chambers ("SIC") filed by the respondent on 22 June 2007 in encl. 26.

Prayers In Enclosure 26

[2] The prayers of the respondent in encl. 26 are as follows:

1. (a) The *decree nisi* dated 22 July 1999 which was obtained by the petitioner wife ("the petitioner") be set aside and the certificate making the *decree nisi* absolute dated 21 October 1999 be also set aside; or

   (b) The terms of the said *decree nisi* order regarding the issue of right of custody of the children and the issue regarding payment of maintenance of the children be set aside;

2. This divorce petition be fixed for further hearing and the respondent be given leave to file an answer to the divorce petition within the period of 21 days from the date of this order;

3. The costs of this application be costs in the cause.

4. Any other relief as the court deems fit.

Grounds Of Application For Encl. 26

[3] The grounds for the application for encl. 26 (see encl. 27) are as follows:

(a) The respondent only recently knew (through his family members) that there was a publication in the newspapers that the petitioner made a complaint against him to the "MCA Public Service and Complaints Department" that he is an irresponsible person because he did not comply with the court order and did not pay maintenance.

(b) Since the court proceedings in 1999, the respondent only remembers that he attended the court once together with his counsel.

(c) The respondent was not present in court on the date of hearing on 22 July 1999 and this absence is confirmed based on the record of the minutes of the court. However, the *decree nisi* order dated 22 July 1999 ("the *decree nisi*") states that the respondent was present in court.

(d) The respondent has no knowledge at all regarding the completion of his divorce case because his previous counsel had withdrawn from acting for him and the respondent was no longer represented or given any further information regarding the case.

(e) The respondent has gone through a bitter and difficult life and his beloved father had also passed away. The respondent does not have a permanent job.

(f) The respondent is illiterate in the Malay language and the English language and was not aware or did not understand the matters that happened before this.

(g) The respondent should be given the opportunity to defend himself and also to state his reply to enable the court to give a just order.

Affidavits

[4] The petitioner filed an affidavit in reply on 24 November 2008 (encl. 40) stating, *inter alia*, that:

i. The respondent can spell and write.

ii. The respondent was present in court on 22 July 1999 together with the mother and their eldest child.

[5] The respondent filed an affidavit in reply on 8 January 2009 (encl. 41) stating, *inter alia*, that the respondent has no knowledge of the *decree nisi* dated 22 July 1999.

Background Of Case

[6] The divorce petition in this case was originally filed in the Muar High Court on 30 November 1998 as DP 33-172-1998.

[7] The Muar High Court dissolved the marriage on 22 July 1999 by granting a *decree nisi* together with ancillary reliefs. On that date of hearing the respondent was absent even though he was served with the complete cause papers on 6 February 1999 (see affidavit of service dated 16 March 1999 filed on 1 April 1999 (it has no enclosure no.)). The *decree nisi* was made absolute on 21 October 1999.

[8] On 30 August 1999 the respondent filed a SIC *vide* encl. 13 to vary the *decree nisi* regarding the care, custody and control ("custody") of the child, Chin Suk Kuan, so that the respondent be given the custody of the same child. The respondent also applied for the order in the *decree nisi* regarding maintenance of the children, medical expenses of the second child and costs to be set aside. The respondent further applied for custody of the child, Wong Yi Ying, whose custody had already been given to the petitioner under the *decree nisi*, which *decree nisi* had already been made absolute.

[9] On 1 September 2009 during the hearing, the Muar High Court made two orders, namely: A

1. The application of the respondent's counsel *vide* encl. 20, ie, to withdraw from acting for the respondent for lack of instructions, was allowed. B

2. Enclosure 13 was dismissed.

[10] On 21 June 2007 the respondent appointed Messrs Josephine, LK Chow & Co. as his solicitors and filed the SIC in encl. 26 with the prayers as stated above. C

[11] On 4 October 2007 the Muar High Court ordered that the case be transferred to the Kuala Lumpur High Court on the application of the respondent on grounds that the respondent lives in Kajang and the petitioner lives in Kuala Lumpur and such transfer would save costs and high expenses. D

[12] The file was received by the Kuala Lumpur High Court on 9 May 2008 and registered in the Family Court with the new registration no. S8-33-670-2008.

Submissions Of Learned Counsel For The Respondent E

[13] Briefly, in addition to the written submissions already filed, Ms YS Yip ("Ms Yip") submitted on behalf of the respondent that the current *decree nisi* is irregular or wrong because it was granted by the court when the respondent was not present in court on 22 July 1999. The record of minutes made by the Muar High Court states that the respondent was absent. However, the *decree nisi* states that both the petitioner and the respondent were present in court. F

[14] In the course of her submissions, Ms Yip referred to another enclosure ie, encl. 13 which is an application for variation of the terms in the *decree nisi*. She submitted that on 1 September 2000 the Muar High Court allowed encl. 20, ie, allowing the respondent's counsel to be discharged, but such application was not served on the respondent. As a result, the respondent was not represented in court. However, the Muar High Court, after allowing encl. 20, went on to dismiss encl. 13 even though the respondent was absent. G H

[15] Ms Yip further submitted that encl. 13 was never heard on its merits by the Muar High Court. Both parties did not make submissions regarding encl. 13. Therefore, encl. 26 in this case, in I

so far as the alternative prayer for custody and maintenance of children is concerned, is not the same application as in encl. 13. The application in encl. 26 is not *res judicata* even though encl. 13 was dismissed by the Muar High Court.

Submissions By Learned Counsel For The Petitioner

[16] Cik Aida Fatimah ("Cik Aida") of the Legal Aid Bureau, in addition to the written submissions already filed, submitted that the application in encl. 26 was filed out of time under O. 42 r. 13 of the Rules of the High Court 1980 ("RHC 1980"). Moreover, the minutes of the Muar High Court dated 1 September 2000 show that encl. 13 was dismissed, and not withdrawn or struck off. After encl. 13 was dismissed, the respondent comes back again with an application in encl. 26 with the same issues. The whole action of the respondent is an abuse of the process of the court.

[17] Cik Aida further submitted that if the respondent does not agree with the court's order, the respondent should apply to set aside the order immediately.

[18] Cik Aida maintained that when the *decree nisi* was granted, the respondent was present. She submitted that the respondent knew his rights but chose not to comply with the *decree nisi*. Therefore, encl. 26 should be dismissed.

[19] Cik Aida also submitted that the respondent should have appealed to the Court of Appeal if he was not satisfied with the court's decision regarding encl. 13.

Submissions In Reply By Learned Counsel For The Respondent

[20] Ms Yip submitted that the respondent, at all times, did not take advantage of the process of law. He is basically an illiterate person, as stated in his affidavit in support. The respondent was depending solely on his counsel who withdrew from acting for the respondent. As such, the respondent was not given any opportunity to be present in court to defend himself.

[21] Ms Yip reiterated that the application in encl. 26 is not similar to the one in encl. 13. She relied on *RHB Bank v. FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 3 CLJ 661 where Kang Hwee Gee J (as he then was) held that there is always a right in an interlocutory proceeding for a party to apply under O. 32 r. 6 of the RHC 1980 to set aside an order made *ex parte* in his absence whether or not the matter is heard on the merits. To succeed in this application, the applicant must show valid grounds

for his application. I note here that this case cited is in relation to the setting aside of an *ex parte* order that was given in an interlocutory matter and not in relation to a *decree nisi* granted in the absence of the respondent in a divorce petition.

Issues

[22] The issues before this court are:

(a) Whether this court ought to allow prayer 1(a) in encl. 26 and set aside the *decree nisi* dated 22 July 1999 which has been made absolute by the certificate dated 21 October 1999; and

(b) Whether this court ought to allow the alternative prayer 1(b) in encl. 26 on the ground that it is not *res judicata* since encl. 13 was never heard on its merits but was dismissed.

Prayers 2, 3 and 4 of encl. 26 are consequential upon the court's decisions regarding prayers 1(a) and 1(b).

Regarding Issue 1 Above

[23] The respondent made the application in encl. 26 under O. 32 r. 6 and / or O. 92 r. 4 of the RHC 1980.

[24] Order 32 r. 6 of the RHC 1980 provides as follows:

> The Court may set aside an order made *ex parte*.

[25] Order 92 r. 4 of the RHC 1980 provides for the inherent powers of the court as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of process of the Court.

[26] Order 32 r. 6 and O. 92 r. 4 of the RHC 1980 apply to all civil proceedings in the High Court (see O. 1 r. 2(1) of the RHC 1980). However, O. 1 r. 2(2) of the same Rules provides as follows:

> 2.(2) These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings ...

[27] From a reading of O. 1 rr. 2(1) and 2(2) of the RHC 1980, it is clear that the RHC 1980, including O. 32 r. 6 and O. 92 r. 4 which are relied upon by the respondent in making the applications in encls. 26 and 13, are of general application and they

apply generally to all civil proceedings. However, if there other rules made for a specific purpose under any other written law then the rules in the RHC 1980 shall not have effect.

[28] The Law Reform (Marriage and Divorce) Act 1976 ("the Act") is a written law enacted for the specific purpose of providing for marriage and divorce matters of non-Muslims.

[29] Section 61 of the Act provides as follows:

> 61. *Decree nisi* and proceedings thereafter.
>
> (1) Every decree of divorce shall in the first instance be a *decree nisi* and shall not be made absolute before the expiration of three months from its grant unless the court by general or special order from time to time fixes a shorter period.
>
> (2) Where a *decree nisi* of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court and on that application the court may:
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> (a) notwithstanding the provisions of the last foregoing subsection, make the decree absolute;
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> (b) rescind the *decree nisi*;
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> (c) require further inquiry; or
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> (d) otherwise deal with the case as it thinks fit.

[30] Section 61 of the Act is a provision enacted under the same written law for the specific purpose of providing for the status of a *decree nisi* that has been granted by the court under the Act and it even provides, *inter alia*, the rule or procedure for rescinding, or setting aside, the *decree nisi* in a situation where no application has been made to make the *decree nisi* absolute.

[31] In this case, the *decree nisi* was granted on 22 July 1999 and made absolute by the certificate dated 21 October 1999.

[32] There is no provision in the Act for rescinding or setting aside a *decree nisi* that already has been made absolute. It appears to me that it is the intention of Parliament to preserve the integrity and finality of a *decree nisi* that already has been made absolute after three months. As such, parties are not allowed to freely apply to the court at any time to rescind or set it aside unless for very good reasons or in exceptional circumstances.

[33] Based on s. 61 of the Act, I am of the opinion that the *decree nisi* in this case should not be set aside *vide* the application in encl. 26 under O. 32 r. 6 and / or O. 92 r. 4 of the RHC 1980.

[34] In this case, even if it is true that the respondent was absent when the Muar High Court made the *decree nisi* order on 22 July 1999, the fact remains that before that he was already served with the cause papers on 6 February 1999. From 6 February 1999 to 22 July 1999 he did not bother to file any answer to the divorce petition. Had he done so, the Muar High Court could perhaps have given another hearing date instead of granting the *decree nisi* on 22 July 1999. The *decree nisi* was granted since the respondent was absent and no answer had been filed by him. The *decree nisi* has already been made absolute. The effect is that the petitioner and the respondent are already divorced. It would require a very good reason for such divorce status of the parties to be reversed or disturbed. The petitioner should not be put in the predicament of an overnight change of her marital status when she was at all times thinking that she was already divorced for more than seven years, only to get the rude shock that suddenly such divorce can now be set aside and the divorce petition re-heard just because, finally, the respondent has decided to take action. In the first place, the respondent has not given any good reason to the court as to why he did not file his answer to the divorce petition, or why he was not present in court on 22 July 1999 (see also the decision of Siti Norma Yaakob J (as she then was) in *Yeop Chooi Peng v. P Manogram V Packirisamy* [1988] 1 LNS 85).

[35] I am therefore of the view that the status of a *decree nisi* granted in a divorce petition that was heard in open court is totally different from that of an order made *ex parte* in chambers for an interlocutory matter that is filed by way of a SIC. A *decree nisi* granted in open court should not be easily set aside under O. 32 r. 6 of the RHC 1980 in view of the specific provisions of s. 61 of the Act. Even if the respondent is allowed to apply to set aside a *decree nisi* that already has been made absolute, then under O. 42 r. 13 the respondent is required to make his application to set aside or vary the *decree nisi* within 30 days of the receipt of such order or judgment by him.

[36] There is no proof of the date of receipt of the *decree nisi* by the respondent. However, by the fact that on 30 August 1999 the respondent filed encl. 13 to vary the *decree nisi*, it proves that as of 30 August 1999 he already knew, and therefore should have receipt,

of the *decree nisi*. The application to set aside the *decree nisi* (encl. 26) was filed on 22 June 2007 ie, about 7 years 9 months after 30 August 1999, which is an unduly long delay after the 30 days allowed under O. 42 r. 13 of the RHC 1980.

[37] Learned counsel for the respondent submitted that this court can set aside the order of the Muar High Court, a court of concurrent jurisdiction, since the *decree nisi*, a final order, was not regularly obtained. She cited the Federal Court case, *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 where it was held as follows:

> [1] It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. The one special exception to this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction. Apart from the breach 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 the ground of illegality or lack of jurisdiction. 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.

[38] Learned counsel for the respondent also relied on the following authorities:

[39] In *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16, the Court of Appeal applied the principles in *Badiaddin (supra)* and held that a court is seized of jurisdiction to set aside an earlier order *ex debito justitiae*, without a need to appeal or file a fresh suit. This can be done in the same proceedings and before the same judge or another judge of concurrent jurisdiction.

[40] In *Macquarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor and Another Appeal* [2007] 6 CLJ 176, the Court of Appeal held that in the following limited circumstances, the jurisdiction to set aside may be exercised, ie, where there is a (a) breach of the rules of natural justice, (b) lack of jurisdiction, (c) illegality, ie, contravention of a substantive statutory provision, (d) serious defect or (e) fraud.

[41] In *Perwira Affin Bank Bhd v. MDV Technical Services Sdn Bhd* [2008] 4 CLJ 66 the High Court applied the case of *Badiaddin (supra)* and recognized the inherent power of a court to set aside an order obtained in breach of any statutory provision. A

[42] I fully agree with and am bound by the decisions in the above authorities cited. However, it is my humble opinion that the principles established in the above cases regarding the setting aside of any court order or judgment must be read together with the rules governing it. Order 42 r. 13 of the RHC 1980 is very clear ie, the party intending to set aside or vary such order or judgment "must make his application ... within thirty days after the receipt of the order or judgment by him". In this case, the respondent did not make his application to set aside the *decree nisi* within 30 days from the date of receipt of the order or judgment, assuming safely that on 30 August 1999 he already had receipt thereof. B C D

[43] Similarly, with regard to the respondent's plea for the court to act under O. 92 r. 4 of the RHC 1980 to invoke its inherent jurisdiction to prevent injustice where the order was "irregularly obtained" and "manifestly wrong and defective", I am of the opinion that such powers of the court such powers should be used very carefully and in exceptional circumstances where an application, such as the one in encl. 26, should be made within a reasonable time, and certainly not more than seven years later. E

[44] In view of the inordinate delay, even if the respondent were to file an appeal against the decision of the Muar High Court for granting the *decree nisi*, he would still be completely out of time. For the above reasons, I do not think that prayer 1 of encl. 26 should be allowed. F

Regarding Issue 2 Above G

[45] The alternative prayer 1(b) in encl. 26 is to set aside the terms in the *decree nisi* which provide for the custody and maintenance of the children. From this prayer, it is clear that here the respondent is not challenging the dissolution of the marriage made under the *decree nisi*. H

[46] The prayers in encl. 13 are as follows:

(a) The order of dissolution of the marriage between the petitioner and the respondent (*decree nisi*) by the court on 27 July 1999 be maintained (I believe there is a typographical error in the date given by the respondent here. It should be 22 July 1999, and not 27 July 1999). I

(b) The care, custody and control of Wong Yi Jing (P) which was given to the petitioner be maintained.

(c) The order that the respondent pays a maintenance of RM800 for Chin Suk Kuan (P) and Wong Yi Jing (P) be set aside.

(d) The order that the respondent pays the medical expenses of the second child ie, Wong Yi Jing (P) be set aside and that the petitioner be ordered to pay the medical expenses of the said child.

(e) The order that the respondent pays the costs of the proceedings be set aside and be substituted by an order that such costs be paid by the respective parties.

(f) Any relief as the court deems fit.

[47] In my opinion, prayer 1 of encl. 13 is different from prayer 1(a) in encl. 26, but it is similar, in its effect, to the alternative prayer 1(b) in encl. 26. As such, it can be said that when the Muar High Court dismissed encl. 13 it had already decided on the matter and therefore prayer 1(b) in encl. 26 is *res judicata*.

[48] Prayer 2 of encl. 13 is different from prayer 1(b) in encl. 26. Therefore, it cannot be said that prayer 1(b) in encl. 26 has already been decided by the Muar High Court when it dismissed encl. 13.

[49] Prayer 3 of encl. 13 is similar, in its effect, to prayer 1(b) of encl. 26. Therefore, it can be said that prayer 1(b) of encl. 13 has been decided when the Muar High Court dismissed encl. 13.

[50] Prayer 4 of encl. 13 is nowhere stated in encl. 26. Therefore, the issue of it being *res judicata* does not arise.

[51] Prayer 5 of encl. 13 prays for costs to be borne by the respective parties whereas prayer three of encl. 26 prays for costs to be in the cause.

[52] On the whole I do not think that all the issues in encl. 26 have been decided in encl. 13. As such, I am of the view that encl. 26 should not be dismissed on grounds of it being *res judicata*. The right approach to be taken by the court is this: should encl. 26 be heard on its merits, then each prayer in encl. 26 should accordingly be considered by the court bearing in mind the question whether it has already been decided in the Muar High Court's decision to dismiss encl. 13.

[53] I reiterate my earlier stand made in relation to encl. 26 ie, that such application should not be allowed since the *decree nisi* has already been made absolute and should not be set aside. Even if the setting aside of such order is allowed, the application here still cannot be allowed because it was filed out of time. It is therefore unnecessary at this juncture for me to deal with the merits of the issues regarding custody and maintenance of the children.

[54] Regarding the respondent's submission that encl. 13 was not heard on its merits by the Muar High Court, I must say that there are scanty records in the court's minutes on 1 September 2000 which merely state, "encl. 13: application by respondent to vary the order: dismissed.". There is no record whether there was a full Hearing on the merits of the application or whether submissions were heard by the court. However, I note that the application was dismissed, and not withdrawn or struck off, which means it must have been heard on its merits. Be that as it may, I believe that decision does not adversely impact on the respondent in my decision in this case regarding encl. 26. I considered encl. 26 totally on its own merits without any bias in my mind that the respondent had earlier on made an almost similar application in encl. 13. I am of the view that encl. 13 in essence is an application for a variation order, as stated by the Muar High Court. Under s. 96 of the Act, any interested person (including the respondent) can apply to the court at any time to vary any order for the custody or maintenance of a child if he can satisfy the court that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances. Thus, even if encl. 13 was decided on its merits by the Muar High Court, it does not preclude the respondent from making a subsequent application for variation (such as the one in encl. 26) if he can prove any material change in the circumstances. However, in this case, I considered encl. 26 mainly on the larger issue as stated under issue 1 above.

Decision

[55] Based on the above, I dismissed the respondent's application in encl. 26 with costs.