

**CHITRA DANAPALAN**  
**v.**  
**AUGUSTINE CHARLES RETNASINGAM**

High Court Malaya, Kuala Lumpur  
Lee Swee Seng J  
[Divorce Petition No: S8-33-1449-03]  
15 October 2015

*Family Law: Maintenance — Dissolution of marriage — Husband's application to vary monthly maintenance to wife — Whether wife could claim for arrears of maintenance of more than three years — Whether there was material change of circumstance justifying suspension of maintenance order — Whether Employees Provident Fund and gratuity payments matrimonial assets — Whether business and tax definition of net income as gross income minus statutory deductions and allowable deductions acceptable — Principle against double dipping — Whether applicable*

The petitioner wife filed a divorce petition and the High Court ('HC') granted the dissolution of the marriage. The respondent husband was ordered to pay the wife monthly maintenance of 25% of his income by virtue of the *decree nisi*. However, the Court of Appeal ('COA') varied the monthly maintenance to 15% of the husband's net income. A notice of motion by the husband for leave to appeal to the Federal Court against the order of the COA was dismissed. Subsequently, he appealed against certain parts of a decision made in chambers in respect to the wife's application in encl 182 for, *inter alia*: (i) the husband to pay monthly maintenance of 15% pursuant to the order read together with the *decree nisi*; and (ii) the husband to produce information and documents pertaining to his income to assess his total income. Enclosure 182 was struck out on technicality, the wife having proceeded on a wrong mode of application. The wife filed an application in encl 188 for ancillary reliefs for her maintenance to be fixed at RM4,500.00 per month or such other sum as may be assessed by the court representing 15% of the husband's net income and for the relevant apartment ('the apartment') to be transferred to her. This was followed by the husband's application in encl 205 to cease payment of maintenance to the wife because of him having retired from employment. The husband then amended the application to include the wife having started her own business venture as an additional material change in circumstance. Regarding encls 188 and 205, the husband's argument was that under s 86(3) of the Law Reform (Marriage And Divorce) Act 1976 ('the Act'), any claim for arrears of maintenance should not be for more than three years. The COA ordered that the apartment be transferred by the husband to the wife, subject to the encumbrance to the relevant bank ('the bank'). The husband however proceeded to further encumber the apartment with an additional loan that he had taken out from the bank. The bank intended to foreclose the apartment, as the husband had fallen back more than three months in servicing the additional loan. Hence, the current application filed by the wife (encl 225)



for an order that the husband pays back to the bank the amount that he had refinanced, together with interests and late payment charges that had accrued after the COA order. She also prayed that the husband pays her from the date of the COA order, the monthly rental of RM2,500.00 collected from letting out the apartment amounting to RM97,500.00 and continuing until the effective transfer of the apartment to her. The husband prayed in encl 245 that the wife pays him certain reimbursements for loan repayments and outgoings regarding the apartment and for appreciation in value of the apartment arising apparently from the fact that with the delay in transfer of the apartment, it had appreciated in value and the delay was sustained through fresh borrowings of the husband from the bank.

**Held** (as below):

(1) It was agreed that the loan outstanding at the point when the husband took the additional loan was RM181,000.00. The additional loan was RM165,500.00, thus making a total loan of RM346,500.00. Both have to be repaid over the remaining years of the loan repayment period. The percentage of the husband's loan was thus about 47.8% of the total loan then outstanding. It was agreed that the redemption sum paid by the wife to enable the transfer of the apartment from the husband to her was RM309,944.71. Therefore, the husband's portion of the additional loan taken for which he must reimburse the wife was 47.8% of RM309,944.71 = RM148,153.00. (para 22)

(2) Regarding the rental collected from letting out the apartment, it was agreed that from the date of the COA order, there were altogether 42 months for which the apartment was let out at RM2,500.00 per month. There was also a shortfall of about RM509.00 per month after taking into account the loan repayment as well as the outgoings incurred in the maintenance service charges and the assessment, quit rent and insurance premium for the apartment. That shortfall of RM509.00 multiplied by 42 months = RM21,000.00; which sum had to be deducted from the previous amount owing by the husband to the wife. That would give RM148,153.00 minus RM21,000.00 = RM127,153.00. (para 23)

(3) The amount spent on the renovation of the apartment would have been included in what was the net income of the husband in determining the 15% of his net income which was the wife's entitlement in respect of her maintenance. The amount spent would have depreciated through the years and certainly when vacant possession was finally delivered to the wife. The apartment was stripped bare and delivered in poor condition to the wife. Taking encls 225 and 245 together, the husband should pay the wife the said sum of RM127,153.00 with interest at 4% per annum from the date of the order to realisation. (paras 26 & 29)

(4) Regarding encls 188 and 205, the 'more than three years' referred to in s 86(3) of the Act covers the period of more than three years prior to the filing of the divorce petition for dissolution of the marriage and for maintenance and that recovery of maintenance could not be for more than three years after it had



become due prior to the filing of the divorce petition and not after. The bar to claiming for more than three years is in relation to the institution of the suit as in the filing of a divorce petition. An action for recovery of maintenance as in an attachment or execution process, is not referred to as the filing of a suit. The amount of maintenance assessed is payable for the period in which the order for assessment said it should be paid and payable upon service of the order assessing the amount. The Parliament could not have faulted the wife here merely because the whole process of assessing the maintenance payable to her after the COA order took more than three years. (paras 38-39)

(5) The business and tax definition of net income as gross income minus statutory deductions and allowable deductions was rejected. The COA when expressing maintenance to be 15% of net income of the husband must have in mind the managing of financial affairs in a typical home where it is the husband's take-home pay after deducting reasonable expenses in maintaining a home and raising children with the basic amenities in life in a township in Subang-USJ. (para 42)

(6) The husband's claim of the average maid's expenses per month of RM550.00 was allowed. It was not uncommon for a middle class income family like that of the husband to have a maid in the home to attend to the needs of the children. The net income after deducting general expenses of RM6,331.58, additional maintenance for the three children of RM2,000.00 and maid allowance of RM550.00 would be RM2,164.17. Thus, working backwards the figure, it was not unreasonable to have a net income of about RM2,000.00 per month from which a 15% of the net income of RM2,000.00 would give RM300.00 per month for maintenance. The maintenance payment should run from the date of the *decree nisi* to the date of filing of encl 205. (paras 50, 51 & 54)

(7) The husband had EPF of RM356,500.00 and Retirement Gratuity of RM256,678.18 totaling RM613,178.18 to which the wife was not given any portion. Both the EPF and gratuity payments were matrimonial assets. In accordance with the principle against double dipping, the income from his gratuity payments and EPF should be excluded in determining his net income for the division of matrimonial assets. The HC and on appeal the COA, had not ordered the husband's gratuity payments and EPF to be apportioned to the wife. Likewise his rental income from the condominiums that the HC and the COA had allowed the husband to retain for himself. Any income derived from these assets should be excluded from the determination of his net income after retirement. (paras 69, 71, 74 & 75)

(8) Regarding encl 205, both counsel agreed that since the application to vary had only been filed on 18 April 2013, any change in the amount of maintenance should run from that date. There had been sufficient material change of circumstance arising out of the fact that the wife has been working coupled with the husband's retirement from salaried employment upon him reaching his company's compulsory retirement age of 56. The husband could not be



expected to maintain the wife forever. It has been 11 years since the date of the *decree nisi*. The wife has been gainfully employed as she runs a travel agency. The husband's application to vary the same by terminating the maintenance payable after 18 April 2013 with costs of RM5,000.00 to the wife was allowed. (paras 58, 63, 64 & 81)

**Case(s) referred to:**

*Chitra Danapalan v. Augustine Charles Retnasingam* [2004] 3 MLRH 201 (refd)  
*Chitra Danapalan v. Augustine Charles Retnasingam* [2012] 3 MLRH 513 (refd)  
*Gisela Gertrud Abe v. Tan Wee Kiat* [1985] 2 MLRH 582 (refd)  
*Kathirsean Kumaran v. Punaswarthy K Shanmugam* [2012] MLRHU 1556 (refd)  
*Koay Cheng Eng v. Linda Herawati Santoso* [2008] 1 MLRA 230 (refd)  
*Lim Kuen Kuen v. Hiew Kim Fook & Anor* [1994] 1 MLRH 788 (refd)  
*Murphy v. Murphy* [2015] BCJ No 496 (refd)  
*Shudesh Kumar Moti Ram v. Kamlesh Mangal Sain Kapoor* [2004] 3 MLRH 183 (refd)

**Legislation referred to:**

Law Reform (Marriage And Divorce) Act 1976, ss 83, 86(3)

**Other(s) referred:**

Dr Anandan Krishnan, *Words, Phrases and Maxims*, LexisNexis Malaysia, pp A0528, S0685

**Counsel:**

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*For the respondent:* Walter Pereira (Izyan Darlina with him); M/s Kamarudin & Partners

