

HONG KONG / JUDGMENT

H v. H

COURT

Court of Appeal

DECIDED

25 January 2007

CASE / FILE NUMBER

CACV209/2006

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bjbj CSL%A cacv 209/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 209 of 2006 (on appeal from FCDJ NO. 10877 of 1997) BETWEEN H Petitioner Respondent Before: Hon Le Pichon JA and Sakhrani J in Court Date of Hearing: 25 January 2007 Date of Decision: 25 January 2007 D E C I S I O N Hon Le Pichon JA: This is an application by the Respondent for leave to appeal to the Court of Final Appeal under section 22(1) (b) of the Court of Final Appeal Ordinance. The underlying proceedings was an application by the Respondent under section 11 of the Matrimonial Proceedings and Property Ordinance, Cap.192, to vary downwards the maintenance ordered by Deputy Judge Levy on 10 September 2001. He succeeded before Deputy Judge Chan. The Petitioner appealed from that order. On 12 September 2006, Master de Souza, the Registrar of Civil Appeals, directed that the appeal be listed before an English Division of the Court of Appeal comprising two judges. On 16 October 2006, the Respondent wrote to the Registrar contending that the matter was a final judgment, that section 34B(2) of the High Court Ordinance applied and that the appeal should therefore be heard by a court comprising three judges. The Respondent was advised by letter dated 16 October 2006 that his letter had been placed before me and that rulings on applications to vary maintenance orders are interlocutory in nature . There the matter rested. Quite naturally, this Court did consider and decided that it had jurisdiction to hear the appeal. The appeal duly came on for hearing on 25 October 2006. Both parties appeared in person. No objection was taken and the appeal was heard. Judgment in favour of the Petitioner was handed down on 7 November 2006. The Respondent maintains that this Court, as constituted, had no jurisdiction to hear the appeal and that the hearing was a nullity. Put shortly, the question said to be of great general and public importance is whether applications for variations of maintenance orders under section 11 of the Matrimonial Proceedings and Property Ordinance are interlocutory in nature . The leading authority on the question whether a matter is final or interlocutory is the decision of the Court of Final Appeal in Shell Hong Kong Limited v Yeung Wai Man Kiu Yip Company Limited & Anor [2003] 6 HKCFAR 222. The statement of principle is to be found in paragraph 31: where an order or judgment given in an application does not finally dispose of the whole action but only an issue in the action, it is necessary to consider the purpose and substance of the application, the issue dealt with and determined by the court, and the effect of a determination of this issue on the rights of the parties, the further conduct of the proceeding and the final disposal of the whole action. A broad

common sense approach should be adopted. An order to which section 11 of the Ordinance applies is always subject to the court s powers of variation and discharge. As such, it is not reasonably arguable that an application made under section 11 is final in nature. The history of this case illustrates the point. There had been no less than four applications and orders made relating to maintenance and two appeals to this Court. The Respondent made reference to the earlier appeal in 2002 which had been heard by a court comprising three judges, as well as to two other Court of Appeal decisions, namely, Yick Yee Lin Josephine v Chung Wing Charn, CACV 254/2000 and Law Sun v Shum Yee Wang [1994] No. 191, where again section 11 appeals had been heard by a Bench comprising three judges. However, there was no decision or discussion in any of those cases on the question of whether an application for variation of maintenance was interlocutory or final. They were simply cases that had been listed before three judges in the Court of Appeal. They cannot assist the Respondent. Finally, I would observe that section 14(5) of the High Court Ordinance states: No appeal shall lie from a decision of the Court of Appeal as to whether a judgment or order is, for any purpose, connected with an appeal to that court, final or interlocutory. For all these reasons, I would refuse leave. Hon Sakhrani J: I agree. (Doreen Le Pichon) Justice of Appeal (Arjan H Sakhrani) Judge of the Court of First Instance The Petitioner/ Respondent, in person The Respondent/Applicant, in person PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 2QX[2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 d#I%A d#I%A Judiciary Title Source Erica *_I%A *_I%A *_I%A Microsoft Word Document MSWordDoc Word.Document.8

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