

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
IN THE FEDERAL TERRITORY, MALAYSIA  
DIVORCE PETITION NO: 33-442-08/2015**

In the matter of sections  
53 dan 54 of Law Reform  
(Marriage & Divorce) Act 1976

BETWEEN

**EVELYN NESAMANI A/P  
SAMUEL GUNALAN PETER**

**... PETITIONER**

AND

**LIONEL SUSHIL A/L EDWARD**

**... RESPONDENT**

**GROUND OF JUDGMENT**



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## Introduction

[1] This is the Respondent husband's application in enclosure 58 (“this Application”) pursuant to order 52 rule 4 of the Rules of Court 2012 (“Rules of Court”) to cite the Petitioner wife for contempt for having breached an order of the Court (“the Order”) dated 30 November 2017.

## The factual background

[2] Parties were married in September 2009 and were blessed with two sons (“the Children”), born in 2011 and 2013 respectively.

[3] In November 2017, the parties obtained a decree nisi in which custody, care and control of the Children were awarded to the Petitioner whilst the Respondent was granted access.

[4] In February 2022, the Respondent obtained leave to proceed with committal proceedings against the Petitioner on the premise that she had denied him access to the Children.

[5] I allowed this Application for the following reasons.

## Contentions, evaluation, and findings

### *Whether there was wilful refusal to comply with Order*

[6] It was undisputed that the Petitioner had, from August 2018, prevented and disallowed the Respondent from meeting the Children. She had even blocked the Respondent through telephone and



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- [7] The Petitioner subsequently fled to New Zealand with the Children without the Respondent's knowledge, and remains there until present day. The Petitioner had also enrolled the Children in a school in New Zealand without the Respondent's knowledge.
- [8] The nub of the Petitioner's contention was that the Respondent had failed to pay child maintenance, and as a result thereof, the Petitioner had no choice but to find employment in New Zealand.
- [9] I found the Petitioner's contention bereft of merit for the main reason that maintenance and access are two separate issues, and access was never conditional upon maintenance. In any event, the Respondent had averred that maintenance was not paid simply because he was unable to do so, as the Petitioner had prevented the Respondent from communicating with either the Petitioner or the Children.
- [10] Furthermore, even if I were to accept that she had to look for work in order to maintain herself and the Children, there was no justification for travelling all the way to New Zealand to seek employment, and as a result, deny the Respondent of access, pursuant to the Order. In fact, when questioned, her Counsel was unable to provide a satisfactory explanation for the need for the Petitioner to move more than 8,000 kilometers away from the Respondent.
- [11] This Court is mindful that contempt must be premised on willful refusal to comply with an order of the court. This is based particularly on the words of Lee Hun Hoe (Borneo) CJ, where, in citing the case of *Fairclough & Sons v. Manchester Ship Cane Co. (No 2)* [1897] WN 7 in *T O Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151, his Lordship had stated that for one litigant to establish that the other is in



contempt of court, 'an order of court must have been contumaciously disregarded. It is no good if it is casual, accidental and unintentional.'

[12] In my view, however, 'intention' referred to by Lee Hun Hoe (Borneo) CJ in *T O Thomas v Asia Fishing Industry Pte Ltd* was addressed in the context of clarity and unambiguity of an order of the court. In the present case, the terms of the Order, which the Petitioner was fully aware of, were crystal clear.

[13] In any event, in *T O Thomas v Asia Fishing Industry Pte Ltd*, it was further stated by Lee Hun Hoe (Borneo) CJ, in the following passage:

Intention is of no consequence in the matter of contempt by disobedience to a court order: A-G v. Walthamstow Urban District Council; [1895] 11 TLR 533. Stancomb v. Trowbridge Urban District Council [1910] 2 Ch. 190. In particular, Donovan LJ expressed his view clearly in Re A-G's Application, A-G v. Butterworth [1963] 1 QB 696 in these words: -

I conceive the position, however, to be this. Regina v. Odham's Press Ltd [1957] 1 QB 73 ex parte A-G [1956] 3 All ER 494 makes it clear that an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough if the action complained of is inherently likely so to interfere.

[Emphasis added.]

[14] My attention was also brought to the case of *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 MLJ 577 where it was held that 'mens rea is not an ingredient to be proved in contempt proceedings' and that 'the corollary of there being no necessity to prove mens rea is that lack of intention does not prevent an alleged contemnor from being found guilty of contempt'. Thus, the Petitioner's intention or lack of it, would not negate her conduct which amounted to contempt of court.



- .....
- [15]** At this juncture, I will have to state that the Respondent had been granted leave to initiate committal proceedings in February 2022, and had complied with all the procedural requirements prescribed by Order 52 of the Rules of Court 2012.
- [16]** The hearing was scheduled for 17 July 2022 but was rescheduled to 14 September 2022 due the Court's unavailability. However, although it was rescheduled, the Petitioner had refused to attend Court on the basis that she was still in New Zealand. As such, her Counsel pleaded for an adjournment stating that he would advise his client accordingly. The hearing was, therefore, adjourned to 11 November 2022, and since the Petitioner had used the excuse of distance to be absent, the direction was for the hearing to be conducted virtually.
- [17]** Instead of making an effort to comply with the Order, or to at least attend Court, the Petitioner, on the very next day of the rescheduled initial hearing, that is, 15 September 2022, had filed an application in enclosure 79 for leave to initiate committal proceedings against the Respondent, claiming that he had failed to pay maintenance for the Children. Although leave was granted, such leave had lapsed and she then filed an application on 1 November 2022, in enclosure 80, to be allowed to proceed with the committal application beyond the prescribed timeframe.
- [18]** I had refused this application to file out of time for the reason that in my view, the Petitioner had deliberately delayed the hearing of the committal proceedings in order to file committal proceedings of her own against the Respondent. The timing of her refusal to attend Court



.....

was indicative that she had deliberately delayed the proceedings in order to file committal proceedings against the Respondent, which was clearly an afterthought.

**[19]** Secondly, I took the view that in light of the fact that it was the Respondent who had first obtained leave to initiate committal proceedings against the Petitioner, the Petitioner was not in a position to have any of her applications heard, as she had to first purge her contempt, if at all.

**[20]** It was crucial to remind all parties that the Petitioner's non-compliance with the Order had nothing to do with upholding the dignity of this Court but had everything to do with the Court's power to ensure that the administration of justice shall not be obstructed or prevented.

**[21]** I drew guidance from the case of *Chandra Sri Ram v Murray Hiebert* [1997] 3 CLJ Supp 518, where it was stated that the 'Courts must fulfil its responsibilities by passing an appropriate sentence to reflect the extreme seriousness of the instant case, in particular, the respondent's unrelenting interference with due administration of justice and the unmitigated culpability of the respondent as demonstrated in his article. Our Courts would not be doing their duties and indeed would be acting against public interest, especially having regard to the facts and circumstances of the instant case, by imposing a mere fine': per Low Hop Bing J (as he then was).

**[22]** I also found instructive the case of *Lee Chang Yong v Teng Wai Yee* [2017] MLJU 1841, where it was stated:



.....

The object of the law of contempt is not to protect Judges and their dignity but to protect the rights of the public by ensuring that the administration of justice is not obstructed or prevented. To constitute contempt of court, there must be some “act done, or writing published calculated to bring a Court or Judge of the Court into contempt or to lower his authority” or “calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts”.

[Emphasis added.]

**[23]** Counsel for the Petitioner had finally conceded that the Petitioner was in contempt of Court, as he admitted that the Petitioner had no leg to stand on. It was undeniable, therefore, that contempt had been proved beyond a reasonable doubt.

*Whether a custodial sentence was warranted*

**[24]** The power of this Court to punish the Petitioner for contempt of court is found in article 126 of the Federal Constitution, and section 13 of the Courts of Judicature Act 1964, both of which read:

Federal Constitution

*Article 126 – Power to punish for contempt*

The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

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Courts of Judicature Act 1964

*Section 13 - Contempt*

The Federal Court, the Court of Appeal and the High Court shall have power to punish any contempt of itself.



[25] The Respondent contended that circumstances of this case warranted a custodial sentence. I had to agree with the Respondent on the authorities of *Sharmila a/p M Helan Govan v. Gunalan a/l Govindasamy & Anor* [2020] MLJU 199, *Ravinthiran a/l Manickam v. Parameswary a/p Vellayan* [2011] MLJU 1517, and *J v. J* [2021] 10 MLJ 784, and based on the following facts, namely, that:

- a) The Petitioner had refused to comply with the Order since August 2018, and continued to disobey it;
- b) The Petitioner had willfully denied the Respondent of access to the Children, by relocating to a place that made it almost impossible for the Respondent to have physical access to the Children.

[26] Since it was undisputed that the Petitioner had breached the terms of the Order, the Petitioner herself had requested for some time to return the Children as she had to make the necessary arrangements pertaining to their school. She had also indicated that she would return the Children before 31 January 2023.

[27] Since the Petitioner had pleaded with this Court for some flexibility, my order was for the Petitioner to return the Children before 31 January 2023, failing which a custodial sentence would be imposed on her until she purged the contempt.

## Conclusion

[28] In summary, in the interest of justice, and after careful scrutiny and judicious consideration of all the evidence before this Court, including submissions of Counsel, this Application was allowed,



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and since the Petitioner had agreed to return the Children by the prescribed date, there was no order as to costs.

**Dated:** 4 February 2023

**SIGNED**

.....  
**(EVROL MARIETTE PETERS)**

Judge  
High Court, Kuala Lumpur

**Counsel:**

*For the Petitioner – Muralidharan Kalidass; Messrs Wong & Kiu*

*For the Respondent – Nurulsyima binti Jamaludin; Messrs Syima J & Co*

**Cases referred to:**

- *Chandra Sri Ram v Murray Hiebert* [1997] 3 CLJ Supp 518
- *Fairclough & Sons v. Manchester Ship Cane Co. (No 2)* [1897] WN 7
- *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 MLJ 577
- *Lee Chang Yong v Teng Wai Yee* [2017] MLJU 1841
- *Ravinthiran a/l Manickam v. Parameswary a/p Vellayan* [2011] MLJU



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- *Sharmila a/p M Helan Govan v. Gunalan a/l Govindasamy & Anor* [2020] MLJU 199
  - *T O Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126 *Ltd* [1977] 1 MLJ 151

**Legislation referred to:**

- Courts of Judicature Act 1964 – section 13
- Federal Constitution – article 126
- Rules of Court 2012 – Order 52



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