N v P

24 February 2017

District Court

DC

Matrimonial Causes No 12236 of 2014

FCMC 12236/2014

Citations:	[2017] HKEC 2659
Presiding Judges:	Judge Sharon D Melloy in Chambers
Phrases:	Family law - divorce - petition - jurisdiction - petitioner-husbandof Indian heritage, had lived in Hong Kong for over 20 years and worked in Hong Kong as diamond trader, but travelled to India regularly - whether petitioner domiciled in Hong Kong and had jurisdiction to issue petition in Hong Kong Civil procedure - stay of proceedings - forum non conveniens - divorce petition by man domiciled in Hong Kong against wife from India - whether Hong Kong or India natural and appropriate forum
Counsel in the Case:	Mr M J Shah, instructed by Jal N Karbhari & Co appeared for the Petitioner Mr. W Leung of William KW Leung & Co appeared for the Respondent
Case cited in the judgment:	SPH v SA [2014] 3 HKLRD 497
JUDGMENT (Domicile and forum non conveniens):	

Judge Sharon D. Melloy in Chambers (Not open to public)

Introduction

1. This is an application by the respondent wife dated the 6 August 2015 as follows:

> A declaration that in the circumstances of the case the court has no jurisdiction over the Respondent in respect of the subject-matter of the claim or the relief or remedy sought in the action; or

> Staying the proceedings on the ground that considering the best interests and convenience of the parties to the proceedings and the witnesses in the proceedings, the proceedings should be conducted in another court;
>
> Costs of this application be in the cause.

2. This application arises out of a very short marriage between two Indian nationals. It does not appear to be in dispute that the marriage was arranged by a marriage broker in India and that the parties had very little contact between the date of their engagement and their marriage, which was according to Hindu marriage rite, eight months later. The husband, who is of Indian heritage, lives and works in Hong Kong as a diamond trader, but travels to India regularly. He has lived in Hong Kong for over 20 years, after his family relocated to Hong Kong when he was about 13 years of age. The wife on the other hand has always lived in India and only came to Hong Kong at the bequest of the husband following their marriage.

3. It seems that after cohabiting for about three months the marriage broke down amidst many accusations and counter accusations between the two families. The couple did not live together as man and wife from that time onwards. Each makes allegations against the other; the husband says that the wife was violent and unstable, that she attempted to commit suicide by swallowing 19 Panadol tablets and that she similarly threatened to commit suicide on other occasions. He admits to striking her several times when things got out of hand. It seems that the police were also called on a number of occasions. He says that he was put "off" by this and that he was concerned that his family would be blamed if anything untoward happened. Consequently, he decided to issue divorce proceedings. He says that from his perspective there is no hope of a reconciliation between the couple. The wife for her part has issued proceedings in India for "Restitution of Conjugal Rights". In other words, she does not accept that the marriage is over and wishes the parties to live together as man and wife. According to the wife's affidavit dated the 12 September 2015 she says that she would be placed in a very disadvantaged position if proceedings were conducted in Hong Kong. She adds that a Hindu marriage is a religious sacrament and that she would face injustice if the proceedings were conducted here. She has also said that she will never agree to a divorce. However even on the wife's case she was "sent away" from Hong Kong on the 21 August 2014 and thus the couple have lived separate and apart for well over two years. She says that in total she has only lived in Hong Kong for 538 days.

Issues

4. The issues presently before the court are as follows:

> Does the husband have jurisdiction to issue proceedings in Hong Kong? And is he domiciled in Hong Kong?
>
> If so, is Hong Kong or the Chennai Family court in India, the most appropriate forum to deal with this matter?

Background to the marriage

5. It does not appear to be disputed that the parties were engaged on the XX December 2011; they subsequently married in India on the XX July 2012. As set out above it is clear that this was as an "arranged marriage" and that both families were involved in that arrangement. Shortly thereafter, on the 11 August 2012 the wife relocated to Hong Kong with the husband as his dependant and they stayed together, until the 21 August 2014, when the wife returned to India permanently. They have not resided under the same roof since. They only cohabited as man and wife for three months.

6. In terms of the proceedings there seems to be some confusion about when each set of documents were served. What is not in dispute however is that the husband issued divorce proceedings in Hong Kong on mild unreasonable behaviour grounds on the 15 September 2014. According to the wife she was not served with that petition until the 1 October 2014. When asked in the witness box, the husband said that he was not sure why that was. In any event the wife issued her application for "Restitution of Conjugal Rights" in the Family Court, Chennai, on the 25 September 2014. She says she did so before she was served with the husband's divorce petition. The husband for his part says that he only received the wife's papers after he had issued the divorce petition in Hong Kong. In any event, for what it is worth, the husband's proceedings were first in time.

The law

Jurisdiction for Divorce

7. The first issue to be determined in that of jurisdiction. In so far as the law is concerned that can be found in section 3 of the Matrimonial Causes Ordinance, Cap 179 which states as follows:

"The court shall have jurisdiction in proceedings for divorce under this Ordinance if:

> Either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application;
>
> Either of the parties to the marriage was habitually resident in Hong Kong throughout the period of three years immediately preceding the date of the petition or application; or
>
> Either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition or application."

8. In this case the husband has pleaded in his divorce petition that both parties were domiciled in Hong Kong as at the date of the petition. As it is sufficient for jurisdictional purposes for only one party to be domiciled in Hong Kong, I will concentrate on the domicile of the husband, given that that seems to be relatively clear and uncontroversial. I will not consider in addition whether or not the wife was domiciled in Hong Kong at the time, as it seems to me that the argument in that respect was rather surplus to requirements.

The law on Domicile

9. For the avoidance of doubt reference to the law on domicile can be found in the Domicile Ordinance, Cap 596. In summary this states that in order for an adult to obtain a new domicile in Hong Kong he or she must be present in Hong Kong and there must be an "intention" to make Hong Kong their "home" for an indefinite period. A child's domicile generally follows that of his parents. Reference can be made to section 4 of the Domicile Ordinance, Cap 596 in that respect which states inter alia as follows:

> Domicile of children
>
> A child is domiciled in the country or territory with which he is for the time being most closely connected.
>
> Where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is most closely connected with that country or territory.

Does the husband have jurisdiction to issue proceedings in Hong Kong?

And is he domiciled in Hong Kong?

10. In the husband's affidavit dated the 22 May 2015 he sets out in case on domicile for the purposes of setting the matter down in the decree nisi list. He says as follows:

> I strongly believe that I am entitled to commence such proceedings in Hong Kong as I am domiciled in Hong Kong and have been for nearly 20 years.
>
> I am born on XX April 1983 in Mumbai, India.
>
> In May 1996, at the age of 13, I moved from India to Hong Kong together with my mother, father and my 2 sisters.
>
> When we first moved to Hong Kong we lived at an address in SM, TST, Kowloon, Hong Kong from 1996 up to 2002. In 2002, we moved to the address stated above and have been living at the same address ever since.
>
> When I moved to Hong Kong, I entered Year 9 at ABC School from September 1996 and left in June 2001 upon completing Year 13. There is now produced and shown to me marked exhibit "NSV-1" a copy of a letter from ABC School dated 9th November 2004.
>
> After completing my secondary education in Hong Kong, I attended the University of DEF from 2001 to 2004 to complete undergraduate studies. There is now produced and shown to me marked exhibit "NSV-2" a copy of a Certificate from the University of

> DEF dated 21st June 2004.
>
> Upon completing my undergraduate studies, I returned to Hong Kong and joined the family business.
>
> In 2007, my father passed away in Hong Kong. As a result the sole proprietorship which was under his name had to be closed. I subsequently reopened the business under my own name in late 2007.
>
> I confirm that I am currently residing in Hong Kong together with my mother. After marriage, I lived at the above-mentioned address together with my mother and the Respondent. In addition, one of my sisters also lives in Hong Kong together with her husband and 2 children.
>
> My place of business has been the same for the last 4 years. I have been paying MPF in Hong Kong and also taxes to the Inland Revenue since 2007.
>
> Finally, according to my travel records issued by the Hong Kong Immigration Department, I have spent 82% of the time in the last 10 years in Hong Kong. There is now produced and shown to me marked exhibit "NSV-3" a copy of the Statement of Travel Records issued by the Hong Kong Immigration Department and all my passport copies.
>
> As a result of the above, I strongly believe that I am someone who is considered to be domiciled in Hong Kong and for those reasons I am entitled to commenced these proceedings in Hong Kong.

11. With respect I agree. It does not seem to me that it can be seriously disputed that the husband is domiciled in Hong Kong and that prima facie he has the jurisdiction to issue proceedings for divorce in Hong Kong, as of right. I am not persuaded by the wife's attempts to suggest otherwise.

Is Hong Kong or the Chennai Family Court in India the most appropriate forum to deal with this matter?

The law

12. As accepted by both sides the most authorative and recent reference to the law on Forum Non Conveniens in matrimonial proceedings can be found in the further restatement of the same in the Court of Final Appeal's decision in

SPH v SA [2014] 3 HKLRD 497
as follows:

> VI Forum non conveniens: principles
>
> It is now well established in Hong Kong that the general principles of forum non conveniens apply to the stay of matrimonial proceedings: Johnston, Conflict of Laws in Hong Kong (2nd ed 2012), para 7.104.
>
> We adopt the re-statement of the principles in matrimonial proceedings by the Court of Appeal (Cheung JA and Tang JA (as he then was)) in DGC v SLC (née C) [2005] 3 HKC 293, 297-298, applying Spiliada Maritime Corporation v. Cansulex Limited [1987] 1 AC 460, 477 and Louvet v. Louvet [1990] 1 HKLR 670, 674-675:
>
> "The single question to be decided is whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action i.e. in which the action may be tried more suitably for the interests of all the parties and the ends of justice?
>
> In order to answer this question, the applicant for the stay has to establish that first, Hong Kong is not the natural or appropriate forum ('appropriate' in this context means the forum has the most real and substantial connection with the action) and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong. Failure by the applicant to establish these two matters at this stage is fatal.
>
> If the applicant is able to establish both of these two matters, then the plaintiff in the Hong Kong proceedings has to show that he will be deprived of a legitimate personal

or juridical advantage if the action is tried in a forum other than Hong Kong.

If the plaintiff is able to establish this, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not necessarily be fatal to the applicant for the stay if he is able to establish to the court's satisfaction that substantial justice will be done in the available appropriate forum."

The Court of Appeal in that case (as in the present case) emphasised that the husband was entitled to sue in Hong Kong as of right. Where jurisdiction is founded in the Hong Kong court as of right (as in divorce proceedings like the present case), the party seeking the stay has to establish that there is another available forum which is clearly or distinctly more appropriate than the Hong Kong forum. This derives from what Lord Goff said in Spiliada (at 477), which has been regularly applied in Hong Kong: e.g. The Kapitan Shvetsov [1997] HKLRD 374 at 377; The Peng Yan [2009] 1 HKLRD 144, at [22].

The Indian Law Expert

13. Before turning to the evidence I should like to refer to the wife's Indian law expert, Mr M. He produced two expert opinions the first dated the 9 September 2015 and the second dated the 25 January 2016. The husband did not produce his own expert, but he did nevertheless seek to challenge some of the assertions made by Mr M.

14. In the first opinion dated the 9 September 2015 Mr M stated as follows:

From the points stated supra, it could very well be observed that, the marriage between Indians, as per Hindu Rites and Customs, solemnized were registered in India in the presence of Indian witnesses, cannot be dealt by a forum to the utter prejudice to the rights of the parties, just because one of the parties is trying to take undue advantage of the Hong Kong Legal system to his advantage and in complete disadvantage of the Respondent.

The basic jurisprudence of deciding the matrimonial issue in India and Hong Kong are totally different.

In India, marriage is a sacrament and in most of the other places it is just a contract.

The matrimonial bond, which is created in India, consists of various ingredients, Religious Rites and Customs, whereas the matrimonial bond created by Hong Kong law is different.

The Petitioner and the Respondent being Indian citizens of India, their marriage being solemnized as per Indian Law, all the friends and relatives of the Petitioner and the Respondent are Indians holding all their assets and relationship in India, and above all, when the Respondent has no means to travel and conduct the case in Hong Kong, I'm of the opinion that, the most convenient forum for both the parties, specially for the Respondent to get justice in this case, is for the forum in India, which can decide the issues relating to the Marriage and Divorce and not any other courts. The factors of private International Law and all the case Laws, which are cited in the article and the copy of the opinion of a leading lawyer in India, which are enclosed along with my opinion, favour the forum conveniens in these type of cases is undoubtedly India.

15. In his second opinion dated the 25 January 2016 he stated inter alia as follows:

The petitioner and the Respondent herein are both Hindus and their marriage was solemnized in India according to Hindu religious rites and customs and their marriage was registered under Hindu Marriage Act, 1955.

In Y. Narasimha Rao and Ors. Vs. Y. Venkata lakshmi, decided on 9 July 1991 by the Hon'ble Supreme Court of India, it was held that,

"The Jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married…."

The Law laid by the Supreme Court can be summed up as follows:

the foreign court's grant of divorce must be acceptable under Hindu law.

the foreign court should grant divorce only on the grounds which are permissible under Hindu law.

The two conditions make it almost impossible for a Hindu married in India to get a legally valid Divorce from a foreign court since no foreign court is an acceptable one under Hindu Marriage Act and also because no foreign court is likely to consider the provisions of Hindu Marriage Act before granting divorce.

In a recent case, the Hon'ble Bombay High Court held that, court outside India is not the competent court of jurisdiction to decide the issue of dissolution of marriage between two Hindus married in India as per the Hindu vedic rite. According to the Hon'ble court, once the provisions of only Hindu Marriage Act apply, they would continue to apply as long as the marriage exist and even for the dissolution of the marriage.

Therefore, dissolution of the marriage between the Petitioner and the Respondent can be tried only under Hindu Marriage Act and only Indian courts have competent jurisdiction to decide this case under the Hindu Marriage Act.

For the better appreciation of the points enumerated in brief in my opinion, the full text of the judgment of the Hon'ble Supreme Court of India in Y. Narasimha Rao vs Y. Venkatalakshmi cited above is enclosed herewith, for this Hon'ble Court's consideration.

16. However, when Mr Shah, for the husband, challenged this assertion, by asking whether Mr M was suggesting that all Indian's living overseas did not have the right to institute divorce proceedings outside of India, Mr M replied that both parties should have a substantial connection and both should then have forum conveniens. As a matter of law this is clearly incorrect from a Hong Kong legal perspective. Further when Mr Shah asked him about the case cited in his last paragraph he was unable to produce it. It was not attached to the opinion as indicated and he was not able to cite a legal reference. When it was suggested that he had incorrectly analysed the case he simply denied.

17. Even more importantly however Mr Shah took Mr M to an article that Mr M had attached to his legal opinion, written by a Mr Anil Malhotra dated June 2011. In this article there was a discussion concerning a decision made by the Bombay High Court which set aside proceedings in India and upheld a divorce decree issued by the court of Oakland, in Michigan, USA. The marriage in question was a Hindu marriage. The article states as follows:

A recent judgment of the Bombay High Court setting aside the parallel proceedings for divorce of the Family Court, Pune and upholding a divorce decree passed by the Court of Oakland, State of Michigan, USA, dissolving a Hindu Marriage on the principle of breakdown, has evoked a new stream of thought with which the author respectfully differs. The verdict, Kashmira Kale v. Kishore Kumar Mohan Kale, 2011(1) Hindu Law Reporter (HLR), 333 lending sanctity to a US Divorce decree in preference to proceedings under the Hindu Marriage Act between the same parties upsets the settled law.

The parties married in Mumbai in 2005 according to Hindu rites, lived in the USA and intermittently visited Mumbai and Pune. In September 2008, the wife filed divorce proceedings in the US whose jurisdiction was challenged by the husband in the US. Simultaneously, in October 2008, the husband filed a divorce petition in the Pune Family Court, claiming it to be the competent Forum for adjudication of their dispute. The husband did not pursue the wife's divorce petition in the US any further and in January 2009, the US Court dissolved the marriage and divided the assets of the parties. However, the Family Court in Pune in September 2009 held that it still had the jurisdiction to try the husband's petition for divorce in India. In appeal, the Bombay High court set aside the order of the Family Court, Pune, and upheld the US Divorce Decree dissolving the Hindu marriage.

18. There then followed a discussion in the article about whether or not this was a correct decision. What can be gleaned from this, is that there appeared at that time to be a debate in India concerning issues relating to cases such as this one and that it is by no means certain that a divorce of a Hindu marriage obtained overseas would not be upheld by the Indian courts. I was not taken to any other cases which could assist me one way or another in this. Thus on a balance of probabilities I am unable to accept the opinion provided by Mr M or the conclusions that he reached.

Can the wife show that Hong Kong is not the natural or appropriate forum to deal with this matter? Where does the most real and substantial connection lie?

The wife’s case

19. The wife's primary argument therefore that the proceedings in Hong Kong must fail because they

would not be recognised in India, must fall away.

20. In so far as the other matters are concerned, it cannot be disputed that the wife is an Indian citizen who holds an Indian passport. She has always lived in India, apart from her brief sojourn to Hong Kong. She is presently living in India where she has the support of family and friends. But equally the husband is an Indian national who has spent over 20 years living and working in Hong Kong. He holds a permanent Hong Kong ID card and operates his business in Hong Kong. There are family properties inherited from his father and owned jointly by both him and his mother and on occasions other family members in both jurisdictions. His income is generated from Hong Kong and he confirmed in the witness box that it terms of monetary value his assets in Hong Kong are worth more than the assets in India. In other words, he is a Hong Kong person of Indian heritage living and working in Hong Kong. One of his sister's lives in Hong Kong and the other lives in India. His mother spends time in both places.

21. In summary then it seems to me that India is probably the most natural and appropriate forum for legal proceedings to be instituted from the wife's perspective and that Hong Kong is conversely the most natural and appropriate forum from the husband's perspective. This is probably indicative of the international climate in which we now live. In such circumstances I will proceed to consider the remainder of the test.

Would the husband be deprived of a legitimate personal or juridical advantage if the matter was tried in Chennai, India as opposed to Hong Kong?

22. It seems to me that the answer to that question must be yes. The husband wishes to divorce the wife after what appears to have been a short and rather unhappy attempt at matrimony. The wife has not issued proceedings for a divorce in India. She will not consent to a divorce in either jurisdiction. On the face of the papers it is clear that the parties have been separated for over two years. Thus the husband would be entitled to a divorce on the basis of two year's separation in Hong Kong, as of right. It seems to me that this may be denied to him if this matter were to proceed in India.

Balancing act: what are the advantage of proceeding in India as compared to the disadvantages that the husband will suffer if the matter proceeds there? Can the wife establish that substantial justice will be done in India in any event?

23. As indicated above I accept that there are some perceived advantages to the wife if proceedings were to take place in India. I accept that she has strong ties there and that on the face of it, it might be easier for her if the proceedings were to be conducted there. As her solicitor has put it in his closing submission:

> Both parties have strong ties in India, perhaps more so for Respondent than for Petitioner. But it will be more convenient for Petitioner to fly to India than it is for Respondent to come to Hong Kong, given her limited financial means, how unfamiliar she is with this place and how little acquaintance she has in Hong Kong. Indeed, the Respondent has no reason to travel to Hong Kong at all (as evidenced in the Respondent's Passport [B219 - 241]. If at all, she travelled, it is only for the Petitioner and nothing else.

Thus I accept that the practicalities of travel etc. potentially make proceeding in Hong Kong difficult for the wife, aside from the fact that she does not agree to a divorce in any event. But there are advantages too. First and foremost, the wife has been granted Legal Aid in Hong Kong so enabling her to have proper legal representation here. It is also possible to conduct trials and longer hearings remotely by either using the Technology Court, as we did on this occasion, or by using the new facility in the District Court, which is likely to be a cheaper alternative than the Technology Court. That would mean that the wife would not have to travel, she would be able to avail herself of the support of her family and friends in India, whilst at the same time being able to enjoy full Hong Kong legal representation. It has been suggested that Legal Aid will not cover the cost associated with the proceedings being conducted remotely. With respect this seems a small price to pay in comparison to non-legal aid representation. If the wife is concerned about this however, there are other options open to her including the fact that she could issue an application for maintenance pending suit/litigation funding which could include any costs associated with the proceedings being conducted remotely or otherwise. If the wife does not have to travel to Hong Kong it seems that many of her objections fall away.

24. I have not been addressed on whether it would be possible for the husband to issue proceedings for divorce in India and what that would mean in terms of time and cost. I am not able therefore to

form a view as to whether substantial justice would be done in India in terms of a divorce in any event. It should be noted however, that the husband may be significantly disadvantaged if he is not able to issue divorce proceedings that would enable him to obtain a divorce relatively quickly. As indicated above although the husband has issued proceedings based on mild unreasonable behaviour grounds it is clear that in the alternative he would now be able to proceed on the basis of two year's separation in Hong Kong.

25. Consequently the wife's summons dated the 6 August 2015 shall be dismissed.

Costs

26. Given that the husband has been largely successful I can see no reason why costs should not follow the event. I will therefore make an order nisi to be made absolute in 28 day's time that the respondent wife do pay the petitioner husband's costs of and occasioned by her summons dated the 6 August 2015 to be taxed if not agreed on a party and party basis. There shall be legal aid taxation of the wife's own costs. There shall also be certificate for counsel.