

N v P

13 November 2017

District Court

DC

Matrimonial Causes No 12236 of 2014

FCCM 12236/2014

Citations: [2017] HKEC 2660

Presiding Judges: Judge Sharon D Melloy in Chambers

Phrases: Family law - divorce - petition - leave to appeal judgment on jurisdiction over respondent and refusal to stay petition on ground of forum non conveniens - refused

Counsel in the Case: Mr. Mohnani of Mohnani & Associates appeared for the Petitioner

Mr. William Leung of William KW Leung & Co appeared for the Respondent

RULING (Leave to appeal):

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

1. On the 24 February 2017, I handed down my judgment on the Respondent wife's application for a declaration that a) the Court had no jurisdiction over her in so far as the proposed divorce was concerned and b) in the alternative that the divorce proceedings issued by the husband be stayed on the basis of forum non conveniens. The husband for his part argued that he did have the necessary jurisdiction to issue divorce proceedings in Hong Kong and further that he was domiciled in Hong Kong in any event. At the end of the day I found in favour of the husband and I dismissed the wife's summons. This then is the wife's application dated the 23 March 2017 for leave to appeal that judgment.

The law

2. Section 63A of the District Court Ordinance allows for an appeal to be made to the Court of Appeal with the leave of the presiding District Court judge. Section 63A of the District Court Ordinance provides as follows:

"Leave to appeal shall not be granted unless the judge hearing the application for leave is satisfied that the appeal has a reasonable prospect of success or there is some other reason in the interests of justice why the appeal should be heard."

3. It is generally accepted that there needs to be an arguable case in respect of an intended appeal, and, as I have said, that it has a reasonable chance of succeeding. The Court of Appeal is unlikely to interfere with the exercise of the Court's discretion unless it can be shown that it has clearly exercised that discretion incorrectly. Alternatively, it will be necessary to show that the Judge was wrong on the law or in relation to a certain legal principle.

4. In the wife's application she also sought leave to appeal out of time, although at this hearing it was

accepted by both sides that this was no longer necessary - as she had not in fact made her application out of time.

Discussion

Expert Evidence

5. In the draft Notice of Appeal, it is suggested that I erred because I did not place sufficient weight on the evidence given by an Indian lawyer, Mr M. Lawyers for the wife have then sought to introduce a judgment that were not before the court at the time of the original hearing. This judgment was referred to by Mr M, but he had not produced it for the court's consideration. Time was given to him during the trial, in order that he might produce the said document, but he was still unable to do so. In his written submission Mr Leung said that he was abandoning this ground. However, at the hearing he changed his mind, whilst acknowledging that this was not his strongest point.

6. In any event it seems to me that the onus was on the wife's expert to produce the judgment in question. It ill becomes the wife to then complain when it proved difficult to place weight on the evidence given by her expert.

7. The next two points require more explanation. The wife said as follows in her draft Notice of Appeal:

Whether the husband would be deprived of legitimate personal or juridical advantage if the matter was tried in Chennai India

The learned Judge erred in her finding of fact that " 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 " (emphasis added) (paragraph 22 of Judgment). Since the parties did not address the learned Judge on the issue of " whether it would be possible for the husband to issue proceedings for divorce in India " (paragraph 24 of Judgment), her said finding was based on the erroneous assumption that the Petitioner (husband) would be denied his entitlement to divorce in India on the basis of two year's separation.

The learned Judge erred in failing to take into account material evidence given by the husband during cross-examination that he had " a team of (Indian) lawyers looking after proceedings in India " signifying that he has submitted to the Indian jurisdiction and has been active in pursuing his rights in India including, but not limited to, his rights to seek for divorce 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

By reason of the paragraphs herein above, the learned Judge erred in holding 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".

8. It is true that neither party produced any evidence in relation to the grounds for divorce in India or the legal procedure for divorce. This was partly because it was the wife's case that she would not agree to a divorce on any ground in either jurisdiction and she had applied for the restitution of conjugal rights in Chennai, India in any event. Consequently, reference needs to be made to the whole of paragraph 22 of my judgment in order to see the phrase complained of in its proper context:

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?

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.

9. Although I accept that at this stage the burden of proof was on the husband to show the court that this was the case, nevertheless it seems to me that it was reasonably foreseeable that a divorce based on two years' separation in India might be denied to him, whereas he would be entitled to

proceed with a divorce on that basis, as of right in Hong Kong. By using the word "may" I acknowledged that this was not known definitively.

10. I added at paragraph 23 and 24 that:

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?

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.

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.

11. At this stage it was for the wife to show inter alia that substantial justice could be done in India if the husband issued proceedings for divorce there. I was not taken to any evidence by her in that respect. Consequently, I again used the word "may as opposed to "shall". The solicitor for the wife states in his submission that:

Although the Appellant is making an application to reconstitute her conjugal Rights and pray for an order from the India Court that H shall ensure peaceful matrimonial life, such Restitution Application would not by any way "hinder/prejudice and/or as an attempt to deny H's right to a divorce in Hong Kong" as submitted by counsel for H (see para 33, H's Skeleton dated 28th December, 2016) [B/63, 501-504]. Should the Appellant's Restitution Application be dismissed by the India Court, her conjugal rights will not be reconstituted and H will not be ordered by the India Court to uphold the matrimonial life, the end result must be a dissolution of the marriage. Hence, H would not be deprived of his right to a divorce in India. It might just be a matter of time when their marriage will be dissolved or the couple is judicially separated. Being granted a

divorce decree sooner or later cannot be said to be a significant disadvantage of a particular forum.

Therefore, the result of the balancing act must be that the advantage outweighed the insignificant disadvantage and the matters should be proceeded in India.

Most important of all, there is no evidence that substantial justice cannot be done in the India forum.

With respect this is not accepted. There is no evidence because the wife chose not produce any. She cannot now rely on this lack of foresight and preparation in support of her application for leave to appeal. Further it is of note that the wife's application in India has been granted and that an order for restitution has been made. The husband did not defend that application. Thus the comments made by Mr Leung could be said at best to be stretching the truth somewhat.

Conclusion

12. In conclusion then it seems to me that the proposed appeal does not have a reasonable prospect of success nor is there some other reason in the interests of justice why the appeal should be heard.

Costs

13. In such circumstances I can see no reason why costs should not follow the event, notwithstanding the fact that the wife is legally aided. However, bearing that point in mind I shall make an order nisi to be made absolute in 14 days' time that the Respondent wife do pay the Petitioner's husbands costs of and arising out of the summons seeking leave to appeal out of time dated the 23 March 2017. The wife's own costs are to be taxed in accordance with Legal Aid Regulations. As an aside I was told by Mr Mohnani that his client is experiencing difficulty enforcing the previous costs order. This is a matter that will need to be taken up with the legal Aid Department.