Nanthivarman a/l Pichamuthu Mookiah v Sharmini Pillai [2011] MLJU 908

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HIGH COURT (KUALA LUMPUR)

YEOH WEE SIAM JC

DIVORCE PETITION NO F-33–35 OF 2011

8 July 2011

Foo Li Mei (Foo Li Mei & Siong) for the applicant.

M Kalaichelvam (Abd Halim Ushah& Associates) for the respondent.

Yeoh Wee Siam JC (delivering judgment of the court):

Appeal

This is an appeal by the Respondent Wife ("the RW") against my decision given on 13.6.2011 regarding enclosure 10.

Enclosure 10

Enclosure 10 is the application of the RW by way of a Summons In Chambers under 0.18 r.19(a), (b) or (d) of the Rules of the High Court 1980 ("the RHC") for the following reliefs:

(a) The whole of the Petition dated 29.12.2010, notice of proceedings, Affidavit In Support and Affidavit affirmed by the Petitioner Husband ("the PH") on 29.12.2010 be struck out on the grounds that -

  (i) it discloses no reasonable cause of action or defence, as the case may be; or

  (ii) it is scandalous, frivolous or vexatious; or

  (iii) it is an abuse of the process of the Court;

(b) costs of this application be borne by the PH;

(c) the Solicitor - Client costs of the RW for these proceedings and for the proceedings of the cause papers of the PH be borne by the PH;

(d) the PH pays costs for embarrassing the RW and such costs are to be fixed by this Honourable Court; and

(e) other relief or order which this Honourable Court deems proper and reasonable.

The Petition dated 29.12.2010 referred to in paragraph (a) above is the Divorce Petition filed on 6.1.2011 by the PH against the RW for the dissolution of his marriage to the RW on 11.12.2005 (enclosure 1) in Kuala Lumpur under s. 53 and 54 of the Law Reform (Marriage and Divorce) Act 1976 ("the LRA") on the ground of irretrievable breakdown of the marriage.

Grounds for the RW's application

The grounds of the RW for the application in enclosure 10 are that:

1. the PH's Petition (enclosure 1) is not in accordance with s.48 of the LRA because the PH is not domiciled in Malaysia at the time the PH's cause papers were filed.
2. the Order of the Court dated 28.1.2010 in the PH's Affidavit In Support of enclosure 1 (i.e. the Order exempting the PH from referring the matrimonial difficulty to a conciliatory body under s.106 of the LRA for a certificate that it has failed to reconcile the parties) had been obtained through an abuse of the Court process; and
3. the allegations of the PH in his Affidavit In Support of enclosure 1 are false, scandalous, frivolous or vexatious.

Decision

After hearing and considering enclosure 10 together with the Affidavits filed and the Submissions of both parties, I dismissed the RW's application with costs of RM2.000 to be paid by the RW to the PH.

Grounds for mv decision

Whether the PH is domiciled in Malaysia

The RW contended that the PH is not domiciled in Malaysia and therefore he is not allowed to file divorce proceedings in Malaysia in view of the requirements of s.48(1)(c) of the LRA which does not "authorise the court to make any decree of divorce except where the domicile of the parties to the marriage at the time when the Petition is presented is in Malaysia".

The RW averred that the PH is not domiciled in Malaysia for the following reasons:

(1) in the Petition (enclosure 1), the PH stated that his address is at No. 107 Faircross Avenue, Barking Essex IG11 8QZ, United Kingdom ("the UK address"). In his Affidavit In Support of enclosure 1 (enclosure 11), the PH confirmed that he had been staying there since December 2005 until now.

(2) the PH is now working as a lecturer in Anglia Ruskin University, United Kingdom; and

(3) there is evidence by the PH's own admission in paragraph 5.4 (a) to (i) of enclosure 11 that the PH is not domiciled in Malaysia, in particular, exhibits SP-1 to SP-9.

The main contentions of the RW that the PH is not domiciled in Malaysia can be summarised as follows:

(1) he gave a UK address and not a Malaysian address for enclosure 1;

(2) he averred that he cannot understand Bahasa Malaysia;

(3) he required more time to file his Reply Affidavit because he is now in the UK;

(4) in OS No. S8-24-136-2006, Suraya Othman J. observed that the PH "resides in Essex, United Kingdom", "he works in the United Kingdom and draws a salary as shown in his bank account" as "a lecturer at the Anglia Ruskin University in Essex, United Kingdom";

(5) the Affidavit of the PH affirmed for OS No. S8-24-136-2006 was before a "Notary Public, England, UK";

(6) in the letter of the PH's Solicitors, Messrs RS Sealan, Parames & Co., to the Court dated 5.10.2007, they stated that the PH "berada di United Kingdom";

(7) in paragraph 3 of the Petition for Nullity, No. S8-33-898-2006, dated 17.7.2006 (which has been struck out by this Court on 16.4.2007) the PH himself admitted that he "adalah berdomisil di 107 Faircross Avenue, Barking, Essex 1G11 8G2, United Kingdom". In paragraph 7 of his Affidavit, the PH admitted that since 29.12.2005 he has been living at his UK address;

> (The RW contended that the issue of the PH's domicile was raised during the hearing of the application for setting aside the Petition for Nullity No. S8-33-898-2006 under 0.18 r. 19(a), (b) or (d) of the RHC 1980 and the Petition for Nullity was struck out on 16.4.2007 by the Senior Assistant Registrar. The RW further contended that this proves that the PH is not domiciled in Malaysia.)

(8) the PH is now a Permanent Resident ("PR") of the UK. The PH confirmed that the number of his British PR is 0437659A and Home Office reference no. P1004964;

(In a letter dated 18.1.2006, the Immigration and Nationality Directorate, UK informed the PH that he "may remain in the United Kingdom", which, according to the RW, means that the PH can remain indefinitely in the UK.)

(9) exhibit SP-9 proves that the PH lives, works and conducts his affairs in Essex, UK.

The law in Malaysia regarding domicile is still based on common law. There is no statute providing for domicile. Neither has the term "domicile" been given a statutory definition to apply generally to all cases

According to the Oxford English Dictionary, "domicile" means a place of residence or ordinary habitation, a house or home, the place where one has his permanent residence, to which, if absent, he has the intention of returning.

There is no lack of cases decided on the issue of domicile.

In *Kanmani V. Sundarampillai* [1957] 23 MLJ 172 Smith J. held:

> "Where a domicil of origin is proved, the onus of establishing that there has been a change of domicil lies upon the person who asserts it, and he must show a change of domicil with clearness and satisfaction.
>
> Where, therefore, a petitioner seeks to establish such a change, the Court must treat with great reserve the statements from the petitioner and the respondent. It is safer to establish the respondent's intention from all the surrounding circumstances and particularly from events which occurred ante litem motam".

In *Anq Geek Choo V. Wong Tiew Yong* [1997] 3 MLJ 467 Suriyadi J. (as he then was) held:

> "The onus of proving that a person has abandoned his domicile for another has always rested on the asserter. Both the intention and the act of abandoning must be demonstrated to be unequivocal and the conscience of the court must be satisfied by the evidence.".

In the same case, Suriyadi J. also held:

> "(1) The pre-conditions of s.48(1)(c) of the Act on the domicile of the parties must be complied with before a court may grant a decree of divorce. As regards the place of domicile of the respondent, no problem was posed for the court as not only was he presumed to be domiciled here by virtue of his Malaysian citizenship, but also due to the fact that he was currently living in Malaysia. Where the petitioner was concerned, there was no presumption in favour of her despite her ten years' residence in Malaysia.".

In *James Sloan V. Sarala Devi Sloan* [2010] CLJ 483 Suraya Othman J. held:

> "(1) Residence alone was not sufficient to prove that the Petitioner had displaced the domicile of origin in favour of the domicile of choice. He had to prove not only that he resided in Malaysia but had the intention to make that residence permanent for an indeterminate period of time."

In the present case, the burden of proof is on the RW to prove, on a balance of probabilities, that the PH had abandoned his domicile of origin in Malaysia and acquired a domicile of choice in the UK at the time when the Petition for Divorce was presented. The RW has to prove that the PH not only resides in the UK, but has the intention to make it his permanent residence for an indeterminate period of time.

After evaluating all the evidence adduced, it is my finding that the PH is not domiciled in the UK. It is true that the PH has the UK address, and he resides or lives there since 2000, and works there. He has his bank accounts, credit cards, and life insurance policies there, and pays council taxes in the UK. The PH has not given a Malaysian address for the Petition (enclosure 1). He is a British PR, but as the PH had pointed out, his PR is subject to certain conditions i.e. "kebenaran bersyaraf (see paragraph 12 of his Affidavit In Reply).

Being a British PR does not equate the PH to being a British citizen. Should the PH ever breach the conditions of his British PR, he would lose the privilege to live there and has to come back to his domicile of origin in Malaysia. It is also to be noted here that the letter dated 18.1.2006 granting the British PR to the PH stated that he "may remain in the UK'. The word "may" is discretionary. It shows that the PH is given permission to remain in the UK but such permission can be withdrawn at any time for good reason at the discretion of the British government.

The question is whether the PH intends to live permanently in the UK, become a British citizen and be domiciled there.

The PH averred that he had no such intentions. He explained that when he used the term "domicile" in the Petition for Nullity, he actually meant his address because he used the Malaysian word "alamat" in paragraph 2 therein. He claimed that it was his previous Solicitor's mistake to use the term "domicile" in that Petition.

I perused the Petition for Nullity and noted that the PH stated that he is domiciled at and he gave his address in the UK. This shows that the PH, at the material time, understood the word "domicile" to mean address.

The PH averred that he still travels back to Malaysia frequently to see his family, and also for his medical treatment at the Subang Medical Centre. He stated that he had no intention of giving up his domicile in Malaysia even though he is PR of the UK.

I note that the PH and RW were married in Malaysia on 11.5.2005 in an Indian temple at Jalan Kasipillay, Kuala Lumpur under the LRA. For the purpose of the solemnisation and the registration of the marriage here, the law, and even the RW herself, recognised the fact that the PH is a Malaysian and domiciled here. So there is no justification for the RW to contend now that, however, for the purpose of a divorce under the same LRA, the PH is no longer domiciled here. It is clear that the PH came back to Malaysia, i.e. the domicile of his origin, to get married according to his cultural norms, and is now seeking a dissolution of that same marriage in a Malaysian Court. All this shows clearly the PH's intention to submit fully to the jurisdiction of this Court as a Malaysian and, even though he has obtained a British PR, he does not intend to give up his domicile in Malaysia.

I do not think that having a UK address since 2000, not being able to understand the Malay language, being employed in the UK, having his own company in the UK since 2003, having bank accounts, credit cards and life insurance policies there, and paying British council taxes conclusively prove that the PH has given up his domicile in Malaysia. From all these factors, it is clear that the PH is living and working in the UK, and he has to be subject to the tax laws there. However, what is paramount is the PH's intention, that he will not give up his domicile in Malaysia. For as long as the PH is not a British citizen, but is merely a PR in the UK, and he has not relinguished his Malaysian citizenship, it proves that the PH has not cut off his roots to his domicile of origin in Malaysia.

It is also noted that the PH travels by a Malaysian Passport, and not by a British Passport. The PH has averred that his intention is to return to Malaysia upon securing a proper job here.

It is therefore my finding that the PH does not intend to reside in the UK for an indeterminate period of time.

My attention was also drawn by the PH's Counsel to the fact that, previously by letter, the RW wrote to them agreeing to a Joint Petition for Divorce being filed (see Affidavit Sokongan of RW, paragraph 6.1(b)(ii) of enclosure 11, and exhibit NP-3 of enclosure 12). For the purpose of such Joint Petition, both parties have to be domiciled in Malaysia under s.48(1)(c) of the LRA. By agreeing previously to a Joint Petition, it also proves that the RW had agreed to the fact that both the PH and she are domiciled in Malaysia.

In my opinion, the RW should not be blowing hot and cold. She should not raise domicile as an issue now, when previously, for the registration of her marriage to the PH, and for the purpose of the proposed Joint Petition, it was not an issue. The RW must come to Court with clean hands.

It is interesting to note, at this juncture, the decision of T.Selventhiranathan J. (as he then was) in Re Prasert Wonaphattarakul & Anor when he held:

> "[2] At common law, a married woman acquires her husband's domicile during the subsistence of the marriage. This is given statutory recognition in s.48(1)(c) of the Act which requires the domicile of both parties to be in Malaysia before the Court can entertain proceedings for a decree of divorce.".

If the above common law position is to be applied strictly here in the present case, the RW, by her marriage to the PH, should have acquired the domicile of her husband. The RW, by contending that the PH has changed his domicile to the UK, is putting herself at risk of being treated as not being domiciled in Malaysia for the purpose of s.48(1)(c) or any other provisions of the LRA which require domicile before a Petition can be filed thereunder.

In view of the above, I do not think that it is right or just to strike out the PH's Petition for Divorce (enclosure 1) on the ground that he is not domiciled here.

Whether the Order dated 28.1.2010 was obtained through an abuse of process of the Court

To my mind this is a vexatious claim by the RW and is totally baseless.

When the Court considered the PH's application for exemption from reference to the marriage tribunal on 28.1.2010, the cause papers were all in order. Based on valid grounds under s.106 of the LRA, the Court granted the exemption on the merits of the case.

According to learned Counsel for the PH, the Order dated 28.1.2010 was served on the Solicitors for the RW by a covering letter dated 19.7.2010.

The RW did not apply to set aside the Order dated 28.1.2010 or appeal the decision. To now raise it as an issue nearly 1 Vz years after the Order was granted is certainly mischievous.

Therefore, it would be legally wrong for the Court to allow the RW to strike off enclosure 1 on this ground.

Whether the conditions in 0.18 r.19(10(a), (b) or (d) of the RHC have been fulfilled

In enclosure 1, the PH is praying for a dissolution of his marriage to the RW on the ground of irretrievable breakdown of the marriage due to the RW's unreasonable behaviour. Based on the PH's averments in the Petition for Divorce and his Affidavit in Support, I am satisfied that the PH has a reasonable cause of action. The case has several triable issues e.g. whether the PH should be granted the divorce, whether it was due to the RW's unreasonable behaviour or otherwise, and whether maintenance ought to be paid by the PH to the RW in the event that a divorce is granted, bearing in mind the degree of responsibility which the Court has to apportion to each party for the breakdown of the marriage for the purpose of assessment of maintenance (see s.78 of the LRA). In the interest of justice, the whole Petition ought to be adjudicated in a full trial. This is not a plain case, and it would not be proper to strike out the Petition for Divorce at this stage, without the benefit of the Court hearing the evidence of the witnesses (see also *Bandar Builder Sdn. Bhd. & 2 Ors V. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7).

I find that the conditions in 0.18 r.19(1)(a), (b) or (d) of the RHC have not been proven by the RW.

For the above reasons, I therefore ordered accordingly.