

NSV v PU

6 February 2018

Court of Appeal

CA

Miscellaneous Proceedings No 58 of 2017

CAMP 58/2017

Citations: [2018] HKCA 74
[2018] HKEC 228

Presiding Judges: Lam V-P and Chu JA

Phrases: Family law - divorce - leave to appeal refusal to stay divorce petition - refused

Counsel in the Case: Mr Mohammed J Shah, instructed by Jal N Karbhari & Co, for the petitioner

Mr William Leung of William K W Leung & Co, solicitor advocate assigned by the Director of Legal Aid, for the respondent

Cases cited in the judgment: Amtrust Europe Ltd v Trust Risk Group SpA [2016] 1 All ER (Comm) 325
Cherney v Deripaska (No 2) [2010] 2 All ER (Comm) 456
SPH v SA [2014] 3 HKLRD 497
Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460
ZJW v SY (CACV 10/2017, [2017] HKEC 2575)

JUDGMENT:

Lam V-P :

1. Having heard and considered the submissions (both written and oral) and materials lodged on behalf the parties, we refuse to grant leave to the respondent wife to appeal against the decision of Her Honour Judge Melloy ["the Judge"] of 24 February 2017 for the following reasons.

2. In light of the facts of the case and the circumstances summarized at [10] of the judgment of 24 February 2017, the decision of the Judge on domicile of the petitioner husband is plainly correct. The petitioner husband was therefore entitled to present the petition for divorce in the Family Court under Section 3(a) of the Matrimonial Causes Ordinance Cap 179. Nothing said by Mr Leung on behalf of the respondent comes close to demonstrating that the evaluation of the facts by the Judge was open

to being disturbed by this Court as per the approach set out in
ZJW v SY CACV 10 of 2017
, 1 December 2017 at [33], see also

Amtrust Europe Ltd v Trust Risk Group SpA [2016] 1 All ER (Comm) 325
at [31] to [33] and

Cherney v Deripaska (No 2) [2010] 2 All ER (Comm) 456
at [10] and [59].

3. That being so, it is a case of the petitioner proceeding in Hong Kong "as of right".

4. The judge at [12] of her judgment correctly reminded herself the principles of forum non conveniens from the judgment of the Court of Final Appeal in
SPH v SA [2014] 3 HKLRD 497

5. In the application of those principles, given that this is an "as of right" case, the respondent has to establish that there is another available forum which is clearly or distinctly more appropriate than the Hong Kong forum, see SPH v SA at [52].

6. The respondent had to satisfy the first stage of the Spiliada¹ test before one needs to go further. On the facts of the present case, given that the petitioner was entitled to present the petition in Hong Kong as of right and the fact that the substantial part of their married life (albeit a marriage of short duration) was in Hong Kong, and the petitioner is residing and working here, the respondent bears a heavy burden in showing that the Indian court is clearly or distinctly a more appropriate forum than Hong Kong. The mere fact that the marriage was contracted in India and the respondent now lives in India are not enough.

7. We do not see any ground for disturbing the Judge's rejection of the expert evidence of Mr Murphy. Mr Leung has failed to persuade us that the Judge made any palpable error in that regard.

8. With the rejection of that piece of evidence, the respondent does not have anything to support her case that the Indian court is clearly or distinctly more appropriate.

9. In our judgment, the respondent failed to meet the first stage requirement. In this connection, we have reservations on the Judge application of the test at [21] of her judgment. The test is not to be applied by examining the matter from two different angles: one from the husband's perspective and another one from the wife's perspective. The court must take an overall view and decide if the party applying for stay succeeds in establishing that Hong Kong is not the natural or appropriate forum and there is another available forum which is clearly or distinctly more appropriate than Hong Kong.

10. As it was stated at [51] of SPH v SA, supra at proposition (2), failure by the applicant to establish these two matters is fatal.

11. Hence, the respondent's application for stay must fail. It is not necessary for us to consider the second stage and the third stage in the Spiliada test.

12. The summons of the respondent of 6 August 2015 did not seek a stay based on *lis alibi pendens* as required by Order 12 Rule 8(3). Hence, that principle was not invoked before the Judge and apparently no submission along that line was run before the Judge. In any event, the nature of the proceedings in India is clearly not a petition for divorce. Thus, it is not the same cause of action within the meaning of Order 12 Rule 8(2A)(c). Mr Leung's reliance on the Indian proceedings is therefore misplaced.

13. For these reasons, the intended appeal has no merit and leave should not be granted.

14. We dismiss the summons of 27 November 2017 accordingly. The statement of costs of the petitioner add up to \$49,917. It is a reasonable figure and we fix the costs to be paid by the respondent to the petitioner at \$49,917.

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Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460

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