ANT *v* ANU
[2014] SGHC 229

Case Number : Originating Summons (Family) No 273 of 2013 (Registrar's Appeal (State Courts) Nos 23 and 24 of 2014)

Decision Date : 07 November 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Suresh Damodara (Damodara Hazra LLP) for the appellant; Koh Tien Hua (Harry Elias Partnership LLP) for the respondent.

Parties : ANT — ANU

Conflicts of laws – Natural forum – Stay of proceedings

Family law – Child – Kidnapping – International Child Abduction Act

7 November 2014 Judgement reserved

Choo Han Teck J:

1 The appellant/wife is a 31-year-old housewife. She is a Chinese national. The respondent/husband is 43-years-old, and works as a Vice-President in a logistics firm. He is a New Zealand ("NZ") citizen. The parties married on 14 February 2007 in Shanghai, China. They are still married; no writ of divorce has been filed. They have two children, a 4-year-old daughter and a 2-year-old son. The daughter was born in Oman, whereas the son was born in Singapore. Both children are NZ citizens and hold NZ passports. Neither of the children is a Singapore citizen or permanent resident.

2 After the parties married in Shanghai, they moved to California, United States of America ("USA"), where they resided for about 2 years. They then moved to Oman in 2009 (where their daughter was born) before moving to Indonesia in 2011. In March 2012, the husband was posted to Singapore (where their son was born) for work, and both the daughter and the wife moved with him. The husband held an employment pass for work in Singapore, whereas the wife and the children held dependant passes. The family lived in a private landed property in the west of Singapore.

3 The husband and wife both applied for Personal Protection Orders ("PPOs") against each other, to restrain family violence against the other and the children. The husband applied for a PPO on 6 February 2013 in Summons No SS 324/2013 ("SS 324/2013") and obtained an expedited protection order ("EPO") on the same day. The wife did the same on 14 February 2013 in Summons No SS 395/2013 ("SS 395/2013") and also obtained an EPO on the same day.

4 In February or March 2013, the parties and their children left Singapore. The wife left for China, whereas the husband left for Auckland, NZ with the two children. The parties say that the marriage had broken down. The husband says that he left for NZ as he was posted there by his firm to handle the Australian and NZ markets for it from April 2013. The parties and their children have resided in Singapore for close to a year.

5 On 18 February 2013, the wife filed an application under the International Child Abduction Act

(Cap 143C, 2011 Rev Ed) ("ICAA") for a return of the children with the Singapore Central Authority.

6 On 20 June 2013, the wife filed an application in Originating Summons (Family Matters) No 273 of 2013 ("OSF 273/2013") under s 8 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("GIA") for the return of the children to her. Section 8 of the GIA provides for broad powers for a court to order as it sees fit where two persons as joint guardians (including parents where no custody order has been made) disagree on any question affecting the welfare of the infant. At the time the application was made, the daughter was 3 years old, and the son was 14 months old. The orders sought in the originating summons are:

(a) That the husband "shall forthwith produce and deliver the biological children…to the custody" of the wife; and

(b) That the husband "be restrained from taking the children from the possession and custody of the wife without further [o]rder of [c]ourt".

The wife's lawyer, Mr Damodara later clarified the order sought in (a) before the District Judge ("DJ") who heard the matter. He says that the wife was actually seeking an order that the children be returned to Singapore, and had not meant to seek custody of the child. The wife, Mr Damodara says, misunderstood the meaning of the word "custody" as used in law to mean care and control. Once the children are returned, Mr Damodara says the wife would then apply for their care and control.

7 The husband then filed an application in Summons No 10295 of 2013 ("SUM 10295/2013") in OSF 273/2013 on 19 July 2013 for the following orders:

(a) A declaration that in the circumstances of the case, the Singapore court has no jurisdiction over him in respect of the subject matter of the wife's application;

(b) Further or in the alternative, that the wife's application be dismissed or stayed on the ground of *forum non conveniens*;

(c) Costs; and

(d) Further or other relief.

8 Besides SUM 10295/2013, the husband also filed Originating Summons (Family Matters) No 323 of 2013 ("OSF 323/2013") on 19 July 2013 for a dismissal or stay of the proceedings in SS 395/2013 on the ground of *forum non conveniens*.

9 OSF 273/2013, SUM 10295/2013 and OSF 323/2013 were all heard by the same DJ in the newly formed Family Justice Courts ("FJC") on 25 October, 15 November and 20 November 2013 as she was of the view that the "factual matrix and the legal principles to be applied were the same". On 18 December 2013, the DJ ordered as follows:

(a) First, she refused the husband's application for declaration;

(b) Second, she stayed the wife's application in OSF 273/2013 for the return of the children on the ground of *forum non conveniens.* The DJ held that Singapore was not the appropriate forum for deciding issues concerning the children;

(c) Third, the proceedings in SS 395/2013 (wife's application for a PPO) be stayed on the ground of *forum non conveniens*; and

(d) Fourth, no order as to costs. This is because the husband had a "financial advantage" over the wife.

The wife filed two appeals. The first, RAS 23 of 2014 ("RAS 23/2014") is an appeal against DJ's order as stated in (b). The second, RAS 24 of 2014 ("RAS 24/2014") is an appeal against the DJ's order as stated in (c).

10 I start with RAS 23/2014 first. The parties rightly agree that the test in determining whether a stay should be granted is that laid out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*"). The *Spiliada* test is a two-stage one:

(a) First, the party seeking a stay of proceedings (in this case, the husband) has to show that Singapore is not the appropriate forum, and that there is another clearly more appropriate forum in which the matter could be heard; and

(b) Second, in the event the first stage is satisfied, the party opposing the stay (in this case, the wife) may argue that there are special circumstances justifying the refusal for stay.

11 In relation to the first stage of the *Spiliada* test, Mr Damodara submits that the husband has failed to satisfy it for the following reasons:

(a) First, the children were kidnapped in Singapore and acts of violence happened in Singapore. Singapore, as such, is the natural forum as it is where these alleged torts were committed. Mr Damodara relies on the following statement by Belinda Ang Saw Ean J in the High Court decision of *The "Reecon Wolf"* [2012] 2 SLR 289 at [16]:

> The place where the tort is committed is *prima facie* the natural forum in the sense that it is the forum that is clearly or more distinctly the more appropriate forum for the action to be tried in.

(b) Second, the husband did not clearly establish that there was another clearly more appropriate forum as he himself was unsure of where to commence divorce proceedings. Mr Damodara bases this assertion on [26] of the husband's first affidavit dated 19 July 2013, where he states that it is his belief that either NZ or China may be the countries with the most substantial connection. Para 26 of that affidavit reads:

> I believe that the country with the closest and most substantial connection is New Zealand. However, China is a possible second. At any rate, both these countries have greater and closer connections to us than Singapore as Singapore was really only a transitional place for us.

(c) Third, the husband, by applying for PPO and obtaining an EPO in SS 324/2013, has already "invoked the jurisdiction" of the Singapore courts. The husband therefore cannot now seek a stay of proceedings for the wife's application for the return of the children. Even though this is not explicitly stated in the wife's written submissions, the wife's position also appears to be that the husband's application for PPO is an admission by him that the Singapore court should hear OSF 273/2013.

(d) Fourth, the DJ erred in stating that there were no connecting factors to Singapore. Mr Damodara takes objection of [36] of the DJ's written grounds of decision ("GD"). In that

paragraph, the DJ said:

> When the wife filed her affidavit in December 2013, she conceded that she would have issues remaining in Singapore with the children as they would be without any kind of status to remain save as visitors or tourists. The wife then gave an alternative for the children to be relocated to China. This changed the complexion of her claim in [OSF 273/2013]. By her own affidavit, the wife admitted that the children and she did not have any connecting factors to Singapore. They did not have a place to stay, the children were not enrolled in any school, they did not have any pass to remain in Singapore beyond the usual tourist or visitors passes. It could not then be said that Singapore was the natural or appropriate forum for her proceedings if the wife was proposing an alternative residence and home for the children.

Mr Damodara argues that the wife's affidavit has been "taken out of context". He says that the wife was merely stating an alternative plan to move to China, as "any responsible parent would", in the event the immigration authorities do not grant them immigration passes, rendering a return to Singapore impossible.

12 In relation to the second stage of the *Spiliada* test, the Mr Damodara submits that there are special circumstances militating against a stay. These circumstances are:

(a) First, the husband cancelled the wife's dependant pass even though he remained employed in Singapore. Mr Damodara submits that this is an attempt to force the wife to leave Singapore;

(b) Second, the husband removed the children out of Singapore without the wife's prior consent. The husband cannot now take advantage of his own wrongdoing by seeking a stay of the wife's application for the return of the children;

(c) Third, the husband relied on the EPO granted in SS 324/2013 to remove her children away from her. In [15] – [17] of her first affidavit dated 20 June 2013, the wife states the following:

> 15. Armed with this EPO [in SS 324/2013), on 9 February 2013, [my husband] turned up at our home with policemen in tow. He demanded that he be given custody of the children. When I refused, the policemen accompanying him warned me that I had to hand over the children to [my husband] pursuant to the EPO as this was an order of Court.
>
> 16. I did not have a choice in the matter and allowed [my husband] to take the children away. The children were upset and bewildered by all the commotion. My mother was with me then and we were under the impression that the policemen were correct.
>
> 17. I am now advised that the EPO could not and did not give [my husband] any right to take away the children. I am their natural mother, having been the only caregiver to them since birth.

(d) Fourth, the husband, being the sole breadwinner, has more money than she does. The husband, in seeking the stay, is compelling the wife to incur greater expenses and costs in the NZ courts to hear her application for the return of the children.

13 Mr Damodara also argues that the DJ erred in observing that that there was delay on the wife's part. The DJ said the following in [38] of her GD:

I had also expressed concerns at the progress of the proceedings. The wife's applications some 4 months after the event, in June 2013. There were delays in, inter alia, getting her instructions for the filing of the affidavits, suitable hearing dates etc and this led to a situation in which the children remained in New Zealand for an extended period. Whilst I appreciated that the parties were in different jurisdictions, I was concerned with the time taken for the matter to be resolved.

Mr Damodara says that these delays were inevitable as the wife was in China. As this comment by the DJ was a mere observation that did not form part of her reasoning in granting the stay, I say no more of it.

14 The husband's lawyer, Mr Koh argues that the *Spiliada* test has been satisfied, and the DJ was right in granting a stay of the wife's application in OSF 273/2013. In respect of the first stage of the *Spiliada* test, the husband's lawyers rely on the following to support their contention that Singapore is not the appropriate forum:

(a) First, none of the parties are habitually resident in Singapore at the time OSF 273/2013 was commenced. OSF 273/2013 was commenced on 20 June 2013, close to 4 months after the wife had left Singapore for China, and close to 3 months after the husband left for NZ with the children;

(b) Second, at the time the DJ gave her decision, the children have lived in NZ for "almost as long as they have been in Singapore". The husband's lawyers say that at the time of the DJ's decision, the children have lived in NZ for 11 months (February 2013 to December 2013). The children were in Singapore for close to a year from February or March 2012 to February 2013;

(c) Third, neither of the parties nor the children currently reside in Singapore;

(d) Fourth, both parties and their children are not Singapore citizens, nor are they permanent residents;

(e) Fifth, out of the 6 years of marriage, the family lived in Singapore for only a year as Singapore was merely a 'transitional place' for work. The parties never intended to make Singapore their home or domicile;

(f) Sixth, the wife only had a dependant's pass in Singapore that could be revoked if the husband's employment pass was cancelled (as has been done by the husband's employer when the husband relocated to NZ for work);

(g) Seventh, the husband's application under OSF 323/2013 for a determination on whether Singapore is the appropriate forum is not an admission on his part that the Singapore courts should hear OSF 273/2013; and

(h) Eighth, where there are jurisdictional challenges in cases involving children, the appropriate jurisdiction is that of where the children habitually reside. Mr Koh says that the decision of the Hong Kong Court of Appeal in *LN v SCCM* (CACV 62 of 2013) ("*LN v SCCM*") stands for this proposition. In [29] of that decision, Peter Cheung JA held that for cases on jurisdictional challenges involving children, he was prepared to proceed on the basis that, in general, the jurisdiction where the children habitually reside should try the matter. This is because:

> [I]ssues concerning their well[-]being can be conveniently dealt with in terms of the Court's local knowledge and experience on the way they are to be raised and educated, inquiry by

social workers and experts, testimony from witnesses and the Court's wish to hear the views of the children directly. More importantly, this will ensure that there is no undue disruption of the children's normal daily life when the matter is heard on home grounds.

15 Mr Koh also submits that there are no special circumstances militating against a stay application. He says that the DJ considered at "great length" the special circumstances raised by the Mr Damodara in [42] of her GD, which reads:

> I considered submissions on the husband's conduct: the timing of the husband's relocation, the cancellation of the wife's dependent pass, the termination of the lease of their apartment in Singapore, the relocation of the children. I could not make a finding that the timing of the husband's relocation was engineered in light of the letters from his [employer]. The husband could have been more genial in the handling of the cancellation of the wife's dependent pass and the termination of the lease but I did not see these matters to be amounting to "special factors"…, namely these did not amount to special circumstances by reason of which justice requires that a stay should nonetheless be refused.

Mr Koh asserts that the DJ is "correct and there is no reason to disturb her well-reasoned order".

16 I dismiss RAS 23/2014. In disputes involving children, the paramount consideration is that of their welfare (s 3 of the GIA; s 125 of the Women's Charter (Cap 353, 2009 Rev Ed)). The court in NZ is in as good a position as ours to decide whether it is in the children's best interest that they should be returned to their mother. While I do accept the argument made by Mr Koh that in jurisdictional challenges involving children, the appropriate jurisdiction is that of where the children habitually reside, it is difficult to tell which jurisdiction is one where the children can be said to be habitually resident in: there is no concrete evidence of how integrated the children are in either NZ or Singapore, though the length of their stay in NZ is longer than that in Singapore by the time I heard these registrar's appeals. In any event, both stages of the *Spiliada* test have been satisfied for a stay of the wife's proceedings for a return of the children. In relation to the first stage of the *Spiliada* test, I am satisfied that Singapore is not the appropriate forum to hear the case, and that NZ is the more appropriate forum for the following reasons:

(a) First, I am agreement with the submissions by Mr Koh, which I summarised in [(a)] – [(g)] of this judgment. These factors collectively show that there are hardly any factors connecting Singapore to the dispute in relation to the return of the children; and

(b) Second, I do not accept that the husband, by commencing OSF 323/2013 for a stay of the wife's PPO proceedings against him, has admitted that the Singapore courts should hear OSF 273/2013. This is because the matters in both OSF 323/2013 and OSF 273/2013 are different. OSF 273/2013, unlike OSF 323/2013, concerns the return of children to the wife.

17 I am also not in agreement with the submissions made by Mr Damodara that the first stage of the *Spiliada* test is not satisfied for the following reasons:

(a) First, there is no finding by the DJ on whether the children were taken out of Singapore without the wife's consent. Even if this is the case, and it could therefore be said that a tort has been committed in Singapore (see above: [11(a)]), the place where the tort is committed is only *prima facie* the appropriate forum; there are other factors that have to be taken into account. Mr Damodara has only quoted one line in [16] of that decision, without having regard to the qualifier after that line. I reproduce the line quoted by Mr Damodara and the qualifier after that for ease of reference:

> The place where the tort is committed is *prima facie* the natural forum in the sense that it is the forum that is clearly or distinctly the more appropriate forum for the action to be tried in. However, as this is only a *prima facie* position, the court will consider if the *prima facie* natural forum is either displaced by other factors or, if taken with other factors, they all clearly point to the natural forum as the more appropriate forum.

(b) Second, I do not agree that the husband was unsure of which jurisdiction bears the closest and most substantial connection In the extract of the affidavit reproduced (see above: [11(b)]), the husband stated that the country with the closest and most substantial connection is New Zealand. In any event, that was the husband's own personal views. The question before me is a question of law;

(c) Third, the husband's application for PPO and obtaining an EPO in SS 324/2013 is not an admission that the Singapore courts should hear the matter for the return of the children. The subject matter of SS 324/2013 concerns a different matter on domestic violence;

(d) Fourth, I find that there is no basis for Mr Damodara to argue that the DJ erred in taking the wife's affidavit "out of context" (see above: [11(d)]). The DJ was aware that the wife was thinking of contingencies in the event she cannot return to Singapore. In [15] of her GD, the DJ stated that she was aware that the wife's plan to live in Shanghai with her children was an alternative proposed in the event she cannot return to Singapore. The relevant portion of [15] of the GD reads:

> However, she accepted that residing in Singapore may not be possible given that she would be dealing with immigration issues…. As an alternative, she said that she would like the children to live in Shanghai, China with her.

18 I am also of the view that Mr Damodara failed to demonstrate that there are special circumstances militating against a stay application as:

(a) First, there is insufficient basis to support the wife's allegation that the husband cancelled the wife's dependent pass in an attempt to force her out of Singapore. This is because the wife's dependent pass was cancelled on 3 July 2013. By then, the wife had already left Singapore. This is clear from a letter by the Work Pass Division of the Ministry of Manpower dated 3 July 2013 sent to the husband's employer. It states that the wife's work pass was cancelled that same day;

(b) Second, as mentioned (see above: [17(a)]), the DJ made no definite finding on whether the husband removed the children out of Singapore without her consent;

(c) Third, the DJ made no definite finding of fact on whether the husband relied on the EPO he obtained to remove her children away from her. This is a disputed fact, and one that involves a serious allegation that may now be a police matter. There is no evidence adduced by the wife to support her allegation. She could have filed a complaint with the police, but did not do so. Nor did the wife's mother, whom she claims was present, file any affidavit; and

(d) Fourth, it cannot be said that the husband, in seeking the stay, is forcing the wife to incur additional costs in the NZ courts to hear her application for the return of the children. The wife should have commenced proceedings in NZ from the outset. Instead, she commenced proceedings in Singapore.

19 I now move to RAS 24/2014. RAS 24/2014 is the wife's appeal against the DJ's order that the proceedings in SS 395/2013 (wife's application for a PPO) be stayed on the ground of *forum non conveniens*. There were no reasons provided by the DJ in her GD (which she wrote after the wife appealed) as to why she made this order. Neither do the parties' written submissions for RAS 24/2014 provide much assistance. Their written submissions for RAS 24/2014 were largely repetitive and make the same points as those in RAS 23/2014, even though these points are largely irrelevant for RAS 24/2014. I also note that the parties have copied and pasted large portions of their submissions in RAS 23/2014 for those in RAS 24/2014 without due appreciation that the appeals concern different matters.

20 I allow the appeal in RAS 24/2014. I find that there is no basis for the DJ's decision to stay the wife's proceedings in SS 395/2013. This is because an EPO was already issued, and there were therefore no proceedings to stay. In any event, even if there were proceedings, I am not convinced by the two reasons given by the husband for a stay. The reasons given by the husband are:

(a) First, the husband says in his first affidavit filed on 19 July 2013 that he would be prejudiced as he would have to return to Singapore for a trial, and would have to incur considerable cost in instructing Singapore solicitors. He says he may not have the means to pay for them as he anticipates that he would have to engage another set of lawyers for divorce proceedings in either China or NZ; and

(b) Second, PPOs and EPOs are not enforceable or recognised by the New Zealand courts.

The husband's reason in (a) is untenable as mere impecuniosity cannot form a basis for evasion of legal obligations. Neither does the reason in (b) hold as PPOs and EPOs are still enforceable in Singapore.

21 For the above reasons, my orders are as follows:

(a) The appeal in RAS 23/2014 is dismissed;

(b) The appeal in RAS 24/2014 is allowed; and

(c) No order as to costs.

22 While one may have considerable sympathy for the wife's attempt in reuniting with her children, she has to do so in accordance with law. She can either make an application under the ICAA (as she has done), or pursue her remedy in the NZ courts. I am given to understand that she has neither the contacts nor the money to litigate in New Zealand, and that Mr Damodara is providing helpful pro bono work for her in Singapore. She will need assistance to find assistance in NZ but that is outside the purview of this court.

23 The wife's appeal in RAS 24/2014 is allowed even though she is likely to derive no practical benefit. As mentioned, there are no further proceedings for the PPO. Even if there were, both parties and their children live out of Singapore. I allow the appeal as an endorsement of her right to apply for a PPO.