BDA *v* BDB
[2012] SGHC 209

Case Number : District Court Appeal No. 19 of 2012

Decision Date : 18 October 2012

Tribunal/Court : High Court

Coram : Chao Hick Tin JA

Counsel Name(s) : Koh Tien Hua (Harry Elias Partnership LLP) for the appellant; Raymond Yeo (Messrs Raymond Yeo) for the respondent.

Parties : BDA — BDB

Family Law – Women's Charter

Conflict of Laws – Natural forum

18 October 2012 Judgment reserved.

Chao Hick Tin JA:

1 This is an appeal filed by BDA ("the Wife") against the decision of a District Court judge ("the Judge") where the Judge stayed an application for maintenance filed by the Wife against her husband, BDB ("the Husband"), under s 69 of the Women's Charter (Cap 353, 2009 Rev Ed) ("Women's Charter") on the ground of *forum non conveniens*.

Facts

2 The Husband and the Wife were married in India in February 2005. Both of them are legally qualified to practise law in India. In addition, the Wife is also qualified to practise as a solicitor in England and Wales. Within six months of the marriage, the parties moved to Hong Kong in pursuit of their careers. In January 2008, the parties relocated themselves to Singapore. Their son was born in Singapore in January 2010. Both the Husband and the Wife lived with the son in the matrimonial home until October 2010, when the Wife took the son and left for India. Prior to her departure from Singapore, the Wife was working at a local law firm as a lawyer. The Husband continues to be employed in Singapore.

3 The Husband and the Wife are citizens of the Republic of India ("India"), and both hold Indian passports. The Husband and the Wife have been Singapore Permanent Residents ("Singapore PRs") since 2009. Although the son was born in Singapore, he does not qualify to be a Singapore citizen; he holds an Indian passport and is currently in Singapore on a long-term visit pass. Incidentally, the Wife was also a permanent resident of the United States of America from 1999 to 2009. Apart from bank accounts, the Husband and the Wife both do not own any immovable property in Singapore.

4 After the Wife's application for maintenance was filed on 2 September 2011, the Husband filed for divorce in India in around October or November 2011.

5 Both the Wife and the son are now residing in India. As such, an issue of contention relates to the question of whether the Wife intended to reside in Singapore with the son. In an email to the Husband dated 11 October 2011 (after the Wife's application for maintenance was filed on 2

September 2011), the Wife requested for her personal belongings, which were left behind in Singapore, to be sent to her in India:

> Could you please arrange for all my belongings including clothes, bags, shoes and any items of jewellery which are in the Singapore house to be sent to me at your earliest convenience. If there is [*sic*] any additional costs involved for the safety of these items to be sent across, please let me know, I will make the payment accordingly.
>
> Thanks.

6 In reliance on this email, the Husband avers that the Wife had no intention of returning to reside in Singapore. In any event, the Husband says that the Wife, who is well-qualified and remains a Singapore PR, is capable of earning a substantial income in Singapore and does not need to reside with the Husband and be supported by him. He also pointed out that the Wife had, on her own steam and resources, returned to Singapore on two occasions: the first to file the maintenance complaint and the second to attend a mediation session prior to proceedings in the District Court.

7 On the other hand, the Wife asserts that she intended at all times to reside in Singapore, and had at that point returned to India because of the Husband's actions. While she was in India, the Husband had threatened to dispose of her personal belongings. She had wanted the belongings to be returned because she realised that the marriage was over. The Wife further alleges that the Husband had withdrawn monies from a joint account, leaving her with "absolutely no funds to return to Singapore" and thus preventing her return.

Decision Below

8 At this juncture, I pause to note that under s 79 of the Women's Charter, an application for maintenance under s 69 of the Women's Charter has to be made by way of a complaint pursuant to the Criminal Procedure Code (Cap 68) (since repealed) ("CPC") (see [11] below). This therefore raises the question as to whether an application for maintenance under s 69 of the Women's Charter is a criminal or a civil process. The Judge did not address this issue as it was not raised before him. It is now being raised before me by the Wife who argues that an application under s 69 of the Women's Charter (hereafter referred to as "s 69 application") is a criminal process; therefore, the doctrine of *forum non conveniens* can have no application. I will come back to this issue in just a moment.

9 The Judge, having weighed the circumstances of the case, found in favour of the Husband and stayed the maintenance application on the ground of *forum non conveniens.* The Judge relied chiefly on four factors. Firstly, the Wife had no intention of returning to reside in Singapore. Secondly, both the Husband and the Wife were Indian nationals. Although both the Husband and the Wife were Singapore PRs, the son only had a long-term visit pass. Thirdly, the parties had no known immovable assets in Singapore. Fourthly, the mere fact that proceedings commenced in India would take a long time to be heard was insufficient to avoid a stay; furthermore, Indian court orders are enforceable in Singapore.

10 I will first discuss the question as to whether a s 69 application is a civil or criminal process and then address whether the application can be stayed on the ground of *forum non conveniens.*

Does the Court have the power to stay proceedings?

Maintenance proceedings are civil in nature

11 Section 79(1) of the Women's Charter stipulates that:

> **Procedure**
>
> **79**.—(1) Except as otherwise provided in the rules made under subsection (1A), all applications to a District Court or a Magistrate's Court under this Part and Part VII shall be made and heard in the same manner and in accordance with the same procedure as applications for summonses are made and heard by the District Court or the Magistrate's Court *under the provisions of the Criminal Procedure Code* (Cap. 68) *and an application under this Part and Part VII shall be deemed to be a complaint for the purposes of that Code.* [emphasis added]

12 The Wife avers that nothing in the CPC allows a court, in the exercise of its criminal jurisdiction, to stay proceedings on the ground of *forum non conveniens.* That power to stay proceedings, she contends, is only exercisable in civil proceedings.

13 A plain reading of s 79 of the Women's Charter leads to the unassailable conclusion that the provision only governs *procedure*. While it does not explicitly state that such an application is a civil matter, neither does it state that it is criminal in nature. If one were to look at the real substance of the application, it is for all intents and purposes a civil matter. Neither s 69 nor s 79 of the Women's Charter provides that a husband commits an offence when he does not maintain his wife or children. It is my opinion that the legislature had via s 79 of the Women's Charter merely intended to provide a simple and expeditious procedure to enable a wife (and children) to obtain support.

14 In this regard, there is another provision in the Women's Charter which is instructive of how one should view a s 69 application. Section 77(1) of the Women's Charter unequivocally states that, for an s 69 application, an appeal from a District Court or a Magistrate's Court shall lie to the High Court exercising its appellate *civil* jurisdiction:

> **Appeal**
>
> **77**.—(1) Subject to the provisions of this Part and Part VII, an appeal shall lie from any order or the refusal of any order by a District Court or a Magistrate's Court under this Part and Part VII to the High Court exercising *appellate civil jurisdiction* under the provisions of the Supreme Court of Judicature Act (Cap. 322). [emphasis added]

This strongly indicates that a s 69 application is essentially civil in nature – it would be strange for criminal proceedings to suddenly transmute, on appeal, into civil proceedings.

15 In *Chew Cheng Swee v Chan Chye Neo* [1932] MLJ 5, the court stated that proceedings are only criminal in nature where they may end in imprisonment. It was held (at 9) that "on an application for an order for a monthly allowance by way of maintenance the proceedings are civil since they cannot result in the imprisonment of the husband or father, but can only result in the making or refusal of any order." In *Tan Hock Chuan v Tan Tiong Hwa* [2002] 2 SLR(R) 90, Yong Pung How CJ opined on the effect of s 79 of the Women's Charter in the context of personal protection orders governed by s 65 of the Women's Charter. The then Chief Justice stated (at [8]) that the "utilisation of criminal procedure in such proceedings does not automatically make them criminal in nature", and further that "no conviction, fine or criminal record can flow from an application for a personal protection order." As such, he held that proceedings relating to personal protection orders were not criminal in nature, and that the process of criminal revision was not available to the applicant in that case.

16 I should also add that in Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2007), the learned author similarly agrees with the foregoing. The author wrote (at p 456)*:*

> *…*
>
> Despite the originating procedure being borrowed from the Criminal Procedure Code, the application for maintenance is civil proceedings [*sic*]. Once started, the maintenance hearing proceeds as any other civil proceeding.
>
> …
>
> In this way, the complainant need not engage a lawyer to kick off the process … the originating process is as cheap and speedy as legal process permits.

17 In the result, I would hold that a s 69 application for maintenance is civil in nature. Accordingly, the doctrine of *forum non conveniens* applies to such proceedings.

18 At this juncture, I should add that I have not been able to unearth any case authority from any Commonwealth country where a stay was ordered on the ground of *forum non conveniens* in relation to a maintenance application filed by a wife against her husband. However, in England, the doctrine of *forum non conveniens* was held to apply to divorce proceedings not governed by intra-European Union legislation on mandatory jurisdiction (see *eg*, *Dampierre v De Dampierre* [1988] 1 AC 92 which applied the test in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*") to proceedings governed by the Matrimonial Causes Act 1973; *JKN v JCN (Divorce: Forum)* [2011] 1 FLR 826).

19 In Australia, the courts do not apply the *Spiliada* test but, rather, the test of whether "the local court is a clearly inappropriate forum, which will be the case if continuation of the proceedings in that court would be oppressive, in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustified trouble and harassment" (see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 ("*Voth*") at 564-565, adopting *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247). Divorce proceedings were stayed pursuant to the test in *Voth* by the High Court of Australia in *Henry v Henry* (1996) 185 CLR 571.

20 It is undoubtedly true that maintenance of a former wife is ancillary to, and is very much a part of divorce proceedings. However, I cannot see any objection in principle or in logic why a freestanding maintenance application *simpliciter* by a wife against her husband should be treated any differently.

Should the maintenance proceedings be stayed pursuant to the doctrine of forum non conveniens?

The law

21 It is well established that the *Spiliada* test is applied to determine if a proceeding commenced in Singapore ought to be stayed on the ground of *forum non conveniens* (see *eg*, the decisions by the Court of Appeal in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519, *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1997] 3 SLR(R) 363, *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 ("*Eng Liat Kiang*") and *Brinkerhoff Maritime Drilling Corp and another v PT Airfast Services Indonesia and another appeal* [1992] 2 SLR(R) 345).

22 The *Spiliada* test consists of two stages. In stage one, it must be shown that there is another

available forum which is clearly or distinctly more appropriate than Singapore to determine the dispute. The court shall take into consideration factors not only encompassing convenience or expense, but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business. If there is another available forum which is clearly more appropriate, the court will ordinarily grant a stay, unless there are special circumstances by reason of which justice requires that a stay should nevertheless be refused. The latter is the second stage of the *Spiliada* test, under which the court shall consider whether those special circumstances exist to warrant the exercise of its discretion to refuse a stay.

23 It is clear that the court, in determining whether Singapore is a *forum non conveniens*, exercises a discretion. As such, an appellate court should be slow to interfere. In *Spiliada*, Lord Templeman opined (at 465) that "the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge … An appeal should be rare and the appellate court should be slow to interfere". The same proposition was repeated by the Court of Appeal in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [84]:

> 84 It is clear that in determining whether or not to grant a stay of proceedings, the judge will be exercising a discretion. Such an exercise of discretion should not be interfered with by an appellate court unless the judge had misdirected himself on a matter of principle, or he had taken into account matters which he ought not to have taken into account or had failed to take into account matters which he ought to have taken into account, or his decision is plainly wrong …

24 The *Spiliada* test is essentially a factors-based test: the weight to be placed on the various factors varies with each factual matrix. A factor that proves to be the tipping point in one case might not be that important in another. However, the defendant's residence does appear to be of some import. Lord Goff in *Spiliada* opined (at 477) that "if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas". Thus, where a defendant seeking a stay is working and residing in Singapore, there lies a greater evidential burden on him: the countervailing factors adduced in favour of the stay have to be correspondingly more convincing, in comparison to the hypothetical factual matrix, *ceteris paribus*, where the defendant is not resident in Singapore.

25 In *Rockware Glass Ltd v MacShannon* [1978] 1 AC 795 ("*MacShannon*"), this burden was met. The defendants were companies headquartered and registered in England. Despite this, the House of Lords granted the *forum non conveniens* plea of the defendants. Lord Diplock stated (at 812):

> My Lords each of the instant actions arises out of an industrial accident or disability alleged to have been sustained by a plaintiff who lives in Scotland in the course of his employment in a factory in Scotland. All the witnesses to fact likewise live in Scotland and unless they have since retired earn their livings there. The plaintiff was treated for his injuries or disability by doctors practising in Scotland. Medical and other expert witnesses accustomed to giving evidence in industrial injury actions are available in Scotland. A mere recital of these features of the actions is sufficient to establish a prima facie case that each of them could be tried at the local sheriff court or the Court of Session at substantially less expense and inconvenience than in England.

26 In *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494, the plaintiff sued the defendant, who was a Singaporean residing in Singapore, on a personal guarantee. The High Court stayed the action on the basis that (at [21]):

> 21 It is, indeed, clear that the majority of the real and close connecting factors were located

in *Malaysia*. These include the underlying transaction upon which the defendant is basing his defences, the material witnesses as well as the documents of ACT (which had, as already mentioned, since been wound-up as a result of proceedings initiated by the plaintiff itself in Malaysia). It is important to note that it is not the mere literal or factual geographical connections that are important (which the plaintiff raised in the context of Singapore). There must be legal significance, so that the mere number of geographical connections *per se* is not conclusive by any means. … [emphasis in original]

27 Similarly, the Court of Appeal in *Eng Liat Kiang* stayed proceedings despite the fact that both the plaintiff and defendant were Singapore citizens resident in Singapore (see [34]):

> 34 Although the nationality and place of residence of the parties are relevant, they are not the only factors to be taken into account in deciding whether Singapore is the appropriate forum. The jurisdiction of the court is not based on the nationality and residence of the parties alone. Great weight should also be attached to the location of the subject matters in dispute and the undesirability of a Singapore court in deciding issues involving ownership of land in Malaysia. …

28 Admittedly, while a defendant's place of residence is an important factor, it is not determinative. Still, the defendant must show that there is another available forum which is *clearly or distinctly more appropriate* than Singapore. To do so, he must adduce sufficient evidence pointing to countervailing factors in favour of a stay – be they the location (and compellability) of witnesses, the place where the tort or transaction occurred, or the *ratione materiae* of the dispute.

Stage one of the Spiliada test

29 Reverting to the instant case, the only factor which the Husband could point to in justifying a stay is the fact that the Wife (and the son) is presently residing in India and that there is some indication that she does not intend to return and live in Singapore. I note that the Wife and son are both Indian nationals. While not entirely discounting nationality as a connecting factor, nationality *per se* is of limited significance. In an increasingly globalised world, multiple nationalities are becoming the norm. Residency and/or domicile are better indicators of the strength of a party's connection to a particular forum. Further, unlike the circumstances in *MacShannon* and *Eng Liat Kiang*, there are really no other factors which demand that the determination of the maintenance application must be heard in India. On the other hand, the Wife instituted the maintenance application in Singapore, where the Husband resides and works. His income is derived from his work here and he maintains bank accounts in Singapore. The Wife is not complaining that she has to come to Singapore to pursue the claim. Indeed, if the matter should be heard in India, then the Husband would have to travel from Singapore to India. Thus, no matter where the claim is heard, one party would have to travel. This is therefore a neutral factor. From all accounts, it will be just her testimony against his testimony as to whether she and the son are entitled to any maintenance and, if so, what would be the appropriate quantum. There is no question of there being a need by either party to compel third party witnesses to testify in court, as was the case in *MacShannon.* It is true that the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) provides for the local enforcement of judgment sums obtained from an Indian court (see the Reciprocal Enforcement of Commonwealth Judgments (Extensions) (Consolidation) Notification (N1, GN No S151/1925, 1999 Rev Ed). While this procedure may be somewhat more cumbersome compared to the enforcement of a Singapore judgment sum in Singapore, this does not *per se* militate against a stay. I would regard it as neutral.

30 In this regard, I ought also to point out that the pending divorce proceedings instituted by the Husband in India is not for the same relief as that claimed by the Wife in the present maintenance application in Singapore. If the Husband were to succeed in his divorce petition, it would result in the

termination of the marriage, with the Wife being entitled to apply for post-divorce maintenance. On the other hand, the maintenance application by the Wife pursuant to s 69 of the Women's Charter is premised on the subsistence of the marriage. Thus both proceedings are distinct and do not cover the same grounds.

31 The only pertinent factor in favour of a stay is the fact that the court here may be required to determine matters touching on the cost of living in India. This may be so to a certain extent, but is not entirely the case, as the quantum is also contingent on the earning capacity of the Husband. The court is entitled to take judicial notice of the fact that one's cost of living depends on the stratum of society to which one belongs. Here, both the Wife and the Husband are lawyers whose standard of living would certainly be higher than average.

32 I note that in *Helen Diane Womersley (m.w.) v Nigel Maurice Womersley* [2003] SGDC 186 at [14], it was held by the District Court that an "English court would be in a better position to consider the cost of living in England". In *Prapavathi d/o N Balabaskaran v Manjini Balamurugan* [2002] SGDC 354 at [48], the District Court opined that it would be easier for a Singapore court to consider the wife's cost of living in Singapore. While I do not disagree with these statements as general propositions, in the present case I do not think that this factor *per se* tilts the balance in favour of a stay, especially with the lack of other factors pointing towards a stay.

33 Ultimately, two questions must be addressed by the court in a s 69 application. First, the wife must show that she needs maintenance and that the husband has neglected or refused to provide reasonable maintenance for her and any child of the marriage. Second, the court will have to determine the quantum required for maintenance. On the first question, the court in Singapore is as well placed as any other to rule on the issue. As regards the second question, the advantage of an Indian court is at best limited because of two considerations. First, the Wife has stated that she intends to return to live in Singapore. Second, in determining the quantum of maintenance, the court shall have to take into account the standard of living enjoyed by the Wife and the son *before* the Husband's neglect or refusal to maintain them (see s 69(4)(*f*) of the Women's Charter). On this aspect, a Singapore court would be better placed than an Indian court to determine that matter as the parties were then living in Singapore. Thus while a Singapore court may be at a slight disadvantage vis-à-vis the question of the cost of living in India, it is at an advantage vis-à-vis the question of the previous standard of living of the parties in Singapore. In other words, a Singapore court will not be at a complete disadvantage, when compared to an Indian court, in determining the proper quantum of maintenance.

Conclusion

34 In the result, I hold that the Husband has not discharged the burden of showing that India is clearly or distinctly a more appropriate forum. The Judge had erred on two counts: first, in placing too much weight on the nationality of the parties and not giving sufficient consideration to the fact that the Husband is residing and working in Singapore and, second, in over-emphasising the impracticality of a Singapore court in adjudicating on the issue of quantum, when a Singapore court is no more disadvantaged than an Indian court (see [33] above). Therefore, based on stage one of the *Spiliada* test, this proceeding should not be stayed. Accordingly, there is no need to apply stage two of the *Spiliada* test.

35 The appeal is therefore allowed. The Wife is awarded costs here and below (to be taxed, if not agreed), with the usual consequential orders.