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James Sloan v Sarala Devi Sloan

HIGH COURT (KUALA LUMPUR)
SURAYA OTHMAN J
DIVORCE PETITION NO S8-33-623-2009
22 February 2010

*Cyndi L. K. Chow (June Y. S. Yip with her) (**Josephine, L. K. Chow** & Co.) for Petititoner*

Foo Yet Ngo (Cynthia Bernard with him) (Y. N. Foo & Partners) for Respondent

Suraya Othman, J

INTRODUCTION

This is an application by the respondent by way of Summons in Chambers in encl 6 under Rule 102(1) of the Divorce and Matrimonial Proceedings Rules 1980 and Order 18 Rule 19 of the Rules of the High Court 1980 ("RHC 1980") praying for the following orders:

(1) that the petition for divorce dated 27th April 2009 filed on 6th May 2009 herein be struck out on the grounds that:-
  (a) it is scandalous, frivolous or vexatious; or
  (b) it is otherwise an abuse of the process of this honourable court.

(2) that the whole of the divorce proceeding herein be stayed pending the determination of the application herein;
(3) in the event prayer (1) is rejected, that the respondent be allowed to file her answer within twenty-one (21) days of the order herein;
(4) that the costs of this application be borne by the petitioner; and
(5) any further or other relief that this honourable court deems just and reasonable.

GROUNDS FOR APPLICATION

The respondent in her application laid down grounds for the application which are among others:

(a) the domicile of the petitioner at the time when the petition was presented is not in Malaysia;
(b) pursuant to section 48(1) of the Law Reform (Marriage and Divorce) Act 1976 this court has no jurisdiction to make any decree for divorce;
(c) accordingly, the filing of the petition herein is an abuse of the process of this honourable court;

FACTS AND BACKGROUND

James Sloan, the petitioner, a citizen of the United Kingdom ("UK"), came to Malaysia in 1996 for the purpose of employment. Since then he had worked and resided in Malaysia and still continues to work as a commercial project manager and reside here. He married one Sarala Devi d/o Sockalingam, the respondent, a local Malaysian citizen on 29th July 2004. The marriage was solemnized and registered in Petaling Jaya, Selangor, Malaysia.

On 6th May 2009, the petitioner filed a petition for divorce against the respondent in the Family Division in the High Court of Malaysia. The respondent then filed this Summons in Chamber in enclosure 6 to strike out the petition for divorce on the grounds that this court has no jurisdiction to grant any decree of divorce since the petitioner was not domiciled in Malaysia when the petition for divorce was presented to this court.

SUBMISSION OF COUNSELS

Counsels for the respondent, Ms. Foo Yet Ngo and Ms. Cynthia Bernard submitted that the Petition for Divorce filed herein should be struck out on the ground that the domicile of the petitioner at the time when the petition was presented is not in Malaysia. Learned counsels for the respondent argued that the domicile of a person is that country in which he either has or is deemed by law to have his permanent home, so that in order to acquire a domicile in another country other than the country of origin, a person must intend to reside in it permanently or indefinitely. In this regard, Ms. Foo Yet Ngo, counsel for the respondent submitted the case of *Re Bhagwan Singh Decd* [1964] MLJ 360, where Gill J held that:

> "For this reason it has been said that the term domicile lends itself to illustration but not to definition, unless one is content to define it as permanent home."

Ms. Foo Yet Ngo further submitted that the burden of proving the abandonment of the petitioner's domicile of origin and the acquisition of a domicile of choice in Malaysia falls squarely on the petitioner as decided by Tan Chiaw Thong J in the case of *Melvin Lee Campbell v Amy Anak Edward Sumek* [1998] 2 MLJ 338. In this case, it is stated:

> "...there are two essential elements involved in determining the domicile of choice and these are the factors of residence and the requisite intention to reside permanently for an indeterminate period in the country where it is alleged that the petitioner has adopted the domicile of choice."

Ms. Foo Yet Ngo also submitted that the petitioner's intention of abandoning his domicile of origin in the UK in favour of a domicile of choice in Malaysia is not supported by his conduct as follows:

(i) the husband petitioner has not taken any effective steps to relinquish his citizenship in his country of origin, namely Britain;
(ii) the husband petitioner continues to maintain bank accounts in the UK and has failed to provide any proof that he has since closed any or all such bank accounts;
(iii) the husband petitioner continues to maintain a house in UK allegedly in his ex-wife's name and owns an apartment in Belfast.

Therefore, she argued that the petitioner cannot be said to have "burnt his boats" as far as the UK, his domicile of origin is concerned since he still actively seeks, courts and fosters contact with his domicile of origin.In replying to the above submission, counsel for the petitioner, Ms. Yip Yee Sean submitted that the petitioner has stated in his own words that his intention is to retain Malaysia as his domicile of choice and he continues to be domiciled in Malaysia. He has made Malaysia his home since 1996. This is sustained by the fact that the petitioner continues to live in Malaysia, continues to take up employment in Malaysia and continues to live in his Malaysian home despite having been separated from his wife.

Ms. Yip Yee Sean further submitted that the petitioner's averment on oath in expressing his real intention to live in this country coupled with the surrounding facts and based on his proof of travels and return to Malaysia each time, as seen in his passport is conclusive that Malaysia is his base and that the petitioner has made Malaysia his place of domicile like so many foreigners who had chosen to live here. The petitioner's citizenship and nationality has no relevance to the determination of his domicile of choice. She contended that the petitioner has abandoned the UK as his place of domicile and has chosen Malaysia as his permanent home. Ms. Yip Yee Sean submitted the case of *Ang Geck Choo v Wong Tiew Yong* [1997] 3 MLJ 467, where Suryadi J (as he then was) held that:

> "It is accepted law that the concept of nationality and the issue of domicile are two totally different concepts which

deserve different and separate treatment. A person may change his place of domicile but yet not be divested of his nationality. It would be fallacious to think that the terms 'domicile' and 'residence' as being synonymous..."

PRELIMINARY ISSUE

Having regard to the facts of this case and the above submissions, the preliminary issue that this Court has to consider is whether it has the jurisdiction to entertain the petition for divorce filed by the petitioner on 6th May 2009 and the power to grant it. For it to have jurisdiction, both the petitioner and the respondent has to be domiciled in Malaysia at the time the petition for divorce was presented.

THE LAW

Section 3 of the Courts of Judicature Act 1964 ("CJA") defines local jurisdiction as:

3. Interpretation - "local jurisdiction" means -

a in the case of the High Court of Malaya, the territory comprised in the States of Malaya, namely, Johor, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and

b in the case of the High Court in Sabah and Sarawak, the territory comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan."

It is also relevant to state section 23 of the CJA which reads:

"Civil jurisdiction - general 23. (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where -

(a) the cause of action arose;
(b) the defendant or one of several defendants resides or has his place of business;
(c) the facts on which the proceedings are based exist or are alleged to have occurred; or
(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court."

Section 24 of the CJA is also relevant. It reads:

"Civil jurisdiction - specific 24. Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include -

(a) jurisdiction under any written law relating to divorce and matrimonial causes; (emphasis added)
(b) ...
(c) ...
(d) ..."

The Law Reform (Marriage and Divorce) Act 1976

The specific jurisdiction of the High Court to entertain divorce petitions is provided for under section 48 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ("LRA 1976"). The said section read as follows:

"Extent of power to grant relief

48. (1) **Nothing in this Act shall authorize the Court to make any decree of divorce except:**
(a) where the marriage has been registered or deemed to be registered under this Act; or

(b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
(c) **where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.**" (emphasis added)

Domicile

Section 48 of the LRA 1976 provides that the Court has the power to make a decree of divorce only where, inter alia, "where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia". Therefore, before any proceedings can be heard by this Court, it must satisfy itself that the domicile of both parties were in Malaysia at the time the petition was presented.

In the Supreme Court decision in *William Tan Guan Hock v Khor Chai Heoh* [1990] 1 CLJ 308 Gunn Chit Tuan SCJ at pg 311 e - f (as he then was) observed:

> "... The petitioner would still have to prove and satisfy the Court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the Court could exercise its powers under s. 48 of the Law Reform (Marriage and Divorce) Act to grant any relief to the parties."

Tan Thiaw Chong J in *Melvin Lee Campbell v Amy anak Edward Sumek* [1988] 1 LNS 19 also observed:

> > "The provision of s. 48(1)(c) in my view requires that the Court must be satisfied that at the time when the petition in the instant case was presented, the domicile of both the petitioners was in Malaysia."

In this case the High Court in Kuching, Sarawak held that the husband, a foreigner, even though he had married a native of Sarawak and had lived in Malaysia since 1977 (for a period of over ten years before the joint petition for divorce was filed) had failed to satisfy the Court that at the time of the filing of the joint petition his domicile was in Malaysia. As a consequence, the Court held that the Court had no jurisdiction to entertain the joint petition.

JUDGEMENT OF THE COURT

In our present case, has the petitioner proved to this court that both he and the respondent were domiciled in Malaysia when he filed the petition for divorce on 6th May 2009.

It is not disputed that the respondent wife was domiciled in Malaysia when the petition for divorce was filed by the petitioner husband. But, the pertinent question is whether the petitioner husband too was domiciled in Malaysia when the said petition was filed?

Referring 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. In the light of this case, it is pertinent for this court to discuss on the domicile of choice as the petitioner has stated that his intention is to retain Malaysia as his domicile of choice and he continues to be domiciled in Malaysia.

In Malaysia, the law on domicile is similar to common law. As regard to a domicile of choice, any person may acquire a domicile of choice provided he is an adult, that is to say, 18 years old as required by section 2 of the Age of Majority Act 1971. When a domicile of choice is obtained, the domicile of origin would be held in abeyance until abandonment of the domicile of choice.

In the local case of *Ang Geck Choo (P) v Wong Tiew Ong* [1997] 3 CLJ 201, the petitioner wife a Singaporean was originally domiciled in Singapore but was married to the respondent whose domicile was Malaysia. She filed a divorce petition in the High Court of Malacca.

Suriyadi Halim Omar J, (as he then was), held that the court had jurisdiction to hear her petition because her domicile of origin (Singapore) had changed to that of dependence (domicile of choice) upon her marriage to her Malaysian husband, and since she has not abandoned her domicile of choice (Malaysia) she can petition for divorce in Malaysia. At held 5 it is stated:-

> "[5] The respondent not only had not succeeded in proving the animus but also the factum. The facts showed that when she was in Malaysia the petitioner had already exercised her choice by making Malaysia her place of domicile. The petitioner cannot be said to have abandoned Malaysia as her place of domicile merely by her remaining a Singaporean and seeking employment in Singapore during the temporary period. The petitioner's return to Singapore was clearly due to the abusive behavior of the respondent. Her act was never pursuant to a free choice and therefore cannot be construed as unequivocal. There was also no evidence that the petitioner had "burnt his boats" as to indicate a desire to permanently move back to her country of origin."

In our present case, it is clear from the facts that the domicile of origin of the petitioner is the UK. The question before this Court is whether the petitioner has acquired a domicile of choice in Malaysia as at 6th May 2009, the date of the presentation of the petition.

Clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.

This principle was established by Sir Jocelyn Simon P in the case of *Henderson v. Henderson* [1965] 1 All ER 179 :

> "In order to help resolve such difficulties the law has evolved further rules. First, clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities."

It is not in disputed that the petitioner has been residing in Malaysia since 1996 and is still residing here. The petitioner has stated in his affidavit that he continues to live in Malaysia, continues to take up employment in Malaysia and continues to stay in his Malaysian home despite having been separated from the respondent. Case authorities have held that the oath of a person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for this Court is whether upon a review of all the circumstances it gives credit to his evidence. In this regard, the court in the case of *Joseph Wong Phui Lun v. Yeoh Loon Goit* [1978] 1 MLJ held that:

> "The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for the court is whether upon a review of all the circumstances it gives credit to his evidence."

CONCLUSION

It is not disputed that the petitioner first came to Malaysia in May 1996 for the purpose of employment and since then he has resided in Malaysia and is still residing here. This fact alone (residence) is not sufficient to prove that he has displaced the domicile of origin in favour of the domicile of choice. The petitioner has to prove that he not only resided in Malaysia but has the intention to make that residence permanent for an indeterminate period of time.

The question is whether that intention has been successfully proven in this court. The cases of *Re Bhagwan Singh Decd* (supra); *Joseph Wong Phui Lun* (supra) and *Copinger-Symes v. Copinger-Symes & Anor* (1959) MLJ 196 may be of assistance.

In *Re Bhangwan Singh Decd*, the court in determining a change of domicile will look into the intentions of the party (who is not under disability) to see whether there is intention to reside indefinitely in the country of his domicile of choice.

> "The general rule as to change of domicile is that any person not under disability may at anytime change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with the intentions of continuing to reside there indefinitely."

In Joseph Wong Phui Lun FA Chua J stated that in determining a man's domicile it is always material to consider where his wife lived and where their permanent place of residence is located.

> "... it was always material, in determining a man's domicile, to consider where his wife and children lived and their permanent place of residence or where his establishment was kept. But where the marriage had broken down, the residence of the wife lost it's significance."

In ***Copinger-Symes***, Good J held that:-

> "The person claiming to have acquired a new domicile of choice must, for his claim to succeed, have "burnt his boats". He must have settled in the country of his choice, or at least have taken some steps indicating an intention to take up permanent residence there, such as the purchase of a house for his own occupation, the transfer of his effects ... or the like."

In our present case, the petitioner, as stated earlier, has resided in Malaysia since May 1996 and continues to reside here. He married the respondent, a local Malaysian citizen in Petaling Jaya, Selangor on 29th July 2004. He bought a condominium in Bangsar, Kuala Lumpur for the respondent and himself to live in. He had also averred on oath that he intends to retain Malaysia as his domicile of choice as he has a permanent job and he has become knowledgeable, accustomed and inured with the way of life here and has no intention of leaving unless forced by law to do so. In February 2007, the petitioner alleged that the respondent left the condominium. Despite being left and separated by the respondent, the petitioner continues to live in his Malaysian home. He has been employed and lived in Malaysia for 13 years when he filed the petition for divorce on 6th May 2009.

Apart from this, the petitioner has indicated in his affidavits the following:

(a) the petitioner no longer have an active bank account in UK;
(b) the petitioner does not own any property in the UK save for a small apartment in Belfast;
(c) the petitioner only makes annual visits to the UK to visit his family members and friends;
(d) the petitioner does not maintain any endowments or trust funds in the UK save for the endowment for the apartment in Belfast. The petitioner have since ceased making any contribution to his pension in the UK and has since taken steps to withdraw the same from the UK;
(e) the petitioner is employed in Malaysia under a valid work permit and pays taxes to the Malaysian Inland Revenue Department;
(f) the petitioner travels frequently for work purposes to various places but returns to Malaysia each time. His passport is reflective of this fact;

Therefore, could it be said that the petitioner has "burnt his boats"; that he has abandoned the UK, his domicile of origin and has taken overt steps to acquire Malaysia as his domicile of choice?

I believe so.

All the above facts and averments on oath taken cumulatively showed that the petitioner has changed his domicile, i.e. that he has abandoned his domicile of origin and acquired for himself a domicile of choice. He has by his conduct and actions formed his intention to make Malaysia his permanent home.

The next question is; must the petitioner divest or relinquish his British citizenship or nationality and completely ceased all ties, or in the words of Ms. Foo Yet Ngo, he should not "actively seeks, courts and fosters contact with his domicile of origin" before he can be deemed to have abandoned his domicile of origin and acquired a domicile of choice?

The answer to that is No.

The fact that the petitioner did not denounce or relinquish his British citizenship is not material or relevant in this case. This is because the concept of nationality and the issue of domicile are two totally different and separate concepts which deserve different and separate treatment. They are not synonymous and must not be confused to mean one for the other. This court agrees that a person does not need to divest his nationality to show that he has acquired a domicile of choice.

Further, must the petitioner cease all ties to his domicile of origin? Does the fact that the petitioner owns a small apartment in Belfast and that he makes annual visits to the UK to visit his family and friends disqualify him from acquiring a domicile of choice. To what extent, then, must one need to go, in order to have "burnt one's boats" before one can acquired a domicile of choice?

It is absurd and indeed inhumane to expect the petitioner to cut all ties with his domicile of origin. The UK is after all where his parents, children (petitioner has 2 children by his previous marriage), relatives, old friends and acquaintances still reside. As such, it is illogical to expect the petitioner to just "forsake and abandon" them for surely that could not be the intention of His Lordship, Good J, when he said "burnt his boats".

To own a property overseas, other than that in one's own country, in this day and age, does not mean that one is going to migrate or make that property one's permanent home. Likewise, having or keeping a property in one's original country of origin, then residing in another country for a long time, does not mean, that one will return to live in that property. Owning an apartment in Belfast and not selling it does not mean that the petitioner has not "burnt his boats". The apartment could have been kept for a number of reasons: it could be an investment that brings good returns; it could provide a place for the petitioner to live in when he is in the UK to visit his family and friends or it could be kept for his 2 children to inherit. Therefore, the fact of ownership of property by the petitioner in his country of origin, without more, is not sufficient to prove anything.

As to the allegation that he maintains a house in the UK in his ex-wife's name, I will not dwell on it, since to do so, could to my mind, lead to a lot of unnecessary speculation. Suffice to say, that since the house is in her name, it is most likely that she actually owns it or it could have been given to her by the petitioner as part of their divorce settlement.

The case of ***Copinger-Symes***, has to be read in its proper context. The phrase "burnt his boats" according to Good J, to my mind, is a situation where if one has settled in one's country of choice, or at least has taken some step indicating an intention to take up residence there, such as the purchase of a house for one's own occupation and transfer of one's effect, then in such a situation one could be said to have "burnt his boats" or not to return to live in one's country of origin but to reside permanently in the country of choice.

It must be noted that this decision was made on the 28th January 1959 and our case today, dates 50 years later (the petition for divorce is filed on the 6th May 2009). The circumstances then and now have changed tremendously. The life and times of the 50's and 60's can no longer be strictly relied upon in construing what our living lifestyle and circumstances are at the present times. People travel and move around with such great mobility, frequency and speed that it may sometimes be difficult to define one's place of domicile with mathematical precision. To accept the respondent's contention that the petitioner must sever his ties completely with his birth place before he can be considered to have "burnt his boats" and abandoned his domicile of origin, is to my mind, ludicrous in this day and age:- as stated earlier what if one has family and friends who remains in one's country of origin. Is one to cut off one's family ties and old friendships just to meet the rigid criteria of complete severance before one can be deemed to have acquired a domicile of choice? Must one not keep even one property to satisfy this draconian requirement?

That cannot be so. In the modern day context, suffice if the petitioner has shown clearly that he intends to make his "adopted" country his permanent home and residence where, if he is absent due to work or other engagements, he has every intention of returning.

In our present case, 13 years of working and residing in Malaysia is a very long time indeed! Coupled with

the fact that the petitioner had married the respondent, a local Malaysian citizen in 2004 which marriage was solemnized and registered in Malaysia in accordance with Malaysian law; the fact that he had bought a condominium in Bangsar, Kuala Lumpur for them to live in and he continues to live there despite being separated from the respondent; his oath of intention to retain Malaysia as his domicile of choice and all other factors enumerated before, all these clearly show that he intends to make Malaysia his domicile of choice, i.e. his permanent home.

Therefore, based on all the above, I am satisfied that the petitioner has discharged his burden of proving, beyond a balance of probabilities, that he has abandoned his domicile of origin and acquired a domicile of choice in Malaysia at the time the divorce petition was presented. As such, since both the petitioner and respondent were domiciled in Malaysia when the said petition was presented, this court clearly has jurisdiction pursuant to section 48 of the LRA 1976 to entertain the petition for divorce filed by the petitioner on 6th May 2009, and, consequentially, the power to grant it.

On this premise, the summons in chambers to strike out the petition for divorce filed on 6th May 2009 is dismissed with costs. Prayers 1 and 2 of enclosure 6 are dismissed. With the dismissal of prayers 1 and 2, prayer 3 is allowed.

Application dismissed with costs.