

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980,
ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C
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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2019-095-004467
[2020] NZFC 5047**

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| IN THE MATTER OF | THE FAMILY PROCEEDINGS ACT 1980 |
| BETWEEN | [ANIL VISWAN] Applicant |
| AND | [ASHA SAJAR] Respondent |

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| Hearing: | 17 June 2020 |
| Appearances: | D Chambers QC for the Applicant C Shade for the Respondent |
| Judgment: | 6 July 2020 |

**RESERVED JUDGMENT OF JUDGE L J RYAN
[Dissolution of Marriage – Forum Conveniens]**

[1] This is an application for an order dissolving the marriage of the parties who were married [in October] 2007 and separated on 3 November 2009. They have one child, a daughter, born [date deleted] 2008 ([Mina]).

[2] At the outset of the hearing counsel for the respondent sought an adjournment due to the applicant making an application on 15 June 2020 to strike out the evidence of a [Din Roychaudhuri], the respondent's father.

[3] Counsel for the respondent sought time to obtain further instructions from the respondent in respect of the interlocutory application to strike out evidence and if necessary, to enable her to file evidence from the respondent in respect of that application.

[4] The application for an adjournment was opposed by the applicant, whose counsel submitted that the interlocutory application to strike out inadmissible evidence could be dealt with at the commencement of the hearing. There was ample time for the Court to hear submissions and consider the application as the issue of the affidavit's admissibility was purely a legal one. Ms Chambers QC submitted that it was not necessary for the respondent to get further instructions in respect of the legal issues and no further evidence was required to enable me to deal with the issue of admissibility. I agreed with those submissions and declined the application for adjournment.

[5] The respondent's father's evidence is obviously inadmissible as he was purporting to give evidence on Indian law. It is apparent that the respondent's father has no experience of a professional nature in Indian law and he was giving evidence on matters of which he had no direct knowledge. Indeed, much of his evidence was opinion which in and of itself is unhelpful and accordingly inadmissible.

[6] Accordingly, I order the evidence of the respondent's father be struck out and the affidavit be removed from the file.

[7] The two substantive issues for me to determine relate to forum conveniens and the respondent's defence to the application for dissolution, in the event that I determine this Court is the appropriate forum.

Forum Conveniens

[8] On 31 July 2013 the applicant initiated divorce proceedings in India. It is clear from both parties' evidence this application has followed a slow and tortuous path through the Indian legal system. The delays in the proceedings, which are yet to be finalised some seven years later, have been contributed to by the respondent taking proceedings under different legislative provisions in India such as spousal maintenance and the filing of a petition for restitution of conjugal rights. Additionally, both parties have been dissatisfied with various rulings and judgments from the Indian Courts and there have been appeals in respect of some of those judgments. Currently the applicant's divorce application remains stayed. There is a pending appeal by the against a child maintenance order and the petition for restitution for conjugal rights remains outstanding. The applicant continues to pay the current maintenance obligation for his daughter in the sum of 10,000 Indian Rupees per month.

[9] The applicant in the hope of trying to conclude all of the litigation in India travelled to that country at the end of 2017 where he remained until May 2019. He was unsuccessful in that endeavour and returned to New Zealand. In July 2019 he filed the present application for dissolution of the marriage.

[10] For the respondent it is submitted that the Family Court in India is clearly the more appropriate Court for the divorce proceedings to be determined. She argues that there is already an advanced application for the divorce, that the applicant has submitted to the jurisdiction of the Indian Court system by initially filing that application, convenience, expense and witness availability favour the proceedings being heard in India, and the applicant is seeking clear personal and juridical advantages by issuing proceedings in New Zealand. In doing so there is an abuse of process. Finally, it is submitted that any order for dissolution made by this Court would likely be unenforceable in India.

[11] A strong argument is advanced that there are significant cultural and religious reasons requiring the issue of the marriage to be determined in the country in which it was celebrated. The parties are Hindu and their customs and cultural requirements can be more properly met in India than in New Zealand. It is pointed out that there will not be any prejudice to the applicant to remain married to the respondent pending the Court in India making a decision in those proceedings.

[12] Counsel for the applicant argues that there should not be a stay of the New Zealand proceedings as New Zealand is the appropriate forum for the determination of the substantive issue. I was referred to the judgment in *Gilmore v Gilmore*¹ where it was held the following principles should be at the centre of the Court's inquiry as to whether the foreign forum is clearly more appropriate than New Zealand:

- “(a) Stay will be granted only where there is a foreign forum which is the appropriate forum in the sense that the case will be more suitably tried there in the interests of all parties and in the interests of justice;
- (b) The burden of proof rests on the defendant seeking a stay and foreign adjudication. The approach is objective;
- (c) The burden of showing greater suitability is not merely to show New Zealand is not the natural or appropriate forum, but to establish the foreign forum as clearly or distinctly more appropriate;
- (d) In assessing that question, the Court looks to factors which show up the most real and substantial connection with the respective forums. These include, although not exclusively, such matters as convenience, expense, and witness availability, all three of which are really matters of trial mechanics, but also includes such matters as national law governing transactions or subject matter, respective residences and place of business, and indeed all other connections. An overall view is warranted;
- (e) Even if it then appears the foreign forum is clearly more appropriate, the New Zealand Court may elect not to stay the New Zealand proceedings if there are circumstances by reason of which justice so requires. The burden of proof rests on the plaintiff so seeking to establish an exception. It appears to have been designed to deal with the possibility that a plaintiff may not obtain justice elsewhere. Perhaps because of uncivilised or suspect judicial systems;
- (f) The fact that proceedings are in train in the foreign forum, a so called *lis alibi pendens*, is relevant but not decisive;
- (g) The fact that a plaintiff may obtain legitimate personal or juridical advantage through proceeding in New Zealand is likewise relevant but

¹ *Gilmore v Gilmore* [1993] 10 FRNZ 469.

not decisive. The appropriate forum must be determined on an objective basis, serving the interests of both sides and the general interests of justice;

- (h) Potential enforceability of judgment obtained abroad has been regarded as relevant.”

[13] Dealing with the above factors it is abundantly clear and I find accordingly, that the cost and convenience of the proceedings in New Zealand is significantly less than those in India. The Indian proceedings appear to be stayed in some respects. Certainly no progress is being demonstrated. There is no light at the end of the tunnel. It is difficult to see how the issue of the location of witnesses or the availability of documents is relevant in relation to the dissolution of the parties’ marriage. Whilst clearly there is litigation in India it is equally as clear that seven years on, those proceedings have gone nowhere. It may be the case that the respondent has been deliberately delaying the progress of the various applications before the Indian Court, but I am not prepared to make a finding in that respect. Having said that, I do note that there was a ruling from a senior Court in India to the effect that the application for the divorce ought to be progressed rapidly.

[14] There is no evidence for me to conclude that the respondent will be prejudiced in the proceedings before the Indian Court by my making an order dissolving the marriage here in New Zealand. Certainly, the authorities are clear that the existence of proceedings in a foreign Court does not exclude the jurisdiction of this Court to consider the current application.

[15] Other than obtaining a resolution in respect of the application for dissolution, it appears to me there is no juridical advantage to the applicant by his pursuing the application in the New Zealand Court. I have the view that in any litigation concerning family law matters especially, but also generally, it is in both parties’ interests to obtain a resolution of the dispute between them. It is in no one’s interests to delay a resolution of Court proceedings, especially when one considers the costs associated with litigation. Whilst it has been submitted that a New Zealand dissolution order may not be enforceable in India there is no evidence to that effect. In any event, the order dissolving this marriage is obviously recognised in New Zealand which is where the applicant lives and intends to continue living.

[16] For all of these reasons I am not prepared to stay the proceedings in this Court. I find the New Zealand Family Court to be the appropriate forum for determining the issue of whether this marriage should be dissolved.

Grounds for the Dissolution Order

[17] The evidence establishes that the parties have been living apart for more than two years prior to the date of filing of the application for dissolution. That is evidence that the marriage has irreconcilably broken down which is the sole ground for obtaining an order dissolving a marriage in New Zealand.

[18] Counsel for the respondent submits that I should decline to grant an order dissolving the marriage as the provisions of s 45(1) of the Family Proceedings Act have not been satisfied. In particular, she points out that arrangements have not been made for the maintenance and other aspects of the welfare of the child of the marriage that are “satisfactory or are the best that can be devised in the circumstances”.

[19] In this particular instance the child is in the day to day care of the mother. The father has fairly restricted contact. He is paying maintenance for the child as fixed by the Indian Court. That judgment may be under appeal but clearly the process in India is satisfactory in the circumstances. There is nothing more the applicant can practicably do in respect of the maintenance of his daughter other than to comply with the current order which the evidence discloses he does. That in fact is not challenged by the respondent.

[20] I am satisfied that satisfactory arrangements have been made for the maintenance and welfare of the child of the marriage therefore there is no impediment to the making of an order.

Result

[21] The grounds having been made out, having declined to grant a stay of the proceedings, there is an order dissolving the parties’ marriage in terms of the application.

Costs

[22] Costs should follow the event. The application has been successful. The Registrar is to fix costs in favour of the applicant on a category 2B basis.

Judge LJ Ryan
Family Court Judge

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