

IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2016] SGHCF 5

District Court Appeal from the Family Courts No 124 of 2015

Between

TMO

... Appellant

And

TMP

... Respondent

GROUND OF DECISION

[Family Law]—[Financial relief after foreign divorce]—[Chapter 4A of the Women’s Charter]

[Family law]—[Jurisdiction and Power of the High Court and Syariah Court]

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TMO

v

TMP

[2016] SGHCF 5

High Court — District Court Appeal from the Family Courts No 124 of 2015
Debbie Ong JC
6 January; 18 March 2016

1 April 2016

Debbie Ong JC:

Brief Facts

1 In the present case, the Appellant and Respondent were married under Muslim law. Their marriage was dissolved by a divorce granted by the Johor Court, allegedly without the Appellant's knowledge. The Appellant subsequently sought financial relief in the Singapore Syariah Court. The Appellant's counsel informed this court that the Syariah Court had indicated that the application for the division of assets ought to be pursued in the Civil Courts as the Syariah Court could not grant that relief. He submitted that s 52 of the Administration of Muslim Law Act (Cap 3, 2009 Rev Ed) ("AMLA") does not provide for the division of assets where the marriage was not dissolved by the Syariah Court.

2 Having failed to obtain an order for the division of assets at the Syariah Court, the Appellant made an application under Chapter 4A of Part X of the Women's Charter (Cap 353, 2009 Rev Ed) ("WC"), for leave to apply for a division of assets after a foreign divorce. Chapter 4A of Part X of the WC, which was introduced in 2011 (by virtue of the Women's Charter (Amendment) Act 2011 (Act 2 of 2011)), extended the powers in ss 112, 113 and 127 of the WC to marriages which have been dissolved, annulled, or where the parties to a marriage have been legally separated by means of judicial or other proceedings in a foreign country recognised as valid under Singapore law. Prior to 2011, where a marriage has been terminated by a foreign decree, the Singapore court could not deal with the post-divorce issues such as division of matrimonial assets or maintenance for the former spouse (see *Harjit Kaur d/o Kulwant Singh v Saroop Singh a/l Amar Singh* [2015] 4 SLR 1216 at [1] and [2]).

3 The District Judge granted leave required by s 121D (under Chapter 4A) of the WC but held that it had no jurisdiction to hear the substantive matter under s 121G. S 121G(1) of the WC provides:

(1) On an application by a party to a marriage for an order for financial relief, the court may make any one or more of the orders which it could have made under section 112, 113 or 127(1) in the like manner as if a decree of divorce, nullity or judicial separation in respect of the marriage had been granted in Singapore.

Issue in this appeal

4 The issue in this appeal was whether the District Judge was correct in finding that there was no jurisdiction to hear the application under s 121G of the WC.

Jurisdiction of the High Court and Syariah Court

General

5 Section 17(a) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) provides that:

... the civil jurisdiction of the High Court shall include ...
jurisdiction under any written law relating to divorce and
matrimonial causes ...

Section 17A(1) of the SCJA excepts from the jurisdiction of the High Court, the hearing of certain matters which come under the jurisdiction of the Syariah Court:

(1) Notwithstanding sections 16 and 17, the High Court shall have no jurisdiction to hear and try any civil proceedings involving matters which come within the jurisdiction of the Syariah Court under section 35(2)(a), (b) or (c) of the Administration of Muslim Law Act (Cap. 3) in which all the parties are Muslims or where the parties were married under the provisions of the Muslim law.

6 It is noted that s 17A SCJA was introduced in 1999 pursuant to amendments to the AMLA and the SCJA (through the Administration of Muslim Law (Amendment) Act 1999 (Act 20 of 1999)) (“1999 Amendments”) to provide for concurrent jurisdiction over specified matters. *Prior* to these amendments, s 16(2) of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) (“SCJA (1985)”) explicitly stated that the High Court had no jurisdiction to try any civil proceedings coming within the jurisdiction of the Syariah Court:

Notwithstanding subsection (1), the High Court shall have no jurisdiction to hear and try any civil proceeding which comes within the jurisdiction of the Syariah Court constituted under the Administration of Muslim Law Act.

7 The approach the courts took then, pursuant to s 16(2) of the SCJA (1985), was that any matter which did not fall within the jurisdiction of the Syariah Court would be within the jurisdiction of the High Court. In *Madiyah bte Atan v Samsudin bin Surin* [1998] 2 SLR(R) 327 (“*Madiyah*”), the Court of Appeal held that a divorce registered by a *kadi* was valid and did not require any further applications to the Syariah Court. It therefore “oust[ed] the jurisdiction of the Syariah Court when it [came] to the disposition or division of property” (*Madiyah* at [28]). The Court of Appeal concluded that only the High Court had jurisdiction to hear the application (*Madiyah* at [36]).

8 The former s 16(2) was repealed in the 1999 Amendments at the same time that s 17A was inserted into the SCJA. Nevertheless, while it is apparent from the Parliamentary debates that the amendments would not dilute or remove the powers of the Syariah Court, there was no intention for the High Court’s jurisdiction to be limited beyond what is statutorily prescribed. This aspect of the decision in *Madiyah* remains relevant in the present provisions – the High Court has jurisdiction over divorce and matrimonial matters that are not within s 17A(1) of the SCJA. This is consistent with the view espoused by Professor Leong Wai Kum that “non-Muslim law is general while Muslim law is the exception” (Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2nd Ed, 2013) (“*Elements of Family Law*”) at p 736).

Concurrent jurisdiction

9 Section 17A(2)-(3) of the SCJA, which were also added as part of the 1999 Amendments, now provides that:

(2) Notwithstanding that such matters come within the jurisdiction of the Syariah Court under section 35(2)(d) or (e), 51 or 52(3)(c) or (d) of the Administration of Muslim Law Act, the High Court shall have jurisdiction as is vested in it by any

written law to hear and try any civil proceedings involving matters relating to —

- (a) maintenance for any wife or child;
- (b) custody of any child; and
- (c) disposition or division of property on divorce.

(3) Where civil proceedings involving any matter referred to in subsection (2)(b) or (c) and involving parties who are Muslims or were married under the provisions of the Muslim law are commenced in the High Court, the High Court shall stay the civil proceedings —

(a) involving any matter referred to in subsection (2)(b) or (c), if the civil proceedings are commenced on or after the commencement of proceedings for divorce in the Syariah Court or after the making of a decree or order for divorce by the Syariah Court or on or after the registration of any divorce under section 102 of the Administration of Muslim Law Act (Cap. 3) between the same parties, unless a Syariah Court commencement certificate in respect of the civil proceedings has been filed with the High Court;

(b) involving any matter referred to in subsection (2)(b), if proceedings for divorce are commenced in the Syariah Court or a decree or order for divorce is made by the Syariah Court or a divorce is registered under section 102 of the Administration of Muslim Law Act between the same parties after the commencement of the civil proceedings, unless a Syariah Court continuation certificate in respect of the civil proceedings has been filed with the High Court.

10 It is noted that the High Court’s exercise of power under s 17A(2) of the SCJA is subject to the conditions in s 17A(3). Section 17A(3) of the SCJA appears to ensure that the High Court does not exercise its concurrent jurisdiction simultaneously with the Syariah Court save where the stipulated requirements in subs (a) and (b) are satisfied. Further, the Parliamentary debates record that there were concerns in the Muslim community “that giving an avenue to the Civil Courts would undermine and diminish the authority of the Syariah Court”. These concerns had to be balanced against the observation that “Muslims, as citizens of this country, must be allowed the same right of

access to the Civil Courts as non-Muslims.” (*Singapore Parliamentary Debates, Official Report* (15 April 1999) vol 70 at col 1249 (Abdullah Tarmugi, Minister for Community Development and Minister-in-charge of Muslim Affairs). The amendments in the Bill thus proceeded with limitations built in (*Singapore Parliamentary Debates, Official Report* (15 April 1999) vol 70 at col 1250):

The Select Committee saw the need for sufficient safeguards to ensure that parties intending to resolve ancillary issues in the Civil Court did so with full knowledge and understanding of the implications. Under the Bill, the legal processes give that person ample opportunity for such knowledge and understanding. Firstly, he or she must first seek leave of the Syariah Court. Secondly, he or she may appeal to the Appeal Board in MUIS for a final decision, if dissatisfied with the Syariah Court's ruling ...

My decision

11 It appears that this is *not* a case which falls under s 17A(1) of the SCJA in which the High Court does *not* have jurisdiction. This is because it is not a matter that falls within the jurisdiction of the Syariah Court under s 35(2)(a), (b) or (c) of the AMLA. Neither is this a case which falls within s 17A(2) of the SCJA, which would require a certificate from the Syariah Court under s 17A(3) before the High Court can exercise concurrent jurisdiction with the Syariah Court. This is because the divorce was granted by the Johor Court and not the Syariah Court. Does this position necessarily lead to the conclusion that this court can grant the relief under s 121G of the WC?

Exercise of the jurisdiction

12 The court can only exercise its jurisdiction in accordance with the provisions of the law. Section 17(a) of the SCJA provides that the civil jurisdiction of the High Court shall include jurisdiction “under any written

law”. Noteworthy is the Court of Appeal’s further holding in *Madiyah* that the Women’s Charter was not applicable to the Muslim parties (at [40]):

Since this application is within the High Court’s jurisdiction and the Women’s Charter (Cap 353) cannot apply (the parties are Muslims), any declaration as to beneficial ownership in the flat can only be ascertained according to the general principles of the law of trust.

13 In the present case, the Appellant sought the division of assets by virtue of an application under s 121G of the WC. This is essentially an application under s 121G rather than s 112, for s 121G is a specific provision applicable when the parties have already been divorced by a foreign court order. Prior to the enactment of s 121G of the WC (and all the provisions under Chapter 4A of Part X of the WC), the court could not grant an order for financial relief if the parties’ marriage had already been dissolved by a foreign court order (see [2] above).

Does s 121G of the WC apply to the present case?

14 Section 3(2) of the WC provides:

(2) Parts II to VI and Part X and sections 181 and 182 shall not apply to any person who is married under, or to any marriage solemnized or registered under, the provisions of the Muslim law or of any written law in Singapore or in Malaysia providing for the registration of Muslim marriages.

It would appear from s 3(2) that even if the High Court had jurisdiction, parties married under Muslim law (such as in the present case) are *not* governed by Part X of the WC. Parliament had thought it necessary to address the inconsistency arising between s 3(2) of the WC and s 17A(2) of the SCJA (which *allows* the High Court to have concurrent jurisdiction over some matters which are within the jurisdiction of the Syariah Court) by the provision in s 17A(8) of the SCJA. Section 17A(8) makes it clear that s 3(2) of

the WC is subject to the SCJA in respect of the court's exercise of jurisdiction to hear an application under s 112 of the WC:

(8) Notwithstanding section 3(2) of the Women's Charter (Cap. 353), section 112 of that Act shall apply to the High Court in the exercise of its jurisdiction or powers under subsection (2)(c).

15 Section 17A(8) is expressly limited to the exercise of the High Court's jurisdiction or powers under s 17A(2)(c) of the SCJA. As I have noted above at [11], since the present matter does not fall within ss 35(2)(d) or (e), 51 or 52(3)(c) or (d) of AMLA, it does not fall under s 17A(2) of the SCJA. Thus s 3(2) of the WC precludes the Appellant's application under s 121G of the WC, and also precludes an application under s 112 for the division of assets.

16 Professor Leong Wai Kum has remarked in *Elements of Family Law* at p 725:

Having different courts resolve disputes in family life is potentially problematic. One problem is how to keep the courts functioning in separate spheres so that their respective jurisdictions do not overlap and clash over a particular dispute. The civil courts have affirmed that, in those disputes allocated by the Administration of Muslim Law Act to be within the jurisdiction of the Syariah Court, the Syariah Court possesses exclusive jurisdiction. In these areas, the Family Court will not entertain the application. This however, does not give good enough guidance on how to resolve the conflicts, apparent or real, that do crop up.

17 The present case shows up a problem, in this case a lacuna, that arises due to the separation of jurisdiction between the Syariah Court and the Civil Courts. The legislative approach to the delineation employs s 17A of the SCJA which allows, relevant to the present appeal, specific provisions in the WC to be re-included as applicable to persons married under Muslim law, as they would otherwise be excluded by s 3(2) of the WC. Where a re-inclusion of a provision is not made, the result is that it is excluded by s 3(2) of the WC.

Parliament did not appear to have addressed its mind to a situation in which parties to a Muslim marriage could fall outside the jurisdiction of the Syariah Court and the Civil Courts, leaving them with no recourse.

18 Whether the current lacuna in which the Appellant is unable to obtain a division order in both courts ought to be plugged, and if so, ought to be addressed as a provision in the AMLA or the SCJA, is a matter for Parliament to decide.

“Plugging the gap”

19 On 18 January 2016, I gave my decision dismissing the appeal, as I was of the view that the High Court does not have the power to make any order under this provision because Part X (under which s 121G falls) does not apply to “to any person who is married under, or to any marriage solemnized or registered under, the provisions of the Muslim law or of any written law in Singapore”. There is no provision in the SCJA such as one similar to s 17A(8) for this application under the present factual matrix. The Appellant then made an application for further arguments to be heard on how this court can ‘plug the gap’ to achieve justice in this case. I allowed the application and heard further arguments on 18 March 2016.

20 The Appellant’s counsel further submitted on when it would be appropriate for the court to use the purposive approach to plug a lacuna in the law. The Court of Appeal decision of *Kok Chong Weng and others v Wiener Robert Lorenz and others (Ankerite Pte Ltd, intervener)* (“*Kok Chong Weng*”) [2009] 2 SLR(R) 709 was cited for this proposition. The Court of Appeal in *Kok Chong Weng* had (at [57]) adopted the test in *Wentworth Securities Ltd v Jones* [1980] AC 74 for determining cases in which the court could read words into an Act not expressly provided for:

57 In *Wentworth Securities Ltd v Jones* [1980] AC 74, Lord Diplock stated (at 105–106) that three conditions had to be fulfilled before the court could read words into an Act which were not expressly included in it, viz: (a) it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that Parliament sought to remedy with the Act; (b) it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, the eventuality that was required to be dealt with so that the purpose of the Act could be achieved; and (c) it was possible to state with certainty what the additional words would be that the draftsman would have inserted and that Parliament would have approved had their attention been drawn to the omission. In *Inco Europe Ltd* at 592, Lord Nicholls of Birkenhead framed the third requirement in a broader fashion as follows: that the court must be abundantly sure of “the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed” ...

21 I was of the view that the factual matrix of *Kok Chong Weng* was rather different from the present. Applying the tests above, I was unable to find that “it was possible to state with certainty what the additional words would be that the draftsman would have inserted and that Parliament would have approved had their attention been drawn to the omission”. In the present case, there is no evidence of Parliament’s intention on whether Chapter 4A of Part X of the WC ought to be available to parties married under Muslim law. Counsel relied on the Parliamentary debates referred to above (at [10]) that “Muslims, as citizens of this country, must be allowed the same right of access to the Civil Courts as non-Muslims.” But that statement was a broad one made in the context of specific amendments to the SCJA, as explained above. Further, it was made in response to the concerns raised that allowing applications to the Civil Courts would undermine and diminish the authority of the Syariah Court. The amendments debated in Parliament then took on a calibrated approach where the leave of the Syariah Court must first be obtained before the High Court could hear the matter (see [9]-[10] above).

22 I observe that the Parliamentary debates relate to the 1999 Amendments. While s 17A(8) of the SCJA was enacted in 1999, s 121G of the WC was inserted only in 2011. Even if it could be said that Parliament had manifested the intention that parties married under Muslim law could avail themselves of Part X of the WC at the time of the 1999 Amendments, that intention would not necessarily extend to a provision (such as s 121G of the WC) that had yet to be enacted then. There had also been no subsequent amendment to the SCJA to provide a provision similar to s 17A(8) of the SCJA to exclude s 121G of the WC from s 3(2) of the WC.

23 Further, the Report of the Law Reform Committee on Ancillary Orders after Foreign Divorce or Annulment (July 2009) had confined its recommendations on the addition of Chapter 4A to the WC to non-Muslim marriages (at [69]):

We recommend no change to the current law that dissolution of Muslim marriages should fall within the domain of the Syariah courts. We do not make any recommendations in respect of, and our recommendations do not affect, the law and practice of the Syariah courts in Singapore ...

24 I sympathise with the Appellant who appears to have fallen into the lacuna described above. But as I was of the view that this court had no power to grant the remedy sought under s 121G of the WC, I dismissed the appeal. This case demonstrates an area deserving of a review for possible law reform.

Debbie Ong
Judicial Commissioner

Mohamed Ibrahim s/o Mohamed Yakub (Achievers LLC) for the
Appellant;
the Respondent in person (absent).
