

HONG KONG / JUDGMENT

HRT v. RHT

COURT

Family Court

DECIDED

4 December 2007

CASE / FILE NUMBER

FCMC5488/2006

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bjbj FCMC 5488 / 2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 5488 OF 2006

BETWEEN HRT Petitioner and RHT Respondent

Coram: Her Honour Judge Sharon D. Melloy in Court Dates of Hearing: 30, 31 October, 1, 2, 5, 7 &
9 November 2007 Date of Submission of Closing Written Argument: 21 November 2007 Date of
Judgment: 4 December 2007

J U D G M E N T

Introduction

1. This is an application by a petitioner wife for a divorce based on two years separation. The husband defends the petition on the basis that the parties were never validly married. The wife seeks a declaration that the party's marriage is a valid and subsisting one.
2. The background to this case centres on the relationship between an elderly Indian couple, their four children and the family's business affairs.
3. In 1960 the couple married in a Sindhi Hindu religious ceremony in Jakarta, Indonesia. They subsequently lived together and had four children. It is agreed that the parties separated, although the date of separation is not agreed. The date has also changed as this trial has progressed.
4. The crux of the matter is whether or not the marriage is valid according to Indonesian law. The wife says that it is and the husband says that it is not.

5. If it is a valid marriage then the wife can proceed with a divorce in Hong Kong.

Issues

6. The main issue therefore, is not so much whether the parties married according to Sindhi Hindu customary rite, which seems to be accepted, but whether such a marriage is also a valid marriage under Indonesian law? A. To that end, although this seems to be accepted to a large degree, I will consider whether this marriage is a marriage according to Indian custom in Indonesia and consequently I will also need to determine the status of the marriage certificate dated 8th August 1960. B. Perhaps more importantly, I will also need to establish whether it is necessary for a marriage to be registered with the relevant authorities in Indonesia for it to be considered valid under Indonesian law. C. Alternatively if the marriage is a valid Sindhi Hindu marriage, have the parties already dissolved that marriage also according to Sindhi Hindu customary rite? If so, should the court refuse to recognize the divorce on the basis that the wife was not informed or given the opportunity to take part in the divorce proceedings? (See s. 61 Matrimonial Causes Ordinance, Cap 179). E. In the event that I find that the parties are validly married and have not dissolved their marriage, or that they have dissolved their marriage, but nonetheless I do not recognize it, should the divorce be granted or dismissed on the basis of two years separation?

Background

7. Much of the background to this matter has been set out in my judgment of the 21st June 2007, in which I deal with the wife's application for maintenance pending suit. I do not intend to repeat that background here.
8. In summary, however, it is agreed that on the 23rd March 1960 the parties went through a marriage ceremony in Jakarta, Indonesia. This was a religious ceremony, and was conducted in accordance with traditional Sindhi Hindu customary rite. The parties were both Indian nationals at the time.
9. On the 12th May 2006, the wife issued divorce proceedings in Hong Kong based on two years separation. She states that she is domiciled in Jakarta and that the husband is domiciled and habitually resident in Hong Kong. This was not disputed by either side and therefore forum is not in issue.
10. The wife says in the petition that she and the husband separated in 1995. During her oral evidence she says that they only finally separated in April / May 2005. She makes a detailed claim for ancillary relief.
11. The husband filed an Answer on the 29th August 2006, in which he states that the marriage was not valid under the laws of Indonesia. He asks that the petition be dismissed and that the wife's claim for ancillary relief be rejected.

12. It is the husband's case that the parties separated initially in 1976 and that the separation was finalized in 1980. The husband has subsequently said, although this was not originally pleaded, that the parties were divorced according to Sindhi Hindu customary rite in or about 1980.
13. The husband claims that the wife's application for a divorce is part of a bigger conspiracy by her and their two sons to defraud him of his business empire. Litigation is ongoing in Indonesia, Singapore and Hong Kong. Central to this litigation is a transfer by the wife of a 75% shareholding in a family company, from the husband's name into her own. The wife was able to affect the transfer, in part, because she is the legal wife of the husband and because the husband renounced his Indonesian nationality on the 30th November 2005. Only Indonesian nationals are able to own property in Indonesia. The husband claims that he has lost revenue of approximately US\$10 million as a result. The wife admitted during her oral evidence that she was party to the petition, by the younger son, to the South Jakarta Court, which sanctioned the transfer of shares.
14. Consequently these present proceedings form just one part of a series of commercial disputes being litigated across Asia.
15. In considering this matter, it is accepted by both sides that the relevant law for the purpose of establishing the validity of the marriage is Indonesian law (*lex loci celebrationis* . See also s 2(b) Matrimonial Causes Ordinance, Cap 179).
16. In order to determine what the law is on the subject, a total of 7 experts on Indonesian law have filed affirmations and annexed legal opinions. I heard detailed oral evidence from two of them, both former High Court Judges. I heard from the wife and Mr. A for the husband. Mr Pilbrow S.C says it is their opinions that I must properly consider. I agree, for it is their evidence that has been properly tested during the trial. In addition two Indian experts were called. They both gave oral evidence Mr. S for the wife and Mrs. D for the husband. I also heard from the parties themselves. Discussion
17. I must now turn to consider the issues, the law and the parties evidence as set out in their affirmations and those of their experts, their Form E's and as given orally by them and their witnesses during the hearing. For the avoidance of doubt, in so far as the matters set out in this judgment differ from the evidence of the husband or the wife, or from one of the other witnesses, that is because I have preferred the evidence of the other party or because I do not find the evidence given credible, or because I consider that the documents produced confirmed my findings of fact. A. Is the marriage valid according to Indian custom in Indonesia and what is the status of the alleged marriage certificate dated the 8 August 1960?
18. A wedding invitation was issued by the husband's family to attend the parties wedding ceremony at the Hotel D, Jakarta. After the wedding a marriage certificate was issued. The husband says that the certificate of marriage is not relevant to a Sindhi Hindu customary marriage. In any event he says that the certificate is not a certificate of marriage because the Indian Association in Jakarta only issued it and they were not authorized by an Indonesian

Government Department, such as the Ministry of Religion, to issue such a certificate. The husband continued by stating that the person who signed the marriage certificate, namely Mr. T, acting President of the Indian Association did not do so as a witness. Alternatively he says that Mr. T was the wife's foster Uncle and de facto head of her family and that is why he attended the wedding.

19. In contrast the wife says that Mr. T witnessed the wedding ceremony. She says that he, as the Acting President of the Indian Association, had the power and authority by virtue of his position to issue marriage certificates to members of the Indian community in Indonesia at that time. She further states that everyone who married then, within the Sindhi community had such a certificate. This document was then used by the wife to apply to the Indian Embassy for a new passport in her married name which she did. It was also used as proof of marriage for other purposes. The wife is referred to as such in other official documents such as the Indonesian Family card dated 13th August 1979. The husband is described as the head of the family in that document.
20. In 1978 / 9, the husband applied for Singaporean I D cards on an investment basis. He applied on behalf of his wife and three of their four children.
21. In the application for Indonesian citizenship submitted on or about 7th October 1988 the wife is referred to as the husband legal wife and the children are referred to as the husband legal children. Copies of the Indonesian identity cards describe the parties as married. In the children's birth certificates the wife is referred to as their mother and the husband as their father.
22. Both parties were Indian nationals at the time of their wedding and formed part of the Sindhi Hindu Indian community in Indonesia.
23. In support of her case the wife has produced a letter dated the 11th July 2007 from an Indonesian gentleman called Mr. S. He was the secretary of the Indian Association in Jakarta from 1969 and prior to that held office as the Joint Secretary. Although what he says is not in affidavit form, it does nevertheless carry some weight. He knew Mr. T in his position as Acting President. He says The Indian Association was the only authorized body at that time to issue Certificate of Marriage documents for Indian citizens residing in Indonesia. Having seen and examined the attached Certificate of Marriage issued on the 9th August 1960, I confirm that the Certificate of Marriage conforms to those issued in the 60s by the Indian Association in Jakarta. Further, I confirm that Mr. T as acting President of the Indian Association in Jakarta at that time was duly authorized to issue Certificate of marriage documents. Various institutions including the Indian Embassy in Jakarta accepted certificate of Marriage issued by the Indian Association. In fact the Indian Embassy would only recognize Certificate of Marriage issued by the Indian Association in Jakarta as evidence of marriage. This was the primary document required by the Indian Embassy for a wife to effect a name change after her marriage

24. In addition the wife has produced letters from Mr. T s son and daughter. They confirm Mr. S s view.
25. In conclusion it seems to me self evident that the parties not only married according to Sindhi Hindu ritual, but that they also married according to their own Indian customs at that time which required that their marriage be witnessed by someone with the appropriate authority from the Indian Association in Jakarta. I accept that the marriage certificate as produced is evidence of that.
26. I also accept, as has been submitted by Mr Pilbrow S.C for the wife that the marriage certificate is also evidence of the intent and understanding of the parties. They intended to enter into a marriage. They subsequently lived together as husband and wife. In order to upset the presumption that this is a valid marriage the onus is then on the husband to provide decisive evidence to the contrary . (Ref Rayden, 18th edition Ch 7: 12 and Taczanowski (otherwise Roth) v Taczanowski [1956] 3 ALL ER 457). I accept that in considering this matter the appropriate standard of proof is that of the balance of probabilities.
27. The question then becomes whether there was also a separate requirement to register the marriage with an appropriate authorized Indonesian Civil registry? B. Is it necessary for a marriage to be registered with the relevant authorities in Indonesia for it to be considered valid under Indonesian law?

Background

28. As Mr. Pilbrow S.C for the wife, rightly points out, this originally formed the central plank of the husband s case, namely that the marriage was not registered and therefore is not valid. Both parties rely heavily on expert testimony. All of the experts referred to the same laws. They differed, as one might expect, in their interpretation of those laws.
29. Consequently it seems to me that it might be helpful if I summarized the pertinent sections of the laws and regulations as identified by the parties respective legal teams during the trial. Indonesian law
30. Indonesia became independent on the 17th August 1945. Prior to independence laws on marriage and divorce were governed by a series of colonial laws and regulations. The transitional provisions of the Indonesian Constitution state that all regulations that were valid as at the date of the Constitution would continue to be valid until or unless they were subsequently changed by the Indonesian Government. (See Art II Transitional Provisions of Indonesian Constitution 1945).
31. Prior to 1945, regulations concerning marriage and divorce were set out in the Constitution for the Netherlands Indies (Indische Staatsregeling or IRS for short). These then were the governing regulations in 1945.

32. The IRS categorizes people according to race. Reference is made to native Indonesians, Europeans and Foreign Orientals. Foreign Orientals were further subdivided between Chinese and all the other Orientals, including Indians or, in the words of the IRS, Foreign Orientals non-Chinese. Different laws and regulations applied to different racial groups. (See Article 163 of ISR). It is accepted that this couple, who were Indian nationals at the time of the marriage ceremony, were categorized as Foreign Orientals-non Chinese.
33. When the parties went through the Sindhi Hindu marriage ceremony on the 23rd March 1960, the relevant regulation state that marriages between Foreign Orientals non-Chinese were governed by their own customary law and religion (see Art 131 2 (b) of IRS). In contrast the Europeans were subject to their own Civil Code.
34. It was possible for non-Europeans to bind themselves to some aspects of the European Civil Code, but in order to do so they had to submit themselves to it. In other words they had to enter into a Deed or some other legal document, which was notarized, and in which they stated that they agreed to be bound by the Code in its entirety or some part of it. (See Art 131 (4) of IRS and State Gazette 1917-12)
35. The Civil Code further states that, in any event, certain laws were not applicable to Foreign Orientals non-Chinese. These included the sections on registration of marriage, marriage itself and the performance of the marriage/wedding ceremony. (See Article 1A of State Gazette 1924-556, which refers to Book 1, Chapter two, Book II, Chapter 4 14, Book 1, Chapter 15 and Book II, Chapter 12 Indonesian Civil Code)
36. Particular reference has been made to Article 100 and Article 101 of the Civil Code, which states that marriage, is proved by the existence of a marriage certificate. (Article 100 Indonesian Civil Code). In the absence of a certificate, it is for the court to determine whether a marriage exists, based on the evidence before it. (Article 101 Indonesian Civil Code). These sections do not apply to Foreign Orientals non-Chinese.
37. In order to prevent a legal vacuum, these existing laws were to remain in force until such time as they were replaced by new ordinances under the Indonesian Constitution. (See Art 131 (6) of IRS). This did not happen in so far as marriage was concerned until the Marriage law of 1974 came into effect (Marriage Law 1/1974). This came into force on the 1 October 1975.
38. Art 64 of The Marriage Law 1 / 1974 states that marriages, which took place before the passing of this law, were valid as long as they complied with the regulations prevailing at the time of their marriage.
39. This point is reiterated in point 2 of the General Elucidation of Law, The Marriage Law 1/1974, which states as follows: At present, several marriage laws apply to several population groups as follows:
 - (e) for foreign Orientals other than Chinese their own customary law

40. Art 2(1) of The Marriage Law 1 / 1974 states that A marriage is valid if conducted according to their religion and belief .
41. The Marriage Law 1 / 1974 also states that it is only necessary to register a marriage if the customary rules of the population group in question required it. (See Art 2 para 2 Marriage Law 1 / 1974).
42. Going forward all marriages performed after the enactment of the Marriage Law 1 / 1974 had to be registered. There was no requirement in 1960 for Foreign Orientals non-Chinese to register their marriage. No Civil Registries existed in 1960 for them to do so. Discussion
43. The husband contends that the marriage was not registered with the Indonesian authorities in 1960 and therefore that it is not a valid legal marriage. He says that this is the reason why the wife s mother and sister did not attend the ceremony. They did not approve because the marriage was not going to be registered. The implication is that the decision not to register the marriage was a conscious one. He says that the parties knowingly entered into a customary marriage. Consequently he argues, as there was no need to register a Sindhi Hindu marriage for it to be considered valid under Sindhi Hindu customary law, that no registration took place.
44. The husband maintains that it was necessary for the parties to register their marriage with a Civil Registry in order for that marriage to be valid under Indonesian law. This, says the husband, was not done.
45. In support of his position the husband relies on his expert evidence.
46. Mr. A for the husband says that it was possible for the parties to submit themselves to the European Civil Code in 1960 (See Art 131 (4) of IRS), but that the parties chose not to do so. If they had done so then they would have been required to register their marriage under Art 100. Because they chose not to do so their marriage was not registered and therefore it is not valid today. This is because under The Marriage Law 1 / 1974 a marriage must be registered in order to be valid.
47. Mr A confirms that a civil registry was established in 1850 for Europeans and those who submitted to European laws, He also identifies the establishment of other registries for other segments of the population. He confirms that none of these applied to Indians. He premises the whole of his argument on choice . The parties could have chosen to submit themselves to European law but because they chose not to do so, their marriage was not registered and consequently it is not valid under Indonesian law today.
48. In support of his argument he refers to Instruction of the Ampera Cabinet Praesidium dated 27th December 1966. Mr. A says that marriages of Foreign Orientals non-Chinese could have been registered under this instrument. This document was not produced. E, the wife s expert, had never heard of it. Consequently I place very little reliance on the assertions made by Mr. A in this regard.

49. The flaw in the husband's argument is that it does not really stand up to scrutiny, when one looks at the historical development of marriage law in Indonesia as set out above. E says, and this seems to be accepted by the husband, that there was no requirement for Indians to register their marriage with a central Government authority, in 1960. No registry existed for Indians and therefore they could not register their marriage even if they had wanted to.
50. It is accepted by both sides that the parties had not submitted to European Civil law. They were not obliged to do so
51. According to the laws in place in 1960, Indians were subject to their own customary law. The parties were obliged to register their marriage, if that was ordinarily done within their community. Here a marriage certificate was issued as was ordinarily done at that time. As I have stated above I accept the wife's position in this respect.
52. At no point in the husband's affidavits does he say that the parties decided not to submit to European law. Rather he says that the parties had decided not to register their marriage. As it was not possible for Indians to register their marriage other than as set out above, that is hardly surprising.
53. Further there was no retroactive obligation on the parties. In other words the The Marriage Law 1 / 1974 did not require Foreign Orientals non-Chinese to post register their marriage for it to be valid. In fact the law states that if a marriage had been valid at the time that the law came into effect, then it would continue to be valid (see Art 64 The Marriage Law 1 / 1974).
54. In support of the husband's proposition, Mr Egerton relies on the fact that the wife applied to the North Jakarta District Court on the 26th July 2006 for an ex parte order declaring that the marriage was legal. It is argued that this action was a tacit acknowledgment by the wife that the marriage was not registered and therefore not legal. Consequently it is suggested that that is why she made the application.
55. It is, however, important to view the wife's application in its proper context. It is the wife's case that in or about 2004 there was a disagreement between the husband and the two sons concerning the way in which the family business was run. In April 2005 there was a major altercation between the parties. The wife says that in November 2005 she was forced to sign papers in relation to the property in which she resides in Jakarta. This led to the wife filing a complaint with the Indonesian Police and publishing a notification in relation to this matter in the Republika newspaper in Jakarta. This is dated the 23rd November 2005. The husband responded with a rejection notice also published in a newspaper in Jakarta dated the 31st December 2005. In it the husband said that he did not enter into a marital relationship as construed in Law No 1 year 1974 about the marriage with [the wife]
56. The parties son then successfully applied to transfer a 75% shareholding in one of the family companies from the name of the husband to the wife on the basis that the husband was not an Indonesian national and could not therefore hold property in Indonesia.

57. It is against this backdrop that the wife applied ex parte to the North Jakarta District Court for an order that the marriage be declared valid.
58. In view of the prevailing situation at the time it seems to me that the wife's application was an attempt by her to regularize the situation, and she did so because the husband was denying the existence of a legal marriage to her in Indonesia. I do not accept that the wife's application was a tacit acknowledgment by her that she was not validly married.
59. In any event I accept E's analysis of the situation. In her view neither the wife's judgment from the North Jakarta District Court declaring that the marriage is valid nor the husband's judgment from the Bekasi District Court stating that the marriage is not legitimate according to the laws of Indonesia, carry any weight. This is because both applications were made ex parte when they should have been made inter partes. I accept E's analysis, which seems to me to accord with basic legal principles and consequently I do not attach any weight to either pronouncement.

Conclusion

60. In conclusion I agree with E who said that the marriage was valid according to Indonesian law and regulation although it was not registered at a civil marriage registry.
61. In my view the parties marriage was a valid marriage according to Indian custom, when they entered into it, in Indonesia in 1960. There was no requirement on them to register their marriage at that time, other than as required by their own customs, which they did. I accept the marriage certificate dated 8th August 1960 as evidence of their marriage.
62. There was no obligation on them to submit to the European Civil Code. Accordingly they did not do so. I do not accept that because they chose not to submit to the European code that their marriage is now deemed invalid. I find that the The Marriage Law 1 / 1974 recognized valid marriages already in existence as at that date. I find that this was a valid marriage in 1974.
63. It is not therefore necessary for a marriage entered into prior to the enactment of The Marriage Law 1 / 1974 to be registered in a Civil Registry Office in Indonesia for it to be considered valid under Indonesian law. The requirement to register a marriage only relates to marriages entered into after the enactment of that law. There was no obligation on the parties to post register their marriage.
64. Thus, I find that Indonesian law has at all times accepted the parties marriage as a validly existing one. D. If the marriage is a valid Sindhi Hindu marriage, have the parties already dissolved that marriage according to Sindhi Hindu customary rite?

Background

65. Although not pleaded, the husband also contends in his sixth affirmation that the parties divorced according to Sindhi Hindu customary rite in or about 1980. He says that the parties divorced and that they had an agreement whereby he agreed to provide for both the wife and the parties children financially. Thus, he says, that even if the parties were validly married, as I have found, I cannot continue to hear the matter as the parties are already divorced and it is not possible to be divorced twice.
66. In that respect it seems to be accepted by both parties that the provisions of the Hindu Marriage Act, 1955 do not apply to the parties marriage. Notwithstanding that fact the husband argues that the divorce provisions found in the Hindu Marriage Act, 1955, in so far as it relates to customary divorce, should be applied here. I am not clear on what basis he does so. When I asked Mrs. D, who appeared as an expert witness on behalf of the husband, what the jurisdictional basis of the act was, she confirmed that the Hindu Marriage Act, 1955 only applies to those parties domiciled or otherwise with jurisdiction in India.
67. Mr. S for the wife refers to an authority in this respect Law and Marriage and Divorce by A.G Gupte. Section 1 (2) of the (Hindu Marriage) Act specifically makes it clear that the Act extends to the whole of India except the state of Jammu and Kashmir and also that it applies to Hindus domiciled in the territories to which this act extends, who are outside the said territories. Therefore, the Act will apply to a Hindu outside the territory of India, only if he is a Hindu domiciled in the territory of India. Therefore only those Hindus having permanent residence in India will be covered by the Hindu Marriage Act 1955 .
68. Thus it seems to me that the husband s arguments in this respect are of no relevance to the application presently before me, as the parties are neither domiciled in India nor do they have permanent residence in India. I agree with Mr. S in this respect.
69. However, in the event that I am not right in this, I will consider this aspect of the case in the alternative, on the premise that the Hindu Marriage Act, 1955 may be of some relevance, but only in so far as a customary divorce is concerned.
70. Both parties sought to rely on the expertise of Indian lawyers in this respect. Mr. S for the wife and Mrs. D for the husband.
71. Just as I identified the pertinent parts of the Indonesian legal regime I will now do the same in so far as Indian legislation and case law is concerned. Indian law
72. Prior to 1955 Indian matrimonial law was un-codified and was based on different religions and customary practices. The Hindu Marriage Act, 1955 codified the situation and introduced three fault grounds of divorce namely voluntary sexual intercourse with a third person (adultery), cruelty and desertion for a period in excess of 2 years. In 1976 a further ground was introduced namely consensual divorce on the ground of one-year separation. (See s 13B The Hindu Marriage Act, 1955). In addition s. 29 (2) of the act retained the right of parties to dissolve their marriage according to custom. Nothing contained in this Act shall

be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of Hindu marriage, whether solemnized before or after the commencement of this Act .

73. The husband seeks to rely on this section.
74. Section 3 (a) Hindu Marriage Act, 1955 defines custom as follows
 - (a) the expression custom and usage signify any rule, which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family: Provided that the rule is certain and not unreasonable or opposed to public policy: and Provided further that in the case of rule applicable only to a family it has not been discontinued by the family Case law
75. Mr. S produced a number of Indian cases, which in summary, illustrate that the Indian courts have narrowly construed the word custom . (Ref the Supreme Court decision of Dr surajmani stella kujur V/s Durga Charan Hasandah and Yamanaji H. Jadhav v. Nirmala) It is well established by a long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom . (See Subramani v M. Chandralekha (2005) Supreme Court Cases). Discussion
76. Indeed it is Mr. S s contention that it is now mandatory to apply to the Indian courts for a divorce. Not so says Mrs. D.
77. What is not in dispute however, is that if the husband were to rely on a customary divorce he must be able to identify the custom on which he seeks to rely. From an Indian perspective it would appear that such custom has to be certain, reasonable and not opposed to public policy.
78. Mrs. D confirmed this, namely that a customary divorce was dependent on the actual customs of the Hindu community referred to and that this may differ from community to community.
79. On the documents given to her she concluded that there was a reasonable conclusion of customary divorce . However as Mr Pillbrow points out this conclusion appears to be based on the husband s 1st, 2nd and 6th affirmations only, although she indicated that she had seen the other documents whilst giving evidence. (See paragraph 4(c) of her affirmation of the 19 October 2007). She was not therefore initially aware of the stance taken by the wife in relation to this matter.
80. It is the husband s case that the parties dissolved their marriage according to custom in 1980.

81. The background to this assertion is set out in the husband's affirmations. He maintains that the wife had sexual relations with another family member, whilst they were living together as a joint family. In other words that she committed adultery. It is agreed that the parties lived in a joint family system from the date of marriage until 1976. In support of this contention the husband has produced a confession in the form of a diary.
82. The wife denies that she wrote it, although she accepts that she wrote in a previous diary. There is no actual admission of sexual intercourse in it. The wife denies that she ever had an affair as alleged, or at all. It is not signed and it is not dated. I attach no weight to it.
83. The joint family split up in 1976. The husband says that one of the main reasons for the split was because of the wife's illicit relationship. He says that he came to the conclusion that they needed to call it quits.
84. The wife says that the main reason for the split was because there had been a disagreement over how the profits from the family businesses were to be shared.
85. The husband says that the parties began to separate in 1976 and that the separation became permanent in 1980. He says that the parties agreed to dissolve their union. He refers to a meeting between him and the wife and two other family members (the wife's elder sister and the husband's Aunt) to sort out the financial settlement. He says Finally both of us sat down and agreed on terms for dissolving this union and agreed that as she was not able to support herself and the children I would support her financially until the children had completed their education and were married.
86. The wife denies this absolutely. She says that there was no agreement and no financial settlement.
87. The husband says that once the marriage was dissolved he regarded himself as a single man and consequently he entered into a relationship with a woman called N (otherwise known as AT) in 1981. He says that he married her according to religious custom and that they later dissolved their union. He and N had a daughter called P. He has since had other relationships and is presently living with another woman although he accepts that this is not a marital relationship.
88. The wife says that the husband had a number of mistresses, but that they remained married throughout.
89. There are several difficulties with the husband's case as presented both in relation to Indian law and in relation to his evidence.

90. First and foremost the husband has not produced any evidence in support of his contention that it was customary for parties to divorce in the manner described by him in his 6th affirmation. He does not identify or produce any evidence relating to the manner in which Sindhi Indians in Jakarta entered into customary divorces in 1976 / 80. On Mrs. D s own evidence this is crucial and would determine whether or not a marriage had been validly dissolved or not.
91. It is clear from statute and case law that a custom must be certain. This is not the case here.
92. The husband has been unable to provide any documentary evidence in support of his assertion that the original marriage had been dissolved.
93. The wife for her part says that they never separated and certainly did not dissolve their marriage in 1980. She says that the husband used to come to Jakarta often. It is the wife s case that they simply stopped having marital relations in or about 1995 and that she avoided him from that time on, because she knew about the other girls . However she did not consider herself separated. She certainly does not accept the assertion that the marriage had been dissolved in 1980. I find the wife s testimony credible in this respect.
94. In so far as N is concerned, the husband was unable to produce any evidence that he had infact married her according to custom. There was no marriage certificate. There were no photographs of the ceremony. No affidavit evidence had been filed by anyone other than himself. He produced a passport of N, dated the 29th August 2006 in which she appears to have changed her name to Tl that is all. The name of her husband appears as his shortened name RT and the passport is in the name of ART. Mr. Pilbrow suggested that this was because that the Indian Embassy already had a record of him being married to the wife. It was the husband s evidence that the Indian Embassy agreed to change the name of N without any documentary evidence to prove her marriage being produced. With respect I find this statement unworthy of belief.

Conclusion

95. Thus even if the husband has jurisdiction to invoke s. 29 (2) Hindu Marriage Act 1955 which I doubt, I do not accept, on the evidence produced, that the husband dissolved his marriage according to custom in 1980. D. Should the court refuse to recognize the divorce on the basis that the wife was not informed or given the opportunity to take part in the divorce proceedings? (See s. 61 Matrimonial Causes Ordinance, Cap 179)
96. As I do not accept that the parties dissolved their marriage according to custom, this part of Mr Pilbrow s submission falls away. However, for the avoidance of doubt, had that not been the case I would have accepted, in the alternative that it was appropriate for the court to refuse to recognize it on the basis that the wife was not informed or given the opportunity to take part in the proceedings. I am satisfied that that was indeed the case. (See Rayden 18th edition, Ch 13.19 and D v D (Recognition of Foreign Divorce) (1994) 1 FLR 38) E. In the event that I find that the parties are validly married and have not dissolved their marriage, should

the petition be granted or dismissed on the basis of two years separation? The law

97. In order for the parties to divorce on the basis of separation, a number of elements need to exist: The relationship does not end by reason of a separation brought about by the pressure of external circumstances such as absence on professional or business pursuits, or in search of health or, it may be, even pleasure. Sexual intercourse, dwelling under the same roof, society and protection, recognition in public and in private, correspondence during separation may be regarded separately as different elements the presence or absence of which go to show more or less conclusively that the marriage relationship does not exist, the weight of each of these elements varying with the health, position in life and all the circumstances of the parties . (Ref Rayden, 18th edition 9.57)
98. In this case, I have found that the parties were validly married. The evidence that the wife has produced supports her contention that they were married and remained married, after 1980.
99. The wife has produced a number of photographs most of which were taken in the 1980
- s. However there is one photograph of the couple taken in 1990, apparently in celebration of their wedding anniversary. This is a formal portrait style photograph taken in a studio. There are also some holiday snaps taken some in the USA in 1991 and others allegedly of Diwali prayers taken in October 1992.
100. As stated above the husband also applied for Indonesian citizenship in which he says that he is legally married to the wife in or about 7 October 1988.
101. The difficulty however is that the wife s oral evidence contradicts her petition, which she has also confirmed to be true and accurate. During her oral evidence she said that the separation began in April / May 2005. In her divorce petition she says that the parties separated in 1995.
102. Mr Pilbrow says that I may simply rely on the husband s intention to separate, notwithstanding the fact that I have accepted the wife s evidence on validity. There seems to me to be an inherent contradiction with that approach.
103. I have not accepted the husband s case namely that the parties began to separate in 1976 and that the separation was formalized in 1980, when the marriage was allegedly dissolved by custom.
104. The difficulty then becomes, when can it be said that one of the parties formed the intention to separate, even if it was not communicated to the other party, and does that then satisfy the two-year requirement?
105. The husband says that he spent very little time in Jakarata, although he acknowledges that he did stay with the wife when he was there. He says he did so because the property, in which she lived, belonged to him. The analysis of the travel records produced by the wife shows that he spent a total of 67 days in Jakarta from 1995 to 2005. He did not go there at all

for the whole of 2002, 2003 and 2004. On his own evidence the husband went there for three weeks in April 2005 to celebrate his son's remarriage. It was while he was there, that there was a major disagreement over the running of the family company.

106. Mr Pilbrow submits on behalf of the wife that she may not have fully grasped the difference between separation and divorce. Having seen the wife give evidence I would accept this. In any event it is contended on her behalf that on the evidence the parties have in fact been separated for over two years.
107. It seems to me that there was probably a slow deterioration in the marital relationship. The husband established his own home away from the wife. He entered into new relationships. I accept the wife's evidence that there was certainly no sexual relationship between them from about 1995. He came to Jakarta very infrequently. They socialized with each other less and less. The wife did not produce any evidence showing the parties together since the early 1990
- s. At some point it seems to me that the husband must have come to the realization that the parties were separated and formed an intention in that respect. It is not possible to be more precise than that. In the circumstances though I am satisfied that the parties have been separated for over two years and on that basis I will grant a decree nisi of divorce. Costs
108. I will reserve costs for argument. (Sharon D. MELLOY) District Judge Mr. Pilbrow S C instructed by Messrs Robertsons, for the Petitioner Mr Egerton instructed by Howell & Co. for the Respondent PAGE - PAGE - &`#\$~!P] j% Td ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ 1 #' :L- E{k' XW(\$ s `()H/0 -3*\$ 43*\$ c7*+ :p . {^2\ (\$p2\$ 4g3\$ 4QQ4 4lp4 0b50p eB9|q M|;\$ wzO?p= H#@ \$ 3i@\$ nSDH lEFE 5)GTd kxL\$ z FN /eNH S\$O\$ vuWOTd c;R\$ Y CR D)U"Iv G%9UT nm{V RW!W C:~W x% X\$ (OX: x8Y\$ L}YH (Yq[*n\T]fM|; #b2^\$ Q^f Y6xc\$ e>tD ?Dep= ZJg\$ hx;r N)/ h EUhp}{6c vCip= T{sk lmZ"D TCn\ o8'q "hsTd gsTu\$ 4xv\$ Epxfa` + xDs\ \*y\$ Yay~\_ \_\_z4w | >\$> C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[ :p . s `(vuWO c7*+ Y CR T{sk 1 #' RW!W o8'q nm{V z FN 0i|8 @\\Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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