

HONG KONG / JUDGMENT

YY v. QY

COURT

Family Court

DECIDED

11 December 2014

CASE / FILE NUMBER

FCMC5263/2012

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bjbj FCMC 5263 / 2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 5263 OF 2012

BETWEEN YY Petitioner and QY Respondent

Coram: Deputy District Judge I. Wong in Chambers (Not Open to Public) Date of Hearing: 1
December, 2014 Date of Handing Down Reasons for Decision: 11 December, 2014

Reasons for Decision (Striking Out and Rescission of Decree Nisi)

AUTONUMOUT This is the respondent husband s application for an order that: The Petition for divorce be struck out and the action be dismissed upon the grounds that:- It discloses no reasonable cause of action against the respondent; and/or It is scandalous, frivolous and vexatious; and/or It is an abuse of the process of the Court. The Decree Nisi be rescinded. The registration of the Amended Petition for Divorce dated 17 April 2012 at the Land Registry against the respondent s property (the Property) be discharged and vacated. AUTONUMOUT For convenience I refer to the petitioner wife as and the respondent husband as . Background to the Application AUTONUMOUT The parties were married in November 2006 in the Mainland when both of them were PRC citizens residing in Shanghai. P gave birth to a girl Q (the daughter) on 24 August 2007 in Hong Kong, so she is now 7 years old. She is the only child of the family. AUTONUMOUT On 19 April 2012 P petitioned for divorce in Hong Kong on the ground of R s unreasonable behaviour. In the Petition she pleaded that she is domiciled in the Mainland and R is domiciled in Hong Kong. She also pleaded that there have been no previous proceedings in any court in Hong Kong or elsewhere with reference to the marriage or to any children of the family. AUTONUMOUT As for the particulars of R s unreasonable behaviour, apart from other allegations, she said that R took the daughter away some time in 17 June, 2008; since then R and

the daughter had never returned and she was unable to get contact with them in any way: Para (vi) and (viii) of the Particulars. AUTONUMOUT Since it was P's case that R could not be traced, she made 2 Affirmations on 12 September 2012 and 17 April 2013 respectively in support of her application to have the Petition and the relating documents served on R by way of an advertisement in a newspaper circulating in Hong Kong. Essentially, she said that despite her numerous attempts, she had not been able to locate R. In her affirmation of 12 September 2012 she also said that she believed R had been granted permission to immigrate to Hong Kong. AUTONUMOUT On the basis of her affirmations, leave was granted on 18 June 2013 for P to serve the Petition by inserting an advertisement in a newspaper in Hong Kong. Consequently, decree nisi was granted on 9 December 2013. AUTONUMOUT Then what happened was before the court was able to deal with the custody and the ancillary relief matters, R appeared and took out the present application. R's Case AUTONUMOUT To start with, in his affirmation, R made it clear that he is not submitting himself to the jurisdiction of the courts of Hong Kong. AUTONUMOUT's case, in essence, is that there was in fact already a concluded divorce case adjudged by a competent court in Shanghai (the Shanghai Court) on 21 January 2011. Thus the present proceeding is a nullity. AUTONUMOUT He affirmed that P left home in April 2008 for no reason and subsequently, he applied for the dissolution of the marriage at a court in Shanghai (the Mainland Divorce Case) in June 2010. Decree nisi was granted on 5 November 2010 and it was made absolute and effective on 21 January 2011 (the Mainland Divorce Decree). He was also granted the custody of the daughter. Therefore, when P petitioned for divorce in Hong Kong on 19 April 2012, the parties marriage had already been dissolved by a competent court in the Mainland. AUTONUMOUT According to the judgment dated 5 November 2010 by the Shanghai Court, the Mainland Divorce Case was at least the second action taken out by R. He had previously taken out a divorce action in April 2008 but it was subsequently withdrawn. AUTONUMOUT R said the purpose for P to make such untrue statements to the court is an attempt to seek juridical advantage including getting hold of his properties in Hong Kong. Hence, he seeks the discharge and vacation of the registration of the lis pendis against the Property. AUTONUMOUT Furthermore, P recently in April 2014 applied to the Shanghai Court for the re-trial of the Mainland Divorce Case but was dismissed by the Shanghai Intermediate Court on 5 June 2014. P's Case AUTONUMOUT In her Affirmation dated 26 June 2014, P stressed that she had lost contact with R since his departure on 17 June 2008. She admitted that she had applied to the Shanghai Court for the re-trial of the Mainland Divorce Case. Her ground was that she had never received any notice of the proceedings from the Shanghai Court. It was a procedural error on the part of the Shanghai Court; and it was not until 1 April 2014 that she had such notice from R via her solicitors in Hong Kong. In brief, P maintained that she had no knowledge of the Mainland Divorce Case prior to her institution of the present proceedings. AUTONUMOUT At the time of the marriage, R applied for Hong Kong residency for the family in 2007; and for this, R purchased the Property. The Property was not only for the purpose of their residence but also served as part of the capital investment for immigration application. At all materials times, she believed R and the daughter had immigrated to Hong Kong and had been residing in the Property. Further, she believed that R had moved his assets to Hong Kong. Upon the advice of her PRC lawyer, she therefore commenced the present proceedings in Hong Kong. AUTONUMOUT In this regard, it

would appear that R was first granted his Hong Kong identity card in July 2009 but the movement records of the Hong Kong Immigration Department for the period from 1 January 2013 to 10 April 2014 shows he only came to Hong Kong sparingly and each stay was rather short. Discussion Para 2 of the Summons - Rescission of the Decree Nisi AUTONUMOUT During the hearing, Mr Lau, who appears on P s behalf, concedes that the decree nisi is irregular and agrees to its rescission. In my view, the concession is correctly made as even on the strength of P s evidence, there was material non-disclosure on her part. AUTONUMOUT On the affirmation evidence before me, it appears that P has given false information both in her Petition and affirmations tending to mislead the court. AUTONUMOUT First, in her Petition, she said she had never commenced any matrimonial proceedings in any foreign jurisdiction but in fact she had, through her PRC lawyer, commenced divorce proceedings in Changshu of the Mainland on 16 November 2010 (the Changshu Divorce Case) but the action was withdrawn on 19 January 2011 for the reason that, according to her, R could not be traced. AUTONUMOUT Secondly, what is more material is that in her 2 Affirmations respectively dated 12 September 2012 and 17 April 2013 in support of her application for serving the Petition by way of substituted service, she failed to mention that her PRC lawyer, one Mr Yang of Beijing, was able to meet and discuss with R on 15 October 2011 regarding their divorce. This event was clearly stated in her Affirmation dated 26 April 2014 in opposition to the present application. AUTONUMOUT Furthermore, in her supplemental statement dated 5 May 2014 submitted to the Intermediate Court of Shanghai in support of her application for re-trial, she admitted that her another PRC lawyer, also in the name of Mr Yang of Shanghai, was able to contact R in as early as June or July 2010 on the divorce matter on her behalf and subsequently she instructed this PRC lawyer to issue the Changshu Divorce Case on 16 November 2010. AUTONUMOUT To me, P was certainly not truthful when she pleaded in the Petition that there had been no previous proceedings in any court in Hong Kong or elsewhere with reference to the marriage or to any children of the family. Even if she was not aware of R s Mainland Divorce Case, she had commenced her own Changshu Divorce Case in November 2010 and should have mentioned this. It seems clear to me that she had no difficulty in reaching R at least back in 2010 and even as late as October 2011. I was the presiding judge who gave P leave to serve the Petition by way of an advertisement. If my attention had been drawn to these facts, I would certainly have directed P to trace R through her contacts with these two PRC lawyers. AUTONUMOUT This Court has the inherent jurisdiction to control proceedings and such ability to control proceedings implied and justified the need to bring them to an end: see TWY v CWC, FCMC 4710/1991 (unreported, 14 January, 2009) at Postscript. AUTONUMOUT In the said TWY v CWC, in reliance of its inherent jurisdiction the court exercised its power to rescind the decree nisi. AUTONUMOUT The decree nisi was obtained ex parte on the basis that according to P s evidence R could not be found. If it turns out that the evidence is untrue or at least not wholly true, the decree nisi is tainted with irregularity and should be rescinded and I so order. Para 1 of the Summons Striking Out AUTONUMOUT When the hearing proceeds, it has become quite clear that notwithstanding the summons refers to all the 3 grounds under Order 18, rule 19, RHC, R essentially relies on one ground only and it is that the Mainland Divorce Case has already disposed of the divorce and therefore, P s Petition for Divorce is a case of re-litigation, forum shopping (or rather forum hopping) and is an abuse of process. P is seeking to gain, unfairly, a

juridical advantage in having her case tried in Hong Kong again. AUTONUMOUT In reliance of the Court of Final Appeal case *ML v YJ*, (2010) 13 HKCFAR 794, Mr Chu, counsel for R, points out that once a marriage is dissolved by a divorce recognised by the Hong Kong courts, the personal status of the parties is changed in the eyes of the law. And that status is changed from the time when the foreign decree is pronounced: Para 137 (per Litton NPJ). If the marriage was already dissolved, the Petition was a nullity at the time when it was taken out, because in the eyes of Hong Kong law the parties were no longer a married couple. There was then no marriage between them for the Hong Kong courts to dissolve. It follows that the court would have no jurisdiction to deal with the ancillary relief matter: Paras 52 and 138. AUTONUMOUT Part IX of the Matrimonial Causes Ordinance, Cap 179 () deals with the recognition of overseas divorces, in particular, section 56(1) provides as follows:

- (1) The validity of an overseas divorce or legal separation shall be recognized if, at the date of the institution of the proceedings in the place in which it was obtained-
 - (a) either spouse was habitually resident in that place; or
 - (b) either spouse was a national of that place. AUTONUMOUT On the undisputed evidence before me, the conditions set out in either sub-paragraphs (a) or (b) of subsection (1) are clearly satisfied. As both parties clearly see their marriage has long come to an end, it is clear that the main battle will be on the ancillary relief prayed for by P. Unless section 61 of MCO can be invoked, there was clearly the Mainland Divorce Decree binding upon the parties and the court would have no jurisdiction to deal with the ancillary relief matter. AUTONUMOUT Mr Lau argues that the Mainland Divorce Decree should not be recognised. He relies on section 61 of MCO which provides for the exceptions under which an overseas divorce may not be recognised, The validity of a divorce or legal separation obtained outside Hong Kong shall not be recognized in Hong Kong if it was granted or obtained at a time when, according to the law of Hong Kong (including its rules of private international law and the provisions of this Part), there was no subsisting marriage between the parties. Subject to subsection (1), recognition by virtue of this Part or of any rule preserved by section 59 of the validity of a divorce or legal separation obtained outside Hong Kong may be refused if, and only if-
 - (a) it was obtained by one spouse-
 - (i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or (ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given; or
 - (b) its recognition would manifestly be contrary to public policy. Nothing in this Part shall be construed as requiring the recognition of any findings of fault made in any proceedings for divorce or separation or of any maintenance, custody or other ancillary order made in any such proceedings. (emphasis added) AUTONUMOUT It would appear that initially Mr Lau

also relied on the public policy ground on the basis that unlike the situation in Hong Kong, there are no comprehensive discovery and interrogatories procedures in the Mainland but he does not pursue this in the hearing. In any event, Mr Chu draws my attention to the judgment of Litton NPJ in *ML v YJ*, (2010) 13 HKCFAR 794 where His Lordship emphasised the principle of comity being the reason why the public policy discretion is sparingly exercised. The kind of misconduct engaged by the spouse must be very serious which materially contributes to the making of a decree which the courts refuse to recognise on the ground that it is manifestly contrary to public policy: Para 135. AUTONUMOUT Mr Chu also points out that despite her assertion that she did not wish to submit herself to the divorce jurisdiction of the Shanghai Court, she however applied for the re-trial of the Mainland Divorce Case but was dismissed. As a matter of fact, she has submitted herself to the jurisdiction of the courts in the Mainland not only once but twice for the reason that apart from the application for re-trial this year, she had also commenced her own Changshu Divorce Case in November 2010. AUTONUMOUT That said, the question remains whether P is able to rely on the exception under sub-paragraph (ii) of the said section 61(2)(a). As has been pointed out by Litton NPJ in Para 120 of *ML v YJ*, (2010) 13 HKCFAR 794, where adequate steps have not been taken in given notice, or where a party has not had a proper opportunity to take part in the overseas proceedings, the court might nevertheless, in its discretion, give recognition to the overseas decree. AUTONUMOUT The evidence before me shows that notice of the Mainland Divorce Case was served on P by way of public notice. There is however no material before the court regarding the particulars of the public notice such the date of the notice and the mode of its service, for instance, whether it was by way of a notice being posted outside the relevant court building or it was by way of an advertisement in a newspaper. According to the judgment by the PRC court on the application for re-trial, service by way of public notice was employed because P had moved away from her previous place of abode and could not be located. Nevertheless, the service by way of public notice was valid according to the relevant PRC laws and regulations and as can be seen from the Judgment of the PRC court, it was the very reason for the dismissal of P's application for re-trial. AUTONUMOUT In my view, whilst the public notice may satisfy the requirement under sub-paragraph (1) of section 61(2)(a), it cannot be the case for sub-paragraph (ii). AUTONUMOUT's case is that she had no knowledge of Mainland Divorce Case at the relevant time. That is challenged by Mr Chu. AUTONUMOUT The undisputed chronology of the events shows that R commenced his Mainland Divorce Case in Shanghai in June 2010. That was about the same time when P's PRC lawyer Mr Yang of Shanghai also contacted R on the divorce issue. Then a few months later, P commenced her own Changshu Divorce Case on 16 November 2010 but was later withdrawn for the reason that R could not be traced. In my view, if P had known of the Mainland Divorce Case at the relevant time, she would not have commenced her own divorce case. Further, P's another lawyer Mr. Yang of Beijing was able to meet and discuss with R on the divorce matter in Beijing on 15 October 2011 but the discussion was a failure. Later on, since P was aware that R had acquired his Hong Kong identity card and believed that he must have moved his assets to Hong Kong, upon the advice from this Mr Yang, she chose to commence her action in Hong Kong; and

that was what she did a few months later in April, 2012. P's evidence is that R never mentioned to Mr Yang about the Mainland Divorce Case. What strikes me is that bearing in mind that at that time R had obtained the Mainland Divorce Decree for just nearly 9 months, even on his evidence, he never said that when he met Mr Yang of Beijing he had informed him of the Mainland Divorce Case or the Mainland Divorce Decree. The purpose of the meeting was on the divorce. If he had so informed Mr Yang, there was no reason why R would have forgotten to say this in his affirmation. Thus analysed, I find that on balance P was not aware of the Mainland Divorce Case at the material time and therefore she did not have the opportunity to take part in the proceedings. AUTONUMOUT Mr Chu argues that P was given such an opportunity in the form of the re-trial application and hence whatever defect it was, it has been rectified. I do not agree. From the application document filed by P and the PRC judgment that I referred to above, it is clear that the judgment was on whether P should be allowed to re-try the case. To employ the term that practitioners in Hong Kong are familiar with, it was just an application on the part of P to have the decree set aside so that she would be allowed to take part in the proceedings to argue on the merits of the case. In this regard, I also give some weight to the fact that clearly for the reason that P had not participated and R had no such application, the Mainland Divorce Case did not deal with the financial matters between the parties. AUTONUMOUT For the reasons aforesaid, I conclude that this is a proper case where the court should exercise its discretion in favour of P and thus, P is entitled to invoke section 61(2)(a)(ii) of MCO. I am satisfied that the Mainland Divorce Decree should not be recognised.

Orders

AUTONUMOUT Therefore, apart from the rescission of the decree nisi, the rest of R s application must fail. I order that Paragraph 1 (the striking out application) and Paragraph 3 (the vacation of the registration of the Amended Petition against the Property at the Land Registry) of the Summons be dismissed. AUTONUMOUT I also give an order, by consent, that the decree nisi dated 9 December, 2013 be rescinded. Costs AUTONUMOUT As the respondent is only half successful in his application and the petitioner only consented to the rescission of the decree nisi during the hearing, it appears to me that the proper costs order should be for the petitioner to pay half of the costs of the respondent s costs of this application, including costs reserved and with certificate for counsel, to be taxed if not agreed. I so order by way of an order nisi. (I. Wong) Deputy District Judge Mr Lau Yue Sum of YS Lau & Partners, Solicitors, appeared for the petitioner Mr George Chu, instructed by Damien Shea & Co, Solicitors, appeared for the respondent

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