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 AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT HAMILTON

I TE KŌTI WHĀNAU
KI KIRIKIRIROA

FAM-2020-095-005382
[2021] NZFC 3626

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[NAVIN CHETTI] Applicant
AND	[AASMI BHATTA] Respondent

Hearing:	19 April 2021
Appearances:	F Amarasekera for the Applicant No appearance by or for the Respondent
Judgment:	10 May 2021

RESERVED JUDGMENT OF JUDGE N J GRIMES

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[1] These proceedings concern [Navin Chetti] and [Aasmi Bhatta] under the Family Proceedings Act 1980. Mr [Chetti] applied on 10 September 2020 for a single application dissolution of their marriage that had taken place [in February] 2017 in New Delhi, India.

[2] Having had Mr [Chetti] confirm his affidavit evidence, received Ms Amarasekera's submissions and noting Ms [Bhatta] had not taken any further steps

in the proceedings, I granted the order dissolving the parties' marriage on 19 April 2020 and reserved my reasons.

[3] By way of background the parties were married [in February] 2017 in New Delhi, India with Mr [Chetti] returning to New Zealand where he had lived since [mid-2014]. Ms [Bhatta] joined Mr [Chetti] in New Zealand [in mid-2017]. Unhappy differences occurred and the parties separated on 24 March 2018. There is no dispute as to date of separation.

[4] Seven weeks after separation, Ms [Bhatta] obtained a temporary protection order against Mr [Chetti]. The application for a final protection order was dismissed at a defended hearing before his Honour Judge Brown on 8 October 2018. Ms [Bhatta] has not returned to New Zealand since departing [in October] 2018.

[5] Mr [Chetti] brought an application to dissolve his marriage on 10 September 2020. He then applied for the application to be served by email. Mr [Chetti]'s advocate in India attended to service by email on 6 October 2020 and an affidavit of service was provided. Ms [Bhatta] responded to the proceedings on 18 October 2020 disputing a number of reasons why an order for dissolution should be made in the New Zealand Family Court. Given the issues raised by Ms [Bhatta], the Court appointed counsel to assist whose brief was to:

(a) identify whether there were any jurisdictional issues which would impede the progress of the application;

(b) identify the issues to be determined;

(c) consider how this matter might be heard when one party resides in India;

(d) any other matters which impact on matters the Court needs to determine; and

(e) to report in 28 days.

[6] Ms Amarasekera was appointed and filed comprehensive submissions prior to a judicial conference on 18 January 2021 before me. I recorded that Ms [Bhatta] had failed to arrange an appearance at the judicial conference. I recorded the four issues the Court needed to determine and timetabled the proceedings to a two hour submissions only hearing held on 19 April 2021. Mr [Chetti] complied with those directions and filed further affidavit evidence that specifically addressed the issue of domicile including at the time he made his application on 10 September 2020 and his intentions for remaining and working in New Zealand thereafter.

[7] I directed Ms [Bhatta] attend the submissions only hearing by phone. She was to liaise with the registrar to ensure this happened taking into account time zone differences. I continued Ms Amarasekera's appointment as counsel to assist so she could ensure Ms [Bhatta] received Mr [Chetti]'s updated evidence and to liaise with her regarding the filing of submissions. Service of Mr [Chetti]'s affidavit occurred on 28 January 2021. Ms Amarasekera reports she emailed both parties on 8 April 2021 to remind them of the Court's directions and that the hearing was proceeding on 19 April 2021. No steps were taken by Ms [Bhatta] and therefore the hearing proceeded without her.

[8] The four identified issues to be addressed are as follows:

(a) whether the applicant's application for an order dissolving the marriage was validly served on the respondent;

(b) whether the applicant was domiciled in New Zealand when he filed his application for an order dissolving the marriage on 10 September 2020 so that the Court had jurisdiction to deal with the application;

(c) if the applicant was domiciled in New Zealand on 10 September 2020 and the New Zealand Court therefore has jurisdiction, whether New Zealand is Forum Non Conveniens given the marriage was solemnised in India; and

(d) would the dissolution of marriage, if made in New Zealand, be recognised in India.

Was the applicant's application for an order dissolving the marriage validly served on the respondent?

[9] Where a sole application for dissolution of marriage under the Family Proceedings Act is filed, the registrar must under r 15 of the Family Proceedings Rules 1981 issue a copy of the application for service on the respondent.

[10] Section 157 of the Family Proceedings Act gives the Court a discretion to either hear and determine an application made under the Act in the same manner as if the respondent had been served with the appropriate notice of the proceedings or to order that any steps may be taken to bring proceedings to the notice of the respondent who is absent from New Zealand. This is an unfettered discretion. An order made under s 157 may direct that the notice of proceedings be given "in any manner whatsoever."

[11] In this case an order for substituted service was granted on 6 October 2020. An affidavit was filed confirming Ms [Bhatta] was served with the application on 6 October 2020 in accordance with the order for substituted service.

[12] As it has been established that Ms [Bhatta] was absent from New Zealand and s 157 of the Family Proceedings Act gave the Court the power to order any steps to be taken to bring the proceedings to her notice in any manner whatsoever I find therefore she was validly served.

Was the applicant domiciled in New Zealand when he filed his application for an order dissolving the marriage on 10 September 2020 so that the Court has jurisdiction to deal with the application?

[13] In Mr [Chetti]'s affidavit dated 25 January 2021 he provided evidence from his passport that he arrived in New Zealand on 26 May 2014 as a student. He finished a one year diploma in health and service management and started working fulltime as a

community support worker from 2015. He obtained a work visa on 8 June 2016 for two years and continued to work for the same organisation. That visa was further renewed for another three years on 30 May 2018.

[14] Due to a skill migrant shortage, Immigration New Zealand announced immigrants who have employer assisted work visas that were expiring between 1 January and 30 June 2021 would be granted an automatic six months extension. This occurred for Mr [Chetti] whose visa has been extended to the end of November 2021.

[15] Mr [Chetti] deposed of working throughout, he being a [job title and field deleted].

[16] On 15 October 2019 Mr [Chetti], with the assistance of Pathways NZ, lodged his residence application. Further information was requested which he has now submitted, and he is expecting an answer from Immigration in May 2021.

[17] Mr [Chetti] states the only time he has been out of New Zealand is when he travelled to India on 19 January 2017 to meet Ms [Bhatta] for the first time with their marrying [in February] 2017. Mr [Chetti] returned to New Zealand 10 days later. Copies of the relevant pages from his passport have been supplied to support his evidence.

[18] Mr [Chetti]'s evidence is that he has at all times wanted New Zealand to be his home. He has no desire to return to live in India.

[19] In these circumstances I find, on the balance of probabilities, that Mr [Chetti] was domiciled in New Zealand at the time he made his application and that his intention to live in New Zealand remains the same now. Therefore, I find that this Court has the jurisdiction to deal with the application.

Forum Non Conveniens

[20] Having found Mr [Chetti] is domiciled in New Zealand and the Court has jurisdiction to hear the proceedings, the next issue is whether New Zealand is forum non coveniens, given the marriage was solemnised in India.

[21] In her submissions Ms Amarasekera referred the Court to *Gilmore v Gilmore* where the Court [1] referred to the approach in *The Spiliada* as being one in which the New Zealand Court enquires whether the foreign forum is clearly more appropriate to New Zealand.[2] The legal test to determine the appropriate forum is as follows:

> *(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 in 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 is 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 include 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.*

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[1] *Gilmore v Gilmore* [1993] NZFLR 561.
[2] *The Spiliada* (1986) 3 WLR 927.

(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 proceeding 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 might not obtain justice elsewhere perhaps because of uncivilised or suspect judicial systems.*

(f) *The fact proceedings are in train in the foreign forum, a so-called lis alibi pendens, is relevant but not not decisive.*

(g) *The fact that a plaintiff may obtain legitimate personal or judicial advantage through proceeding in New Zealand is likewise relevant but not decisive. The appropriate forum must be determined on an objective basis serving the interests of both sides in the general interests of justice. Factors such as less adequate discovery abroad or less generous awards, will not necessarily mean New Zealand Courts should hold the case back in New Zealand. A New Zealand plaintiff can find himself relegated to a forum in which the substantive law applied is for him relatively less satisfactory.*

(h) *Potential enforceability of the judgment obtained abroad has been regarded as relevant.*

[22] Ms Amarasekera also referred the Court to *CC v DS* where an application of these principles was made in the context of an analogous application for an order dissolving a marriage solemnised in India.[3] In that case the respondent failed to establish on the balance of probabilities that New Zealand was Forum Non Conveniens for the application for dissolution of marriage. In that case the respondent's only ground for objection was her belief that a dissolution order by the New Zealand Court would prevent her from recovering property held in India through the Indian Courts.

[3] *CC v DS* [2013] NZFLR 578.

[23] In the absence of evidence that this was the correct interpretation or understanding of the legal position in India, her Honour Judge Ulrich concluded that the respondent's case did not reach the necessary threshold to show that the Indian Court is the forum that is "clearly or distinctly more appropriate."

[24] In the present case the burden rests on Ms [Bhatta] to show that the Indian courts are the more appropriate forum taking into account all of the above factors. I find she has not provided an understanding of the legal position in India. Whilst she has domestic violence proceedings on foot in India (as she did in New Zealand), she has not provided an understanding of the legal position that such proceedings should delay a dissolution of marriage.

[25] No other proceedings (such as dissolution of marriage) in India have been drawn to this court's knowledge. Therefore, Ms [Bhatta] has failed to show that the Indian court is the more appropriate forum. I find that New Zealand is Forum Conveniens.

Will the dissolution of marriage if made in New Zealand be recognised in India?

[26] The Hindu Marriage Act 1955 does not expressly state whether or not a dissolution of marriage made in a foreign court will be recognised under their national law, however s 13 of the Code of Civil Procedure 1908 provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:

> *(a) where it has not been pronounced by a court of competent jurisdiction;*
>
> *(b) where it has not been given on the merits of the case;*
>
> *(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India] in cases in which such law is applicable;*

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim found on a breach of any law in force in India.

[27] I find that none of the above matters are present in this case. It is not clear that an Indian court would prima facie refuse to recognise an order made by a New Zealand Court dissolving the marriage.

Outcome and orders:

[28] Having addressed the four identified issues, I have determined there is no legal basis to prevent an order for dissolution being made and again confirm and record that the order for dissolution is made in favour of Mr [Chetti].

[29] Ms Amarasekera is thanked for her submissions which have greatly assisted me in giving this decision.

N J Grimes
Family Court Judge