

**IN THE FAMILY DIVISION OF THE HIGH COURT
APPELLATE JURISDICTION**

CASE NUMBER:

10/LTK/0163

BETWEEN:

SUNITA

AND:

DHARMEN

Appearances:

Mr. D. Gordon for the Applicant
No appearance of Respondent

Date/Place of judgment:

Thursday, 20th January, 2011 at Lautoka.

Judgment of:

The Hon. Justice Anjala Wati.

Coram:

The Hon. Justice Anjala Wati.

Category:

All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.

Anonymised Case Citation:

SUNITA v DHARMEN - Fiji Family High Court Case
Number: 10/LTK/0163.

JUDGMENT OF THE COURT

Catchwords

MARITAL STATUS PROCEEDINGS - APPLICATION TOR AN ORDER FOR NULLITY - application by wife on the ground that the she did not provide her real consent to the marriage because her consent was obtained by fraud-ground not established-application dismissed with no order as to costs.

Legislation

Family Law Act No. 15 of 2003.

Cases/Texts Referred To

Silver (orse. Kraft) v. Silver [1955] 1 W.L. R. 728.
Puttick v. Attorney-General [1950] Fam. 1.
R. v. Cahill[1978] 2 N. S. W. L. R. 453.
Sullivan v. Sullivan (falsely called Oldacre) (1818) 2 Hag. Con. 238.
Moss V. Moss (orse. Archer) [1897] P, 263.
In the Marriage of Deniz (1977) 31F. L.R. 114.
In the Marriage of Otway [1987] F.L.C. 91-807.
In the Marriage of Soukmani (1989) 96 F. L. R. 388.
In the Marriage of Osman and Motirral (1989) 96 F. L. R. 362.
Najjarht v. Houlayce (1991) 104 F. L. R, 403.

The

The Application

1. This is an application by the wife to have her marriage solemnised in Nadi in 2009 nullified on the ground that she did not provide her real consent to the marriage as the same was obtained by fraud.

The Response

2. The husband was served with the application but he did not file any response nor did he appear in court to defend the matter.

The Law

3. Section 32 (1) of the Family Law Act No. 18 of 2003 states that a party can apply for an order for nullity of the marriage on the grounds that the marriage is void. In this case the ground is alleged to be pursuant to the second limb of section 32 (2) (d) (i). I will have to state the law in respect of the ground alleged.
4. Section 32 (2) (d) (i) of the Family Law Act No. 18 of 2003 states that a marriage that takes place after the commencement of the Act is void if the consent of either party is not a real consent because it was obtained by fraud. What constitutes fraud is defined by the various cases.
5. Sir William Scott said in Sullivan v. Sullivan (falsely called Oldacre) (1818) 2 Hag. Con. 238 at 248; 161 E.R. 728 at 731-732:-

" I say the strongest case you could establish of the most deliberate plot leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this court to release [a suitor] from chains which, though forged by others, he had riveted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent, however procured, is his own act."

6. Sir Francis Jeune in the case of Moss V. Moss (or. Archer) 11897] P. 263 said:-

"I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but

because of the absence of consent."

7. Justice Frederico in *In the Marriage of Deniz* (1977) 31 F. L.R, 114 held that the old cases on fraud and nullity were no longer relevant to Australian law, and he expressed the view that the act had introduced entirely new concepts which were no longer derived from ecclesiastical principles. He said that the legislature must have intended the term "fraud" to have a wider meaning than that recognised in the old cases, otherwise it would be a mere surplusage given the separate provisions on mistake as to the identity of the other party or as to the nature of the ceremony performed and mental incapacity to understand the nature and effect of the ceremony. Unfortunately Justice Frederico did not offer any satisfactory explanation of what tills term fraud meant save to say that "the fraud relied on must be one whluch goes to the root of the marriage contract."

8. The facts in *In the Marriage of Deniz* involved a young girl from Lebanese family in Australia who was induced by a Turkish visitor to Australia to marry him, ostensibly out of love though in fact simply to enable him to gain permission to reside permanently in Australia. The man left the girl soon after the marriage ceremony, to her utter distress, which resulted in her having a neivous breakdown and attempting suicide. The judge in tills case had no hesitation in holding the marriage to be void on the ground of fraud in that the girl's consent to the marriage had been induced by a trick and apparently also because the conduct of the man amounted to a total rejection of the institution of marriage and what it stands for, with the result that there was a total failure of consideration.

9. The proposition that fraud can cover fraudulent misrepresentation was expressly rejected by Justice McCall in the subsequent case of *In the Marriage of Otway* [1987] F.L.C. 91-807. Justice McCall expressed the view that the term fraud should be given its established meaning as indicated by the older cases. On tire object of the nullity provisions of the Marriage Act, he said:

"In my view the provisions of the Marriage Act were doing little more than putting in statutory form the law as it was then understood, and did not intend to liberalize or expand the meaning of 'fraud'. At best the separation of fraud from mistake and the qualifications attached to mistake in the subparagraph only clarified the fact that an innocent as well as fraudulent mistake could result in the relevant lack of consent to the marriage."

10. Subsequent cases at first instance have left no doubt that the interpretation of 'fraud' in *In*

the Marriage of Otway is to be preferred to that in In the Marriage of Deniz (supra). Some of them are In the Marriage of Soukmani (1989) 96 E L. R, 388; In the Marriage of Osman and Mourrali (1989) 96 E L, R, 362; Najjarin v, Houlayce (1991) 104 E L, R, 403; and In the Marriage of Hosking (1994) 121 E L, R, 196,

The Evidence

11. The wife deposed in her affidavit the following evidence:-

- Sometime in October, 2009, the uncle of the respondent came to her place and spoke to her father regarding arranging her marriage to the respondent.
- After two to three days, the respondent came to her house and saw her.
- ® Her family advised the respondent and his family that she had a physical disability in her right hand which causes her hand to be "crippled" or disabled.
- Upon being told about the disability/ the respondent and his family raised no issues and said that it was not a problem and that they were still interested in the marriage.
- After two days she went with her family to the respondents place to work out and fix a date for engagement and marriage.
- She again rang the respondent on her mobile and told him that she was fearful that her crippled hand would be an issue in their marriage. The respondent told her that he was marrying her and not his family and that he had no issues with her crippled hand.
- On 28th November/ 2009 she was engaged to the respondent and had the legal marriage ceremony on the same night. The matters were good for about one week and they had no problems.
- A week later, her in- laws told her that she should go back to her place and only come back if her hand got better. The respondent did not say anything or object. Her mother-in-law and sister-in- law packed her bags and her father in law dropped her to her parents place.
- Her father went to discuss the issue with her in-laws but he was sworn at by her father-in-law. Her mother-in-law swore at her on phone as well.

- The respondent and his family kept no further contact with her because of her crippled hand.
- She feels that she has been cheated and a fraud has been committed on her.
- The respondent obtained her consent through fraud, deceit, misrepresentation and dishonesty.

The Determination

12. The wife wants to get out of the marriage because of the incidents after marriage. She is relating those incidents back to the time of the marriage. Many marriages fail because of incidents after marriage and this does not mean that those incidents could be levied back at the time of consent to the marriage.
13. The wife and the husband did agree to get married to each other and despite the disability the wife had provided her consent to get married. Both parties were happy to go through the marriage. After the marriage, the promise to live with the wife for whatever reasons did not work out. This does not mean that the marriage is not to be recognised. There are many marriages where promises are made before the marriage, and after marriage, one or the other party cannot keep their words. The answer then lies in dissolution of marriage and not nullity.
14. Fraud does not cover a situation pleaded by the wife. Her relief lies in dissolution of marriage.
15. The application for an order for nullity must therefore be refused for the above reasons.

The Final Orders

16. The application for an order for nullity of marriage is refused,
17. There shall be no order for costs.

Judge

20.01.2011

To:

1. *Air. D. Gordon for the Applicant.*
2. *Respondent.*
3. *File Number; 1 tyLtyff163.*