IN THE FAMILY DIVISION OF THE HIGH COURT	
AT LAUTOKA ORIGINAL JURISDICTION CASE NUMBER:	09/LTK/0429
BETWEEN:	RITESHNI
	APPLICANT
AND:	DHARMEN
	RESPONDENT
Appearances:	Applicant in Person.
	No appearance of Respondent.
Date/Place of Judgment:	Thursday, 20th January, 2011 at Lautoka.
Judgment of:	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:	RITESHNI v. DHARMEN - Fiji Family High Court Case Number: 09/LTK/0429.

JUDGMENT OF THE COURT

MARITAL STATUS PROCEEDINGS - APPLICATION FOR 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 under duress by her parents and through fraud by the husband who had lied to her that he was a businessman, he had a house and he was an educated person when all that was not the truth-she had discovered this after legal marriage- no traditional marriage took place as well -none of the grounds established-application dismissed with no order as to costs.

Legislation

Family Law Act No. IS of 2003.

Marriage Act, Cap.50.

Cases/Texts Referred To

Scott (falsely called Sebright) v. Sebright (1886) 12 P. D. 2.

Cooper (falsely called Crane) v. Crane [1891J P. 369.

Szechter (orse. Karsov) v. Szechter [1971] P. 286.

Re Meyer [1971] P. 298.

Hirani v. Hiraiti (1982) 4 Fam. L. R. (Eng.). 232.

In the Marriage of S (1980) 42 F.L.R. 94.

In the Marriage of Teves and Campomayor (1994) 122 F. L. R. 172.

Silver (orse. Kraft) v. Silver [1955] 1 W.L. R. 728.

Puttick v. Attorney-General [19S0] 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.

lit the Marriage of Deniz (1977) 31 F. L.R. 114.

In the Marriage of Otway [1987] F.L.C. 91-807.

In the Marriage of Sotikmani (1989) 96 F. L. R. 388.

In the Marriage of Osman and Mourrali (1989) 96 F. L. R. 362.

Najjariit v. Houlayce (1991) 104 F. L. R. 403.

In the Marriage ofHosking (1994) 121 F. L. R. 196.

Dickey, A, "Family Law" 4"' Edition (2002) Lawbook Co. Sydney.

The Application

1. This is an application by the wife to have her marriage solemnised in 2009 nullified on grounds that the marriage was not solemnized properly and that she did not provide her real consent to the marriage as the same was obtained under duress and 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. There are certain grounds under which a marriage can be held to be void. In this case three particular grounds are alleged. The first ground is alleged to be pursuant to section 32 (2) (c), the second and third grounds are alleged to be pursuant to the first and second limb of section 32 (2) (d) (i). I will have to state the law in respect of the grounds alleged.

4. Section 32 (2) (c) of the Family Law Act No. 18 of 2003 states that a marriage is void if there is failure to comply with the requirements of tire law of that place with respect to the form of solemnization of marriages.

5. The formalities of this marriage are governed by tire Marriage Act, Cap. 50, Laws of Fiji.

6. The basic requirements in respect of solemnization of this marriage are stipulated in ss. 16 to 28 of the Marriage Act, Cap. 50.

7. I do not find it necessary to restate the provisions as there was no evidence that the marriage was not solemnized in terms of the Marriage Act, Cap. 50.

8. The first limb of section 32 (2 (d) (i) of the Family Law Act No. 18 of 2003 states that a marriage is void if the consent of either party to the marriage is not a real consent because it was obtained by duress.

9. Duress has been defined as follows

   - State of mental incompetence, whether through natural weakness of intellect or from fear (whether reasonably held or not) that a party is unable to resist pressure improperly brought to bear: (Scott (falsely called Sebright) v. Sebright (1886) 12 P.D. 21.)

   - A person's mind is so perturbed by terror that he or she does not understand what he/ she was doing or alternatively if he/she understood what he/she was doing then their powers of volition had been so paralysed that he/ she succumbed to another's will: (Cooper (falsely called Crane) v. Crane 118911 P. 369.)

   - If there is a threat of immediate danger to life, limb or liberty: (Szechter (orse. Karsov) v. Szechter (19711 P. 286.)

   - If there is a threat of immediate danger to life, limb (including serious danger to physical or mental health), or liberty: (Re Meyer [19711 P. 298 at pp. 306 and 307.)

   - If the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual: (Hirani v. Hirani (1982) 4. Fam. L.R. (Eng.).232.

   - If one is caught in a psychological prison of family loyalty, parental concern, sibling responsibility, religious commitment and a culture that demands filial obedience. If these matters operate and a party has no consenting will then there is duress: (In the Marriage of S (1980) 42 F.L.R 94.)

   - Duress does not necessary need to involve a direct threat of physical violence as long as there is sufficient oppression from whatever source, acting upon a party to vitiate the reality of their consent. It must be duress at the time of the marriage ceremony and not duress at some time earlier unless the effect of this continues to overbear the will of a party to a marriage ceremony at the time of the ceremony itself: (In the Marriage of Teves and Campomayor (1994) 122 F. L. R172)

10. 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.

11. What constitutes fraud is defined by the various cases.

12. 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."

13. Sir Francis leune P in the case of Moss V. Moss (orse. Archer) 118971 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."

14. 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 this term fraud meant save to say that "the fraud relied on must be one which goes to the root of the marriage

contract."

15. 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 nervous breakdown and attempting suicide. The judge in this 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.

16. The proposition that fraud can cover fraudulent misrepresentation was expressly rejected by Justice McCall in the subsequent case of In the Marriage of Otway [19871 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 the 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."

17. 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 F. L. R. 388; In the Marriage of Osman and Mourrali (1989) 96 F. L. R. 362; Naj jarin v. Houlayce (1991) 104 F. L. R. 403; and In the Marriage of Hosking (1994) 121 F. L. R. 196.

The Evidence

18. The wife gave the following evidence:-

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o The marriage was arranged by her parents. The parents are in a town in the Western Division. She told the parents that she did not want to get married. Her parents said that she was getting old and that she should get married. She therefore agreed. She did not want to upset her parents.

o She was working in in another town in the western division and one of the husband's family members told her that the husband was a businessman and that he had a house in Suva. After marriage she found out that this was not the truth.

o The husband also showed the parents a house saying that it was his but he was lying. The house was not his.

• She told her parents that it was all a lie and the parents said that she was making up false allegations because she was reluctant to get married.

o She could not do anything. Her parents forced her to get married. She therefore did not resist. They got married. After one week of the marriage, the husband told her that he could not get traditionally married -as scheduled because his land was taken by the landowners and he did not have money. He said that he had bought a dalo farm in the interior and when he has money then he will get married.

o The husband has given all kinds of reasons why he will not get married. He lied to her about him being a businessman, about having a house and also that he was educated. In fact he is only educated - till Primary School. He should not have lied. If he told the truth then she would not have had any problems but he has lied and she does not wish to remain married to him. She wants her marriage to be nullified.

19. The applicants' mother also gave evidence. She said as follows:-

o As parents they just asked the daughter to get married. They did not do anything apart from that.

o Before marriage, they knew him as a good boy, from a good family. After the marriage, he refused to get married and gave excuses like he had no house and had bankruptcy problems. He lied to them and so they do not

want the daughter to remain married.

The Determination

20. The applicant wife is hunting a way out of this marriage. There is no evidence of duress. Normally all parents ask their children to get married. That is part of their obligation as parents. In this case, the parents did exactly the same and the daughter agreed to get married. She provided her consent to get married. She did not resist the marriage. This request by parents does not amount to duress. The application fails on the ground of duress.21. On the issue of fraud, I must say that the cases above indicate that fraud cannot cover a situation of the nature pleaded by the applicant. The fraud must relate to the nature and form of the ceremony.

22. In my judgment, the applicant had agreed to marry the human being that she did marry. Fraudulent misrepresentation as to a person's rank, family fortune, age or habits of life will not nullify the marriage.

23. There is also no evidence that the civil marriage was not solemnised properly. It is clear from the evidence of the applicant that she means the term "marriage" to be a religious marriage. However the marriage referred to in section 32 (2) (c) of the Family Law Act is the civil marriage solemnized and registered under the provisions of the Marriage Act, Cap. 50 and not the religious marriage.

24. The use of the terms "*comply with the requirements of the law of that place with respect to the form of solemnization*" in s. 32 (2) (c) clearly indicates that the marriage that is referred to is the registered marriage solemnized under the Marriage Act, Cap 50 because in Fiji marriages are solemnized under the said Marriage Act and only those marriages duly solemnized under the Act are given legal recognition.

25. Section 38 of the Marriage Act, Cap 50 is relevant. It reads that:-

"*Every marriage duly solemnized under the provisions of this act unless therein expressly declared to be void shall be deemed to be good and valid in law until the contrary is proven.*"

26. In Fiji religious marriages are recognised as an additional ceremony which has no legal effect. It does not supersede or invalidate the marriage which must be

first solemnized under the provisions of the Marriage Act. Religious Marriages can only be performed after the civil/legal marriage. Section 36 of the Marriage Act, Cap. 50 is relevant. It states that:-

"At any time after the solemnization of a marriage by the Registrar-General or district registrar, the parties to such marriage may, if they so desire, upon the production of the certificate of the Registar-General or district registrar as to the marriage, have a further marriage service performed according to the form ordained or use by the religion or religious denomination to which either or each of such parties belong.

Nothing in the reading or celebration of a marriage service under the provisions of subsection (1) shall supersede or invalidate any marriage previously solemnized nor shall such reading or celebration be entered as a marriage in the register of marriages.

27. There is no evidence that the marriage to which our Act refers to was not solemnized properly.

28. The application for an order for nullity must therefore be refused for tire above reasons.

The Final Orders

29. The application for an order for nullity of marriage is refused.

30. There shall be no order for costs.

Judge
20.01.2011

To:

1. *Applicant.*
2. *Respondent.*
3. *File Number 09/Ltk/0429.*