IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

CASE NUMBER:	**14/LTK/0528**
BETWEEN:	**SHAZMEEN**
	APPLICANT
AND:	**SAMAR**
	RESPONDENT
Appearances:	*Mr. K. Tunidau for the Applicant.*
	No Appearance of Respondent.
Date/Place of Hearing:	*Tuesday, 03 February 2015 at Lautoka.*
Date/Place of Written Judgment:	*Wednesday, 04 February 2015 at Lautoka.*
Judgment of:	*The Hon. Justice Anjala Wati.*
Category:	*The Hon. Madam Justice Anjala Wati.*
	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:	*SHAZMEEN V. SAMAR- Fiji Family High Court Case Number: 14/LTK/0528.*

JUDGMENT

MARITAL STATUS PROCEEDINGS – APPLICATION FOR AN ORDER FOR NULLITY – application by wife on the ground that her consent to marry was not a real consent as it was obtained by duress - the ground for nullity not established-application for an order for nullity dismissed-no order as to costs.

Legislation:

Family Law Act No. 18 of 2003.

Marriage Act Cap. 50.

Cases/Texts Referred To:

Brodie v. Brodie [1917] P. 27.

H. v. H. [1954] P. 258.

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

Morgan v. Morgan (orse. Ransom) [1959] P. 92.

Scott v. Scott (orse. Fone) [1959] P. 103.

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

In the Marriage of Suria (1977) 29 F. L.R. 308.

In the Marriage of Otway [1987] F.L.C. 91-087.

Vervaeke (formerly Messina) v. Smith [1983] 1 A. C. 145.

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

Griffith v. Griffith [1994] I.R. 35.

Leonards v. Leonards (1961) 2. F.L.R. 111.

Parojcic (orse. Ivetic) v. Parojcic [1958] 1 W. L. R. 1280.

Scott (falsely called Sebright) v. Sebright (1886) 12 P.D. 21.

Cooper (falsely called Crane) v. Crane [1891] p. 369.

Re Meyer [1971] P. 298.

Singh v. Singh [1971] p. 226.

Singh v. Kaur (1981) 11 Fam. Law 152.

Hirani v. Hirani (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.

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

Case Background

1. On 24 October 2014 the wife filed an application for an order that their marriage which was solemnised in New Zealand in 2014 be nullified on the ground that she did not provide her real consent to the marriage as the same was obtained by duress.

The Law

2. Under s. 32 of the Family Law Act, a party can apply to have the marriage nullified on the grounds that the marriage is void.

3. The first limb of section 32 (2 (d) (i) of the Family Law Act 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.

4. It is fundamental to marriage that both parties consent to being joined together as husband and wife. A marriage is a *"voluntary union"*. The concept of voluntariness is an essential ingredient in the definition of marriage under the laws of Fiji Islands: *s. 15: Marriage Act:*

   "Marriage in Fiji shall be the voluntary union of a man and a woman to the exclusion of all others".

5. What is it that each party to the marriage must give real consent to? There are two possibilities here. Either the parties are required to consent simply to entering into formal marriage relationship or they are required to consent to living with the other party in the way normally expected of a husband and wife.

6. Australian and English Courts have always refused to take notice of any understanding by parties to a marriage concerning the future course of their marriage: *Brodie v. Brodie [1917] P. 271; H. v. H. [1954] P. 258 at 267-269; Silver (orse. Kraft) v. Silver [1955] 1 W. L. R. 728; Morgan v. Morgan (orse. Ransom) [1959] P. 92; Scott v. Scott (orse. Fone) [1959] P. 103; Szechter (orse. Karsov) v. Szechter [1971] P. 286 at 296; In the Marriage of Suria (1977) 29 F. L.R. 308 at 314; In the Marriage of Otway [1987] F.L.C. 91-087.*

7. There is accordingly no doubt that the consent is simply consent to enter into a formal marriage relationship, and nothing more. As *Lord Hailsham* said in *Vervaeke (formerly Messina) v. Smith [1983] 1 A. C. 145 at 152*, concerning the corresponding law in England:

" The fact is that in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties' personal relationships once it is established that the parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities".

8. *Lindenmayer J* put it in the more recent Australian case of *In the Marriage of Hosking (1994) 121 F.L.R. 196 at 207:-*

   "Should a court ever be entitled to say that a party's reasons for marriage are so improper that it will declare their marriage void? The answer, in my view, must be a resounding 'no'".

9. What constitutes duress, however, is a matter of degree, and herein lies the basic problem concerning this part of the law on nullity. As *Haugh J.* observed in the Irish case of *Griffith v. Griffith [1994] I.R. 35 at 42*, duress may begin from a gentle form of pressure and end up with physical violence accompanied by threats of death.

10. The courts have consequently had to determine at what point constraint upon a person to marry is so severe as to nullify that person's consent to the marriage.

11. In considering this problem, courts have consistently distinguished duress from lesser forms of pressure. So in *Leonards v. Leonards (1961) 2. F.L.R. 111* a reluctant bridegroom claimed to have marred simply because he had wanted to placate his father and mother, who desired the marriage, and that he was a tormented person whose heart was not in what he was doing, and that he was under a considerable emotional stress. The court held that pressure of this kind did not constitute duress.

12. On the other hand, in *Parojcic (orse. Ivetic) v. Parojcic [1958] 1 W. L. R. 1280*, a father, a Yugoslav refugee, ordered his daughter to marry a man chosen by him, who was another Yugoslav refugee, and he threatened to send her back to Yugoslavia against her wishes if she refused. He even hit his daughter in an argument over her refusal to marry the man in question. The court found that the girl had terrified into obedience to her father and that the ensuing marriage accordingly void on account of duress.

13. In England, the degree of oppression that constitutes duress for the law of nullity has changed over the years. Until 1970, the two leading cases on this matter were *Scott (falsely called Sebright) v. Sebright (1886) 12 P.D. 21 and Cooper (falsely called Crane) v. Crane [1891] p. 369.*

14. In Scott's case, a wealthy young lady was induced by her suitor to put her name to a number of bills of exchange to meet some of his accommodation expenses. The young lady was subsequently pressed by discounters to pay these bills, with writs being issued against her and bankruptcy proceedings threatened. As a result of all this, she became both mentally and physically ill. The suitor, a true Victorian bounder, then told the young lady that if she married him he would make appropriate arrangements with the discounters, but if she refused he would not. Moreover, he said that if she refused to marry him he would falsely accuse her to her mother *"and in every drawing-room in London"* of having been seduced by him. He forcibly took her to a registry office and told her that he would shoot her if she did anything to show that she was not acting of her own free will.

15. The marriage at the registry office was held to be a nullity as the young lady had been reduced by mentally and bodily suffering to a state in which she was incapable of offering resistance to the respondent's coercion and threats. In particular, the judge held that there can be no consent to marry if a party is in such a mental state of incompetence, whether through natural weakness of intellect or from fear (whether reasonably held or not), that he or she is unable to resist the pressure improperly brought to bear.

16. The facts of Cooper were as Victorian as the previous case. There a man took a young lady to a church, where he had arranged by stealth for marriage to take place. Outside the building he said to her *"you must come into this church and marry me, or I will blow out my brains, and you will be responsible"*. The young lady was so alarmed at this, for she knew he was in the habit of carrying a revolver, that she complied with his demand. The judge held that for the wife to avoid the marriage on the ground of duress, she had to show that her mind was so perturbed by terror that she did not understand what she was doing, or alternatively that although she understood what she was doing, her powers of volition had been so paralyzed that she had succumbed to another's will. On the facts of the case, this was not established.

17. From 1970 until 1982, the English courts substantially restricted the nature of the duress that could invalidate a marriage. The leading case in this regard was *Szechter (orse. Karsov) v. Szechter (supra).* The facts of this case involved both actual imprisonment and a threat of immediate danger to the petitioner's life. The petitioner was a woman in poor health who had been imprisoned in appalling conditions under communist rule in Poland for 'anti-state activities". Her subsequent marriage was a device, to which the respondent was a willing party, to enable her to leave Poland. There *Sir Jocelyn Simon P.* held that for the purposes of

the law on nullity, the cause of the duress had to be a threat of immediate danger to life, limb or liberty. In particular he said:

"It is, in my view, insufficient to invalidate an otherwise good marriage that a party has entered into it in order to escape from a disagreeable situation, such as penury or social degradation. In order for the impediment of duress to vitiate an otherwise valid marriage, it must, in my judgment, be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat of immediate danger (for which the party is not himself responsible) to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock".

18. It may accordingly have been because of the special facts in that case, which the judge described as involving *"a situation of hardship brought about by heroism in the teeth of cruelty and oppression",* that Sir Jocelyn Simon referred to the need for a threat of immediate danger of life, limb or liberty. However, be that as it may, the formulation of the law was consistently followed in England until 1982.

19. Only two qualifications were judicially suggested to the law as stated in *Szechter (orse. Karsov) v. Szechter*. The first was that a present likelihood of future danger, rather than a threat of immediate danger, to life, limb, or liberty would suffice and the second was that 'danger to limb" includes any serious danger to physical or mental health": *Re Meyer [1971] P. 298 at 306-307.*

20. During the 12 years from 1970 to 1982, the test of duress in *Szechter (orse. Karsov) v. Szechter* proved to be very restrictive in many circumstances involving the overbearing of a party's will. Prominent among these were situations involving arranged marriages. In England, as in Australia, immigrants often wish to continue to practice the social traditions and customs of their children. The question has thus arisen in both countries in recent years of what degree of parental or communal pressure will vitiate an arranged marriage to which a child is an unwilling party.

21. In two English cases concerning arranged marriages, *Singh v. Singh [1971] p. 226* and *Singh v. Kaur (1981) 11 Fam. Law 152* the Court of Appeal approved the test laid down in *Szechter* and held that duress would nullify an arranged marriage, like any other, only if the mind of the party was so overborne by fear caused by a threat of immediate danger to life, limb or liberty that the constraint destroyed the reality of the consent to marriage. In neither case was such duress established.

22. In the subsequent case of *Hirani v. Hirani (1982) 4 Fam. L.R (Eng.) 232*, however, the Court of Appeal expressly declined to follow the law as stated in *Szechter*. Without referring to *Singh v. Singh* or *Singh v. Kaur*, the Court of Appeal held that the crucial question was simply *"whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual"*. The court expressly held that there was no requirement of any threat to life, limb or liberty in order for there to be duress for the purposes of the law of nullity. In the light of the facts of the case, the Court of Appeal found that the will of a 9 year old Indian woman had been sufficiently overborne by her parents, who had arranged her marriage in order to prevent her marrying a member of another religion, to vitiate her consent and thus invalidate the marriage.

23. The Australian Courts have followed the English definition of duress until in the case of *In the Marriage of S (1980) 42 F.L.R. 94*. There *Watson J.* not only declined to follow the strict test in *Szechter* but went so far as to relax the more liberal principles in *Scott* and *Cooper*. The facts of the case were that a girl aged 16 succumbed to parental pressure and went through an arranged marriage in a Coptic Orthodox Church in Australia. The girl had been born in Egypt and had come to Australia with her family when she was eight. The marriage had been arranged in accordance with Egyptian Coptic traditions. The girl said in evidence that she had not wanted to go through with the marriage but that her parents had insisted and she could not stand up against them. The judge found that *"she was caught in a psychological prison of family loyalty, parental pressure, sibling responsibility, religious commitment and a culture that demanded filial obedience… if she had ' no consenting will' it was because these matters were operating-not threats, violence, imprisonment or physical constraint".*

24. *In the Marriage of Teves and Campomayor (1994) 122 F.L.R. 172, Lindenmayer J.* had no hesitation in following the decision in the *Marriage of S.* He said:

" It can be said that duress does not necessarily need to involve a direct threat of physical violence so long as there is sufficient oppression, from whatever source, acting upon a party to vitiate the reality of their consent".

The judge in this case also emphasized that it is duress at the time of marriage ceremony with which the law of nullity is concerned, 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.

The Evidence

25. The wife testified that her marriage to the respondent was arranged. She did not take part in that arrangement or say anything about the marriage. She agreed to get married out of respect to her parents and family. She was taught that she has a traditional obligation to respect her parents for the sake of family unity.

26. She was never in love with the respondent. She can never live with someone who she does not love.

27. She has never cohabited or had any kind of relationship with the respondent. Before the civil union she wanted to run away and cause herself harm but did not do so out of respect for her parents. She was under duress at the time of the marriage and she wants this marriage to be nullified.

28. She also told the court that when her parents asked her to get married they had said that she was getting old so she agreed to the union out of love and respect for them.

The Determination

29. There is no evidence of any pressure before me by the parents on the applicant. She says in her evidence that out of respect and to placate her parents she went through the marriage ceremony and that her heart was not in what she did. This form of pressure does not constitute duress as outlined in the case of ***Leonards (supra)***.

30. At no point in time did the wife refuse the marriage. The parents had no idea that she did not want to go through the ceremony. There is no evidence of the wife's parents being people who exercise power and authority on her to the extent that they would take adverse steps if she expressed her wishes.

31. If the wife says that she respects her parents and that is why she entered into the marriage then the filing of the application for nullity negates her evidence in that this step by her is definitely going against the parent's choices and wishes. She is exercising her wishes now to get away from the marriage and I find that even at the time of the civil union she was capable of overriding the wishes of her parents and that her powers of volition were not paralysed. She chose not to exercise her powers and succumb to the wishes of her parents. That, in law, under the authorities I have highlighted, does not constitute duress to nullify the marriage.

The Final Orders.

32. I therefore dismiss the application for an order for nullity.

33. There shall be no order as to costs.

34. The Applicant shall have a month within which she can appeal against the decision dismissing her application from an order for nullity.

ANJALA WATI

JUDGE

04.02.2015

To:

1. Mr Tunidau for the Applicant

2. Respondent in person

3. File number: 14/LTK/0528