

IN THE FAMILY DIVISION OF THE HIGH COURT
AT LAUTOKA

CASE NUMBER: 09/LTK/0379

BETWEEN: IQBAL

APPLICANT

AND: NIKHAT

RESPONDENT

Appearances: Applicant in Person.
Respondent in Person

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: IQBAL V. NIKHAT - Fiji Family High Court Case Number: 09/LTK/0379.

JUDGMENT OF THE COURT

MARITAL STATUS PROCEEDINGS - APPLICATION FOR AN ORDER FOR NULLITY - application by husband to have his marriage nullified on the ground that his consent to the marriage was obtained by fraud in that he was tricked by the respondent when she did not show him her true facial features-allegation that the respondent had covered her face and later after the marriage he discovered that the respondent had a -facial disfigurement with skin disease --thus the allegation that the consent was obtained by fraud-the test for fraud not met-application dismissed with no order as to costs.

Legislation

Family Law Act No. 18 of 2003.

Cases/Texts Referred To

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) 31 F. 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 Mourrali (1989) 96 F. L. R. 362.

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

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

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

The Application

1. The husband filed an application for an order to have the marriage solemnised at Lautoka Registry -in 2009 nullified on the ground that he did not provide his real consent to the marriage as his consent was obtained by fraud.

The Law

2. 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.

3. What constitutes fraud is defined by the various cases.
4. 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."

5. Sir Francis Jeune P in the case of Moss V. Moss (orse. Archer) [1897] 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."

6. 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."

7. 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.

8. The proposition that fraud can cover fraudulent misrepresentation was expressly rejected by Justice McCall in the subsequent case of In the Marriage of Otway 11987] 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."

9. 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; Najjarin v. Houlayce (1991) 104 F. L. R. 403; and In the Marriage of Hosking (1994) 121 F. L. R. 196.

The Evidence

10. The husband testified that when he saw the respondent for the first time she had had her head covered and was sitting at the kitchen door. He did not see the respondent properly. He agreed to get married to her. His family had a discussion and asked him to get married. His mother is sickly and there was no one to work at home so he agreed to get married. One day he saw the respondent in town. She did not have her head covered. He dropped her and her sister at her home. He noticed that the respondent had a -facial disfigurement and skin disease -. The respondents' family has also confirmed that the respondent has a -facial disfigurement. He does not want to marry the respondent anymore.

11. The respondent testified that her parents have spent a lot of money for the civil marriage. She will only agree to dissolution of marriage if he returns all her money. She has already applied for return of the money through Small Claims Tribunal. The applicant has no good reasons to be granted an order for nullity. He had told her that he has a girlfriend and that is why he does not want to remain married to her.

The Determination

12. The applicant had agreed to marry the respondent and he was not defrauded by the respondent at all. She may have had her head covered at the time the applicant came to consider her for marriage but the applicant provided his consent to marry the respondent and the human being he saw. His subsequent discovery and unhappiness cannot vitiate the consent that he provided at the time of the marriage. The difference in the looks does not entitle the applicant to be released from the chains that he had riveted on himself.
13. The test for fraud has not been met and the application must be dismissed forthwith.

The Final Orders

14. The application for nullity of marriage is refused.
15. There shall be no order for costs.

Judge

20.01.2011

To:

Applicant.

2. *Respondent.*

3. *File Number 09/Ltk/0379.*