

<b>IN THE FAMILY DIVISION OF THE HIGH COURT</b>	
<b>CASE NUMBER:</b>	10/SUV/0696
<b>BETWEEN:</b>	Manjita
<b>AND:</b>	Hirday
<b>Appearances:</b>	Applicant in Person No appearance of Respondent
<b>Date/Place of judgment:</b>	Wednesday, 07 <sup>th</sup> September, 2011 at Suva
<b>Judgment of:</b>	The Hon. Justice Anjala Wati
<b>Category:</b>	<i>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.</i>
<b>Anonymised Case Citation:</b>	ManjitavHirday - Fiji Family High Court Case Number: 10/Suv/0696

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

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Legislation

Family Law Act No. 18 of 2003.

Cases/texts Referred To

*Sullivan v. Sullivan (falsely called Oldacre) (ISIS) 2 Hag. Con. 23S.*

*Moss V. Moss (orse. Archer) [1897] P. 263.*

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

*In the Marriage of Otway [19S7] F.L.C. 91-S07.*

*In the Marriage of Soukmani (1989) 96 F. L. R. 3S8.*

*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.*

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### The Application

1. This is an application by the wife to have her marriage solemnised in 2010 nullified on the ground that she did not provide her real consent to the marriage as the same was obtained through 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 one particular ground is alleged which is 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. The second limb of 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.
5. What constitutes fraud is defined by the various cases.
6. 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."*

7. 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."*

8. 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.*"

9. 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 hick 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.

10. 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 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."*

11. 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**

12. The wife stated in her testimony that she is a divorcee. The husband, the respondent, came to her house with one family friend. He told her that he was from New Zealand and was 47 years old. He wanted to go to England and Europe in October and November and so he wanted to get married before going away abroad. He also said that he had a business in Fiji which was a timber company. He further said that he did not want to inform his family members about the marriage as he had two grown up daughters whom he wanted to give away in marriage first. She did not want to get married but he became very desperate and started crying. He said that his wife died 2 years ago and that she looked like his wife and she had brought some happiness to him. She therefore, continued contact with him. One day he asked her to join him for a ride in the car so that they could talk and she agreed. She went with him and again she agreed to go with him the following week when he took her to a hotel and forced her on the bed. She stopped him because they were not married and he said that he wanted to prove to her how much he loved her. After that, she cried and he said that he would marry her. Subsequently, she gave all her documents to arrange the marriage

and he did. She went with her mum. She wanted to get married too. When her brother came from New Zealand in September, he went to a hardware shop and there, the people told him that he had been giving fraud cheques to the company. She then asked the husband for his passport to check and he refused and went away from her and never came back. After that he did not come back. He lied to her about the age and that he was from New Zealand. He has been arrested about four to five times for fraudulent issues and he has cases pending in the Court. She therefore wants the marriage to be nullified.

13. The wife's cousin also gave evidence. She testified that the respondent was 53 years of age and he told the applicant that he was of 47 years of age. The applicant did want to get married to him but he has many fraud cases in court. He also behaved very spiritual but he was not. She does not wish to be married to him. He ran away from her without telling her when she asked for his passport to check.
14. The applicant's mother also gave evidence. She stated that one of her family brought the respondent to her place and introduced him as a citizen of New Zealand and a well educated man who had been a former employee of a media organization in Fiji. The respondent told everyone at her place that he intended to get married as his wife had died. He also said that he was 47 years of age. He said he was a New Zealand citizen and owned a timber company in Fiji. He said that he was supposed to travel abroad to England, Europe, America. He also seemed very religious. He prayed most of the time and preached gods words all the time.' He said that he helped the poor and the needy and has a lot of respect for women. Whenever he discussed about his wife, he cried several times. He talked about his good qualities. The entire family liked him and they decided to have the applicant married to him. He did not want his family to know about the marriage as he had two daughters who were still single and had to be married off first before he did. He wanted the applicant to stop working. She was working in a retail company and she stopped working. He took from them all the relevant documents for the purpose of arranging the marriage. He said that he was going to Europe so he wanted to get the legal marriage done. He drove her and the daughter to the marriage office and arranged the witnesses himself. The daughter told her that she did not have a good look at the marriage certificate as the husband had snatched it from her but that she saw that the address of the husband that was endorsed on the marriage certificate was an address in Fiji. When her son came from New Zealand, he went to the hardware shop where he discovered the fraud cheque given by the husband and she then informed her daughter. Her daughter then asked her husband to

show her the passport and he refused and went away soon thereafter. They retrieved the marriage certificate and found out his real age and discovered also that the husband was a Fiji citizen. His address was wrongly written on the marriage certificate. They also discovered that he did not have a feet.

### **The Determination**

15. This is a clear case of the wife who consented to marry the human being she did. She is unhappy about the untruth that was told to her about the age of the husband and his status which she discovered after marriage. The husband may not have been correct in telling the wife about Iris age, rank and status but one must not overlook that she was capable of consent and she did not consent which was her own act. The disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this court to release from chains which, though forged by others, she had riveted on herself.

16. The applicant wife has not shown to me or satisfied me that there was lack of her consent due to the incorrectness about the husband's rank or status. The stringent test for fraud has not been met and the application has to be dismissed.

**The Final Orders**

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

18. There shall be no order for costs.

ANJALA WATI

JUDGE

07.09.2011

To:

1. *Applicant.*
2. *Respondent.*
3. *File Number 10/Snv/0696.*