

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

<b>CASE NUMBER:</b>	20/SUV/0163
<b>BETWEEN:</b>	MOHINEE 1 <sup>ST</sup> APPLICANT
<b>AND:</b>	RANVEER 2 <sup>ND</sup> APPLICANT
<b>Appearances:</b>	Mr. Kumar S [Kumar Goundar Lawyers] for the 1 <sup>st</sup> Applicant No appearance for the 2 <sup>nd</sup> Applicant
<b>Date/Place of judgment:</b>	Tuesday, 09 <sup>th</sup> March, 2021 at Suva
<b>Judgment of:</b>	Hon. Mr. Justice Vishwa Datt Sharma
<b>Coram:</b>	
<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>	<b>2021-March-09/ 0163 of 2020/Kumari v. Singh</b>

**JUDGMENT OF THE COURT**

*Catchwords*

**MARITAL STATUS PROCEEDINGS - APPLICATION FOR AN ORDER FOR NULLITY** – Joint application by wife and husband 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.

*Legislation*

Family Law Act No. 18 of 2003.

### The Application

1. This is a joint application by the **1<sup>st</sup> Applicant (Wife)** and the **2<sup>nd</sup> Applicant (Husband)** to have their marriage solemnized in 2019 **nullified** on the ground that she did not provide her real **consent** to the marriage since the same was obtained through **fraud**.
2. The application is made pursuant to *section 32 (2) (d) (i) of the Family Law Act 18 No.18 of 2003*.

### The Response

3. The 2<sup>nd</sup> Applicant (husband) was served with the application. He appeared in Court on the first returnable date of the application on 06<sup>th</sup> July 2020 and subsequently on 14<sup>th</sup> July 2020. The application was scheduled for Hearing on 14<sup>th</sup> September 2020. He neither filed any response nor did he appear in court to defend the matter on the scheduled Hearing date. The application was heard in his absence accordingly.

### The Law

4. *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.
5. There are certain grounds under which a marriage can be held to be void. In the current case, **one particular ground** is alleged which is pursuant to the second limb of *section 32 (2) (d) (i) of the act*. This section provides 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**.
6. Various cases have in detail defined what in fact constitutes **fraud**.
7. *Sir William Scott* said in *Sullivan v. Sullivan (falsely called Oldacre) (1818) 2 Hag. Con. 238 at 248; [1818] EngR 533; 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." (underline mine)*
8. *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." (underline mine)*

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 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.
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 **1<sup>st</sup> Applicant** (wife) stated in her evidence that she came into first contact with the **2<sup>nd</sup> Applicant** (husband) via Viber on 2<sup>nd</sup> September, 2019. The conversation that took place was the introduction of the **2<sup>nd</sup> Applicant** (husband), and him completing his PhD Studies in Human Resource Management from USP and discussion of marriage to settle down. Subsequently, both met face to face on 4<sup>th</sup> September, 2018 and later at GPH Coffee Shop. The **1<sup>st</sup> Applicant** (wife) told the **2<sup>nd</sup> Applicant** (husband) that she was not interested in dating but looking for someone who is equally educated like her and provide a comfortable living after marriage. She met the **2<sup>nd</sup> Applicant's** (husband) parents at his residence. It was after this meeting that she agreed with her mother that she should not marry the **2<sup>nd</sup> Applicant** (husband). She made a telephone call to the **2<sup>nd</sup> Applicant** (husband) and informed her decision not to marry him however, the **2<sup>nd</sup> Applicant** (husband) assured **1<sup>st</sup> Applicant** (wife) and her mother that he will buy a matrimonial home after the legal marriage and find a decent job since he is close to completing his PhD Studies. She was convinced by the **2<sup>nd</sup> Applicant** (husband) assurance. In 2019 both got legally married and in 2020 the **1<sup>st</sup> Applicant** (wife) spoke with the **2<sup>nd</sup> Applicant** (husband) regarding consummating the marriage about 5-6 times but the husband was not interested in this rather will have sex with the **1<sup>st</sup> Applicant** (wife) later on. Consensus was there that they will have sex after marriage. Further, **2<sup>nd</sup> Applicant** said that it will take 2 years more to complete his PhD studies. She got anxious and depressed and started to visit her Psychiatrist. During this period the **2<sup>nd</sup> Applicant** (husband) admitted to her that he was not sexually active and capable physically of having sex with her. She became suicidal.

13. Doctor P. also gave evidence on behalf of the 1<sup>st</sup> Applicant (wife). She admitted the 1<sup>st</sup> Applicant (wife) in the Stress Ward at CWM Hospital because she displayed genuine and obvious signs of depression and suicidal and therefore was kept under 24 hour's supervision. She was discharged later in April 2020 but continue with her medicine.
14. The Manager of the University gave evidence. She confirmed that there is no student specifically by the name of the 2<sup>nd</sup> Applicant (husband) under taking the PhD programme at USP.
15. The finally witness **Ms. D.** Iso gave evidence in support of the 1<sup>st</sup> Applicant (wife) case. The witness stated that she was related to the 1<sup>st</sup> Applicant (wife) through marriage. Both, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants were invited to her residence for dinner in order to ascertain whether the 2<sup>nd</sup> Applicant (husband) was a genuine person for the 1<sup>st</sup> Applicant (wife) to settle down with. She further stated that she felt suspicion on whether the 2<sup>nd</sup> Applicant (husband) was actually under taking the PhD Programme at USP. She asked the 1<sup>st</sup> Applicant (wife) to follow up on the suspicion.

### **THE DETERMINATION**

16. The 1<sup>st</sup> Applicant's (wife) claim for an order for nullity of marriage herein is that she wanted a prospective husband that was equally qualified like her by holding post Graduate qualification and also could provide a comfortable living after their legal marriage.
17. However, after getting legally married, the 2<sup>nd</sup> Applicant (husband) did not want to consummate the marriage nor stick to his initial assurance that he will buy a matrimonial house and find a decent a job for himself.
18. The 1<sup>st</sup> Applicant (wife) also stated that the 2<sup>nd</sup> Applicant (husband) admitted to her that he was not sexually active and capable physically of having sex.
19. She further stated that her consent was obtained by fraud due to material misrepresentation in terms of his higher education (PhD) and material non-discloser in regards to his ability to consummate the marriage with the 2<sup>nd</sup> Applicant (husband).
20. There is no doubt that this is a case of the 1<sup>st</sup> Applicant (wife) who had given her consent to marry the 2<sup>nd</sup> Applicant (husband).
21. The 1<sup>st</sup> Applicant's (wife) evidence reveals that she was not interested in dating rather settling down with the 2<sup>nd</sup> Applicant (husband,).
22. She further confirmed to court in her evidence that she was looking for someone who was equally educated like her and will provide a comfortable living after legal marriage.
23. Initially she agreed with her mother that she should not marry the 2<sup>nd</sup> Applicant (husband) and therefore subsequently made a telephone call to the 2<sup>nd</sup> Applicant (husband) and informed him of her decision. At this

point in time, the 1<sup>st</sup> Applicant's (wife) consent to marry the 2<sup>nd</sup> Applicant (husband) was somewhat on the verge of complete withdrawal.

24. However, upon the 2<sup>nd</sup> Applicant's (husband) assurance that he will buy a matrimonial house after the marriage and find a decent job for himself after completing his PhD studies that made the 1<sup>st</sup> Applicant (wife) agree to get married to him. The **consent** of the 1<sup>st</sup> Applicant (wife) to marry the 2<sup>nd</sup> Applicant (husband) remained **intact**. Hence, the marriage contract was entered into and they both got married in 2019.

25. It is quite clear, as Karminski LJ says in Singh V Singh (1971) P. 226, 230, the first essential of a valid marriage is consent. He goes on:

*“Anything short of consent makes the marriage a nullity ab initio.”*

26. In the current case the 1<sup>st</sup> Applicant (wife) together with the 2<sup>nd</sup> Applicant (husband) initiated a joint proceedings seeking for nullity of marriage on the ground of fraud in terms of section 32 (2) (d) (i) of the Family Law Act no. 18 of 2003 and not on the ground of duress induced by incapacity to consummate the marriage owing to invincible repugnance.

27. The 1<sup>st</sup> Applicant (wife) has failed to establish and satisfy this court that there was no consent given to marry the 2<sup>nd</sup> Applicant (husband) due to his status in terms of possessing higher education (PhD), misrepresentation and/ or material non-disclosure in regards to his inability to consummate the marriage.

28. The stringent test for fraud has not been made out herein by the Applicant.

29. For the above reasons, I have no alternative but to dismiss the application accordingly.

30. However, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants are at liberty to file an application for dissolution of marriage at the Family Magistrate's Court Division accordingly since their marriage has broken down irretrievably.

**Final Order:**

- 1. The application for an order for nullity of marriage on the ground of fraud is hereby refused.**
- 2. There will be no order as to costs since a joint application was made by the parties to this proceedings.**

**DATED** at SUVA this **09<sup>th</sup>** day of **March, 2021.**

**VISHWA DATT SHARMA**  
**JUDGE**

cc: **Kumar Goundar Lawyers, Suva.**  
**Ravinay Amit Chandra, Suva.**

