

IN THE FAMILY DIVISION OF THE HIGH COURT

ORIGINAL JURISDICTION

CASE NUMBER: 10/SUV/0025

BETWEEN: NIRBHAY

APPLICANT

JOTIKA

AND:

RESPONDENT

Mr.S. Shah for the Applicant.

Appearances:

Mr. Sunil Sharma for the Respondent.

Date/Place of judgment:

Tuesday, 25th January, 2011 at Suva.

Coram:

The Hon. Justice Anjala Wati.

Category:

All identifying information in this judgment has been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are purely coincidental.

JUDGMENT OF THE COURT

Catchwords

MARITAL STATUS PROCEEDINGS - APPLICATION FOR AN ORDER FOR NULLITY - application by husband on the ground that he did not provide his real consent to the marriage because his consent was obtained under duress by his mother and that his marriage was not solemnised properly-cross application by mother that she did not provide her real consent because she was mistaken as to the true identity of the husband who was not a man in his true definition as he was impotent and also that her consent was obtained by fraud -none of the grounds established and application for nullity dismissed with no order as to costs.

Legislation

Family Law Act No. 18 of 2003.

Marriage Act, Cap.50.

Cases/Texts Referred To

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

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

Szechter (orse. Karsov) v. Szechter [1971] P. 256.

Re Meyer [1971] P. 298.

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.

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

Puttick v. Attorney-General [1980] 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.

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 (1959) 96 F.L.R. 388.

In the Marriage of Osman and Monrrali (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.

Allardyce (falsely called Gordon) v. Mitchell (falsely called Gordon) (1869) 6 W. W. & A'B. (IE & M.)45.

Militante v. Ogimwomoju [1994] Fam. Law. 17.

C. v. C. [1942] N.Z.L.R. 356.

In the Marriage of C. and D. (falsely called C.) (1979) 35 F.L.R. 340.

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

The Case/Parties Background

1. The parties were married in the West in 2009.
2. Currently they are separated and living apart.
3. On the 11th day of January, 2010 the husband filed an application in the Family Division of the High Court to have the marriage nullified on the grounds that the marriage was not solemnised properly and that he did not provide his real consent as the same was obtained under duress.
4. On the 29th day of January, 2010 the wife also filed an application in the Family Division of the High Court in another Decision to have the marriage nullified on the grounds that she had not provided her real consent because she was defrauded into providing her consent and also that she was mistaken as to the identity of the husband.
5. On the 05th day of February, 2010, the wife filed a response to the husband's application in High Court. In her response, she asked for the husbands' application to be dismissed and sought an order that the marriage be nullified on her application because "the applicant does not have the capacity to consummate the marriage".
6. On the 17th day of February, 2010 the court had ordered the two proceedings in the two Divisions be amalgamated and tried together as application and cross application.
7. It was agreed by the parties that the husband's application would be treated as the substantive application and the wife's application and response would be heard as her response and cross application. No prejudice was caused to any party to try the proceedings in this manner.

The Law

8. 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 four

particular grounds are alleged. The husband's application relies on the ground stated in section 32 (2) (c) and pursuant to the first limb of section 32 (2) (d) (i) and the wife's application relies on grounds stated in the second limb of s. 32(2)(d) (i) and s. 32 (2) (d) (ii) of the Family Law Act.

9. I will have to state the law in respect of the grounds alleged.

10. 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 the law of that place with respect to the form of solemnization of marriages.

11. The formalities of this marriage are governed by the **Marriage Act, Cap. 50, Laws of Fiji.**

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

13. 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.

14. 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.

15. 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 (1891) P. 369.**)

- If there is a threat of immediate danger to life, limb or liberty: (**Szechter (or. Karsov) v. Szechter (1971) 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 (1971) 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.R 172.**)

16. 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.

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

18. 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."

19. Sir Francis Juene 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."

20. 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."

21. 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.

22. 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."

23. 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**.
24. Section 32 (2) (d) (ii) of the **Family Law Act No. 18 of 2003** provides that a marriage is void if consent of either party to the marriage was not a real consent because one party was mistaken as to the identity of the other party. I am going to state the law in respect of this head because the evidence of the wife was also directed towards this ground.
25. There is little judicial guidance on the scope of this provision. However, it does appear that a distinction must be drawn between mistake as to the human identity of a person,

and a mistake as to the name, status or other attribute of a party. The better view, based on the ordinary law of contract, seems to be that only the former type of mistake justifies a decree of nullity.

26. It is held that the early Australian case of **Allardyce (falsely called Gordon) v. Mitchell (falsely called Gordon) (1869) 6 W.W. & A'B. (IE & M.) 45** (See also the curious modern case of **Militante v. Ogunwomoju [1994] Fam Law. 17**) does not support the view just presented. In that case a former criminal called James Mitchell deceived a young woman into believing he was one James Gordon, a person whom she knew to exist and to come from a respectable family in Scotland. He subsequently married her, she believing him to be Gordon. In proceedings for nullity, the Chief Justice of Victoria, Sir William Stanswell, had no hesitation in making the decree. He said:-

"Here, it is not merely a mistake of name; it is actually a mistake of identity. The Petitioner contracts with James Gordon, thinks she married James Gordon, and would only have married James Gordon, whereas in truth, and in fact, the ceremony of marriage was performed between her and James Mitchell. There was no contract."

27. The Australian decision did not find favour in New Zealand in the subsequent case of **C. v. C. (1942) N.Z.L.R. 356**. There a widow was induced by one Samuel Coley into believing that he was Michael Miller, a well known Australian featherweight boxer, and that he had ample financial means and good prospects. On the basis of these representations, the woman married the imposter. Callan, J. Declined to follow Allardyce, describing it as "an oral unconsidered judgment of over 70 years ago". He preferred to follow the English case of **Sullivan v. Sullivan (falsely called Oldacre) (1818) 2. Hag. Con, 238; 161 E.R. 728** and **Moss v. Moss (or se. Archer)(1897) P. 263**, where it was held that fraudulent misrepresentations as to such matters as a person's rank, family, fortune, age or habits of life would not nullify a marriage so long as each party consented to marry the other person. In the New Zealand case, the judge found that as the petitioner truly consented to marry the human being to whom she was married, the marriage was valid

notwithstanding the false representations.

28. The most recent of the few reported cases concerning mistaken identity and nullity is the Australian case of **In the Marriage of C. and D. (falsely called C.) (1979) 35 F.L.R. 340.** There Bell J. declared the marriage between a woman and a hermaphrodite (intersexual) to be void on the ground that at the time of the marriage the woman believed she was marrying a man and not a person in the biological state of the respondent. If this decision is good law, the test propounded by Callan J. in the New Zealand case must be modified. The question to be asked is now not simply: did the applicant for the decree of nullity truly consent to marry the human being who he or she did marry? Rather, it would appear to be: did the applicant duly consent to marry a person having the fundamental physical characteristics of a person whom he or she did marry?

The Evidence

29. The husband filed affidavit evidence in chief and also gave oral evidence. He stated as follows:-
- During routine visit to the West, he went to have lunch at a Restaurant in Lautoka. His mother saw a lady and asked him to marry her because she was pretty for his mother and his mother had learnt that she was a Christian.
 - His mother and stepfather discussed marriage with the wife's parents and decided that he should get married to her. He was not prepared to get married as he suspected that she had a boyfriend.
 - He refused to marry but his mother ordered him to marry as she is a staunch Christian and she would not allow him to marry someone out of his religion. He had a girlfriend that he wanted to marry but his mother did not permit him to marry the girl.
 - His mother said that if he did not marry, she would chase her out of her house

where he lives. He would then have to stay on his own. He did not want to move out as he had no place to go. He lives in the family house. In that house lives his mother, father, and his brother.

- Due to threats and pressure by his mother he entered into the marriage. The marriage has had a suicidal effect on him. He fears that he would commit suicide.
- He told his father and brother that he wanted to marry his girlfriend and they agreed with him. However his mother was not happy and forced him to marry the respondent.
- He was not able to formally solemnise the marriage in the marriage hall.
- After the wedding he took his wife to his home. He was driving and she was sitting on his side. She was very upset. He asked her what was wrong and she said she had a personal problem. She never shared the problem. She was his wife and he respected her.
- On a Sunday, a day after their marriage they were at his place. They went to sleep on the same bed and he asked her for a kiss. She refused. He asked her why she was refusing and she said that he was supposed to kiss her at the wedding and he did not do it. The second night when he tried to hug her she asked him not to as she was sick and her hands were cold. She made excuses for 4 different nights.
- For honeymoon they went to a hotel. They spent two nights in the hotel. Both nights they slept in different beds. She did not allow him to touch her. She told him that she was not interested in him and that she had a boyfriend somewhere. He does not know about the boyfriend.
- Every time she slept she put a pillow between them. She used to wear full suit and sleep, instead of wearing a night dress.
- It is a lie that he could not have erection. He also did not tell her that he will see a doctor or that he has seen a doctor or that the doctor gave him 2 tablets. For honeymoon they went to a hotel. They spent two nights in the hotel. Both nights they slept in different beds. She did not allow him to touch her.

- At his home he tried to hold and hug her and he got an erection. He has never seen a doctor as alleged.
- In the hotel he again got an erection. He is sexually active.

30. From the cross examination, the husband's material evidence was that:-

- The reason why he says that the marriage was not properly solemnised was because at the wedding when he lifted the veil, he was supposed to kiss the bride but he did not as the pastor did not tell him to do so.
- He is a taxi driver and he earns money. If his mother chased him out of the house he could still look after himself.
- The wife was upset after marriage but there was no big issue as girls are upset after marriage. He has seen girls crying after wedding ceremony.
- Before the civil marriage, there was the engagement ceremony and he participated in the same although he was not happy. After the engagement he visited the wife three times at her place. He did not ever tell her or her family members that he was pressured to enter into the marriage.
- The wife was happy during the marriage and she changed when she came home. It could be the natural effect of departure from parents.
- They had gone to Resort for honeymoon. His friend had given him a gift for 2 days. First night in the hotel he didn't kiss her or make love bites as alleged that it was done for the family members to see.
- He kissed her in the car for the first time. It is a lie that he cannot have erection. He did not tell her that he has lost all his energy.
- He does not have any enmity with her or the family members. However her family members are not good people.
- On the 2nd day of honeymoon he did not kiss her or have failed erection as

alleged. He did not get angry or frustrated as a result of non erection. He also did not blame her at all.

- The wife was not co-operating sexually. He rang the pastor who said for him to solve his problems. He was not the problem but the wife was.
- 1st night they slept together and nothing happened as she did not allow him to touch him. He had erection in the morning of 1st night and he could not do much as he noticed that she was not interested.
- He has had sex with his girlfriend before marriage.
- After honeymoon they slept separately. The wife slept in the bedroom and he slept in the living room. The wife would sleep with warm clothes and say that she has cold.
- He never admitted to her that he has had sexual problems. He has had erections and because she did not co-operate they could not have sex. He did not consult a doctor alone or with his father. He did not even tell the wife that he went to see the doctor or that he has erection problems.
- At his place there was a family meeting and he did not tell the mother in law that he was fit after seeing the doctor. This is an allegation against him. He did not even raise his arms and say that he was fit.
- He remembers talking to one of his friends. He did not tell him anything about taking the tablets and that he had sexual problems before marriage and at the time of honeymoon.
- He has seen the medical report of the wife which states that she is a virgin. He is not blaming her to keep her reputation.
- He will not be embarrassed if he has sexual problems and people came to know about it. The reason to refuse marriage was not that he had erection problems or that he was impotent

31. The husband's mother also gave evidence, the material evidence is as follows:-

She lives overseas. She left the son when he was above 18 years old and since then he has been on his own. She came for a holiday and she met the wife. She and her husband liked her and approached her parents for marriage. Her son did not want to marry and she said for the son to get married or else she would chase him out of the house. She also told the advantages of getting married. He agreed to get married.

32. The husband's step father also gave evidence. The material part of his evidence was that he forced his son to get married and said that if he did not, then he had to leave the house. They also said that age was catching up and he had to settle down and have family. The son was involved with another woman and they did not like that woman.

33. The step father also said under cross examination that the son was living on his own and earning and was quite capable of living and surviving on his own. The son lives in the house since birth. It was his parent's house. It is his right to stay in that house. He did not tell the wife or her family members that they had forced or pressured the son to get married. After the honeymoon there was a family meeting. The meeting was because the parents came to take the wife for a week and return her after a week. In the meeting he never said to anyone that his son had sexual problems and that he had taken him to a doctor who had given tablets which has been consumed by the son and that he was fit. These are all allegations.

34. A doctor was also called on behalf of the husband. In his evidence the doctor said that he was asked to check the husband and he did by asking him to masturbate. He also said that upon masturbation he found that the penis had firmly erected which was quite capable of penetrating the vagina. In cross examination the doctor also said that in this matter only a simple test was required and he carried that test out. He did not carry out any blood test because it was not required. If he complained of any erectile problems then a blood test was necessary. Erections can also occur due to drugs in the market. If the husband had taken drugs, he cannot confirm that because it is not possible to do that clinically. Only blood testing would show presence of drugs in body.

He cannot say conclusively that husband was potent a year ago. In that aspect his medical certificate is inconclusive to the effect that husband was potent a year ago. He also said in examination in chief that drugs are taken an hour before and with stimulation the drugs work. The husband was in his clinic for 20 minutes only. He just had the test and went away.

35. The respondent wife also gave evidence. The material part of her evidence was as follows:-

- The marriage was proposed and she happily agreed. The husband was also happy. He told her that he had dreamt of a girl, a car and a girl in the car. He then said that she was the girl he dreamt of.
- The husband used to come to her place for about 2 or 3 times. He would go to her place and wait for her. They went to town in his car as well.
- Before marriage she asked him if he was under any kind of pressure and if he was happy and he said he was happy to get married. He also told that to the pastor. Before marriage they tried to know each other and they were happy. She never felt that husband was depressed or under pressure to marry her. They also tried to get to know each other before marriage.
- At engagement he was happy and they kissed after engagement.
- She has heard the allegations against her. That is not true.
- For honeymoon they went to a Resort. There he kissed her, made love bites on her body and cut her nipples and it was sore. He was getting angry and said that she was not responding well. He tried hard but he did not have any erection. He struggled and used his hand. He was forcing himself. Initially she thought it was normally like that but when they did not have sex, she took a shower and they slept together. He hugged her and slept. The 2nd night of the honeymoon, he tortured her again and she requested him to be gentle and he started fighting and blaming her and said that if she did not want to have sex, she should not have married him.

- They could not have sex the second night as well. He struggled very hard and had pre-ejaculation. He said he had lost all his energy.
- The third night was his uncle's birthday so he just hugged and kissed her and went to bed.
- She had told her mother about the problem and she did this on the 2nd day of the honeymoon. The mother asked her to wait and watch.
- Without telling her, the husband went to see a doctor. The husband and his father said that doctor had checked the husband and has given some tablets. She was told that the doctor was to check her on Monday. She got scared as to why there was a need to check her. She told her parents and they came to discuss the issue. The husband said to her mother that he has taken a tablet and that he was fit. The step father said for her parents to take the daughter away for a week and that they would pick her up but they never came. She was told by the pastor that his husband's family does not want her.
- She never had a boyfriend before marriage. She was and still is a virgin.
- The husband had never told her that he had a married woman as her girlfriend. However he had told her that he had a girlfriend but he did not sleep with her. The furthest he had gone with her was putting his hands in her knickers

36. From the cross examination, the material part of the wife's evidence is that she co-operated in sex but the husband after numerous efforts and long sessions could not have an erection. He failed in sex and she knew that he could not consummate the marriage. He had pre-ejaculation. She did not want to sleep with him when he told her that he had taken tablets because she was not sure what his reaction would be as he had tortured her without tablets.

37. The wife's mother also gave evidence. Her material evidence is as follows:-

Before marriage the husband had come to their place for 3 or 4 times. He was happy. He used to talk to her daughter on phone as well. The daughter

complained to her that her husband was not able to perform sexually and she said for him to wait for 2 or 3 times, and then see. She again complained that the husband has sexual problems and that he could not have an erection. She also said that he was going to see a doctor. They went for discussion at daughter's place where she asked the husband what was wrong and he said that he had taken a tablet and that he was fit. He lifted his hand and said he was fit; he blamed her daughter and said that she was not good enough. He also said he was tired and stressed due to wedding ceremony. She brought the daughter home.

38. From the cross examination, the mother's material evidence is that the daughter does not have a boyfriend. The husband blamed her daughter for not having sexual intercourse with her. He said that his daughter was not good and she was not co-operating.

39. The wife's brother also gave evidence. His material evidence was to the effect that before civil marriage both parties were very happy. His mother had told him about the problem his sister was having in that her husband could not perform sex. We had gone to the husband's place to discuss issues and there the husband said that he had taken two tablets and that he was fit. He also said that he did not know that he had sexual problems and that he came to know about it after marriage. He also said that his sister was not co-operating and responding well to sex. The husband's father had also said that his son was alright and that he was like that due to pressure. Husband's father also said for them to take the sister away and they will collect her after one week.

40. In cross examination, the brother said that the husband told him that his sister had just removed the clothes and spread her legs and so he could not be attracted and that it was not his fault.

41. The wife's father also gave evidence. He said that he is separated from his family but he took part in the wedding. He attended engagement ceremony and the daughter and applicant were both happy. He went to the daughter's place after wedding and the stepfather had informed him that the husband had some problems and he was not fit

for the girl. He also said that the doctor had given some tablets and the husband is all right. He also asked if he could take the daughter away and they will collect her after one week. They did take the daughter away but no one came to collect her.

The Determination

42. I will deal with the first ground that the marriage was not properly solemnised. There is absolutely no evidence to this effect. The application cannot be allowed on this ground.

43. The second ground is that of duress on the husband. The husband had lived on his own for about 14 years without his mother. He is independent in all ways. He looks after himself and he said that he got pressured by the mother to get married. He had the capacity to refuse the marriage and not give in to the wishes of his mother who was only in Fiji for holidays. She would have gone away. Her threats to chase the son out of the house is unbelievable in light of the fact that it is the sons right to live in the house and that he had been living in the house for 14 years without her and without getting married. This evidence is concocted to establish a ground. Even if this was true a threat on the applicant, then the applicant could have still resisted the marriage. He could have found an alternative place to live rather than getting married to a person whom he does not want to get married to. The husband's powers of volition were not paralysed.

44. I accept the evidence of the wife that he was ready and happy to go through the marriage ceremony and that he did consent freely. He went to her place and kept in touch after the engagement. He wanted the marriage to take place. The ground of duress is not established.

45. On the issue of fraud, there is no evidence that the husband knew about the alleged impotency and did not disclose the same to the wife. If a party knows about his impotency and does not tell the wife and obtains her consent, the said consent would be vitiated as material non-disclosure on such an important aspect of the marriage is material and affects the root of the contract of marriage. Marriage is a voluntarily union of a man and a woman and if a man is not a man in his physical characteristics and the

man has hidden that important issue then he is defrauding the woman.

46. The application for nullity cannot be based on the ground of fraud.

47. On the aspect of mistaken identity I also hold that if the man was impotent, whether or not he knew about it, then the woman's consent will be vitiated as she would be consenting to marry a man with proper physical characteristics of a man. When the man turns out to be an impotent, the woman would be mistaken as to his true identity at the time of the marriage.

48. In this case the undisputed evidence is that the wife is still a virgin. She did not have sexual intercourse with the husband. What is disputed is the reason why no sexual intercourse took place. The husband is blaming the woman and the woman is blaming the man. For the issue of mistaken identity I have to rule on whether the man was impotent.

49. It has not been established to my satisfaction without any concrete medical evidence that the husband was impotent at the time of marriage. I appreciate that no sexual intercourse took place and that could be for many reasons. That could be for reasons of non-co-operation, for reasons of stress leading to temporary erection problem, for reasons of excitement and many more. It is not conclusive that erection problems arise because of impotency. It is very dangerous to make that finding in absence of any concrete medical evidence and I am not prepared to make a conclusive finding on such an important matter without medical evidence.

50. I also have before me the medical evidence which states that currently the clinical test indicate that the husband is potent. Whether the husband had erections due to drugs or otherwise is not established. It is also not established that he had temporary erection problems when he got married.

51. The evidence that he took tablets to correct after marriage is also not established. The doctors were not subpoenaed to firmly establish what medical problems the husband had, whether the tablets were for impotency and not for any other medical problems and whether in fact there was a problem in the first place.

52. I am not satisfied that the woman was mistaken as to the husband's identity because she has failed to satisfy me that he in fact does not possess the hue characteristics of man.

53. The application for nullity must be dismissed on all grounds. The answer to the party's relief lies in dissolution of marriage.

The Final Orders

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

55. There shall be no order for costs.

Anjala Wati
Judge
25.1.2011

To: 1. Mr. S. Shah for the Applicant.
2. Mr. Sunil Shanna, DLAC, Solicitor for the Respondent.
3. File Number 10/Suv/0025