

<b>IN THE FAMILY DIVISION OF THE HIGH COURT</b>	
<b>CASE NUMBER:</b>	12/SUV/0290
<b>BETWEEN:</b>	BHASKAR
<b>AND:</b>	SHAGUNA
<b>Appearances:</b>	Mr. A. Sen for the Applicant. No appearance for the Respondent
<b>Date/Place of judgment:</b>	Friday, 07 September, 2012 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>
Anonymised Case Citation:	BHASKAR V. SHAGUNA - Fiji Family High Court Case Number: 12/SUV/0290
<b>JUDGMENT OF THE COURT</b>	
<b>Catchwords</b>	
<i>MARITAL STATUS PROCEEDINGS - APPLICATION FOR AN ORDER FOR NULLITY - application by husband on the grounds that he did not provide his real consent to the marriage because his consent was obtained by fraud when the wife failed to disclose to him that she was an acute type 1 diabetic patient-test for fraud not met-application dismissed with no order as to costs.</i>	
<b>Legislation</b>	
<i>Family Law Act No. 18 of 2003 ("FLA").</i>	
<i>Marriage Act, Cap. 50 ("MA").</i>	
<b>Cases/Texts</b>	
<i>Sullivan v. Sullivan (falsely called Oldacre) (1818) 2 Hag. Con. 235.</i>	
<i>Moss V. Moss (orse. Archer) [1897] P. 263.</i>	
<i>In the Marriage of Deniz (1977) 31 F. L.R. 114.</i>	
<i>In the Marriage of Otway [1987] F.L.C. 91-807.</i>	
<i>In the Marriage of Soukmani (1989) 96 F. L. R. 388.</i>	
<i>In the Marriage of Osman and Mourrali (1989) 96 F. L. R. 362.</i>	
<i>Najjarin v. Houlayce (1991) 104 F. L. R. 403.</i>	
<i>In the Marriage of Hosking (1994) 121 F. L. R. 196.</i>	
<i>Dickey, A, "Family Law" 4<sup>th</sup> Edition (2002) Lawbook Co. Sydney.</i>	

1. This is an application by the husband to have his marriage solemnised at Nasinu in 2011 nullified on grounds that he did not provide his real consent to the marriage as the consent that he provided was obtained by fraud.

#### *The Response*

2. The wife was served with the application. She did not file any response or appear in Court to defend the proceedings.

#### *The Law*

3. Section 32 (1) of the FLA 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 grounds alleged.

- 4: S. 32 (2) (d) (i) of the FLA 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. Fraud concerns one of the more perplexing areas of family law.

6. Both Australian and English cases indicate a clear reluctance to allow fraud to vitiate an otherwise valid marriage. As *Sir William Scott* said in the old case of *Sullivan v. Sullivan (falsely called Oldacre) (1818) 2 Hag. Con. 238; 161 E.R. 728*:

*" 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. The principal English case concerning fraud as a ground of nullity is *Moss v. Moss (orse. Archer) [1897] P. 263*. There *Sir Francis Jeune P.* distinguished between fraud which induces consent to marry, and fraud which procures the appearance without the reality of consent. He held that only the latter can vitiate an otherwise valid marriage. In particular, he 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 the agreement, and in which*

*the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent".*

The President suggested two examples of fraud, personation and the deliberate ' inducement of a feeble-minded person to marry.

8. In Australia, the meaning of "*fraud*" in the context of the nullity provisions first arose for consideration in *In the Marriage of Deniz* (1977) 31 F.L.R. 114.

The facts 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.

9. The reasoning of the judge is difficult to appreciate. There was fraud but not absence of consent. The court cannot look behind consent to the reasons which induced it. This case can be compared with the case of *In the Marriage of Otway* [1987] F.L.C. 91-807. A woman from Philippines deliberately married an Australian citizen in order to be able to live permanently in Australia. The man, however, knew of her motive. What he did not know was that his wife was all the time in love with another man, whom she went to live with some three months after marriage. The husband sought a decree of nullity on the ground that his consent to marry had been obtained by fraud in that his wife never really intended to remain with him but went through the ceremony of marriage simply to obtain the right to reside in Australia.
10. *McCall* J, held that there had been no fraud in this case sufficient to nullify the marriage. He rejected the proposition that "*fraud*" can include fraudulent misrepresentation and expressed the view that this term should be given its established meaning as indicated by the older cases.
11. Subsequent cases have rejected the interpretation of fraud in *In the Marriage of Deniz* and preferred the one in *In the Marriage of Otway*. These cases 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.; *In the Marriage of Hosking* (1994) 121 F.L.R. 196.
12. In *In the Marriage of Deniz*, Frederico J. 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 recognized in old cases, otherwise it would be a mere surplusage given the remaining provisions. Unfortunately, however, Frederico J, did not offer any satisfactory explanation of what this term does mean save to say that "*the fraud relied on must be one which goes to the root of the marriage contract*".

### ***The Evidence***

13. The husband testified on oath that his marriage was arranged with the respondent. 2 months after the legal marriage he saw the respondent. A week before the religious marriage he went to take the marriage certificate. When he went to her place, she was bed ridden. She had sores in her leg. The sores were big and the wound was deep. He asked her how it happened; she said that the wound just came up.
14. The husband further testified that during the religious marriage, the respondent was very weak. She could not attend to the rituals on her own. She had to be assisted by him and other relatives. She could not sit on the floor. She could not board the vehicle to go to his place. She had to be lifted by her brother and put in the vehicle.
15. On the honeymoon night, the condition deteriorated. She got bedridden. She was taken to the hospital after 3 days. With her condition, he did not consummate the marriage until date. The doctors told him that she had uncontrolled diabetes and the testing meter read "high". She was taken to the Intensive Care Unit ("*ICU*"). She stayed in the ICU for 4 days and then was admitted to women's ward. He spoke to doctor Frank for an hour during her admission. The doctor told him that she had acute type 1 diabetes. The doctor told him that if he decided to live with her, he had to adjust his life. He was also told that there would be after effects, the wife would be coming to hospital often and her condition will deteriorate.
16. Dr. Frank also advised that the wife was on insulin before and that she did not take care of herself and so she was in that situation. He asked the doctor whether she could consummate the marriage and he said that she could not at the time and if she became pregnant, she would have lots of complications.
17. The wife had not disclosed to him about the diabetes. If he knew about her condition he would not have married her. She has thus defrauded him.

### ***The Determination***

18. The husband had provided his consent to marry the wife. He is now saying that the wife committed fraud because she cannot consummate the marriage.
19. It is incorrect to state that because the wife got sick at the time due to her diabetic condition, she cannot consummate marriage. Incapacity to consummate the marriage is not a ground for nullity of marriage. The reforms made by the FLA have now made the sexual consummation of marriage irrelevant to the law of nullity, s. 32 does not refer to the consummation of the marriage. Nor is consummation relevant to any of the grounds of nullity that are specified in s. 32.
20. The wife may be sick but that does not entitle the husband to be released from the chains that he riveted on himself. There may be non disclosure of certain information on the wife's part but that does not go to the root of the marriage. The marriage is thus valid and proper.
21. It is unfortunate that the wife is sickly and the husband now has to go through the difficulties as well but that does not mean that he did not provide his consent. His consent was proper and real and cannot be vitiated by the subsequent finding that the wife is a sickly person.
22. I am sure that the term fraud was not meant to cover situations of this nature as stipulated by the applicant.

***The Final Orders***

23. The application for an order for nullity of marriage is refused.
24. There shall be no order for costs.

ANJALA WATI  
Judge  
07.09.2012

**To:**

1. *Mr. A. Sen, counsel for the Applicant.*
2. *Respondent.*
3. *File Number 12/Suv/0290.*

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