NEEL SINGH v BABITA DEVI (HBC0624 of 2005)

HIGH COURT — CIVIL JURISDICTION

PULEA J

9 February 2006

Family law — marriage — annulment — Petitioner sought to annul his marriage to Respondent — whether willful refusal to consummate marriage ground to annul marriage — Family Law Act 2003 s 4(1) — Matrimonial Causes Act (Cap 51) ss 9(1), 9(1)(a), 36(1)(a), 36(1)(b), 36(1)(c).

The Petitioner and the Respondent (parties) who were both domiciled in and resident of Fiji were married on 3 July 2005. The Petitioner sought to annul his marriage to the Respondent on the ground of non-consummation. The petition was filed on 22 August 2005 under the Matrimonial Causes Act (Cap 51) (MC Act), which was repealed on 1 November 2005 by the new Family Law Act 2003 (FL Act). The proceedings commenced prior to the effectivity of the FL Act and were considered as pending proceedings under s 4(l) of the FL Act. Thus, the petition was considered under the MC Act notwithstanding its repeal.

The Petitioner contended that he was unaware of the Respondent's incapacity to consummate the marriage despite his efforts and that he tried several times to consummate it by trying to take her to town and to his bedroom but no evidence was given about the nature or form of the Respondent's incapacity, or if such an incapacity existed, that medical assistance was explored. The parties and the Petitioner's mother stated in their sworn evidence that the parties never lived together after the marriage. The mother also claimed that she tried to talk to the Respondent's family in an effort to bring the parties together but there was no response from them nor was she informed by the Petitioner as to the reasons why the Respondent refused to live with him. On the other hand, the Respondent alleged that she was forced to get engaged to the Petitioner and that she did not wish to live with him. The sole issue was whether the willful refusal to consummate a marriage was a ground to annul the marriage.

Held — The Petitioner fell far short of meeting the standard of proof required by the statute and the principles and elements to annul the marriage. In *Napier v Napier*, refusal to consummate a marriage was not sufficient to annul a marriage unless it was referred to impotence or incapacity existing at the time of the marriage. The court further held that refusal of marital intercourse was relied upon as a ground for a decree of nullity, except so far as it was regarded as evidence of some abnormal physical condition. The Petitioner did not establish that the refusal to consummate the marriage was linked to the Respondent's abnormal genital incapacity or any psychological defect amounting to her invincible repugnance to the act of consummation. His only reference was the Respondent's statement that she was forced to be engaged to the Petitioner.

Petition dismissed.

Cases referred to

Cuno v Cuno [1873] SA 301; *Dredge v Dredge* [1947] 1 All ER 29; *Horton v Horton* [1948] LJR 396; [1947] 2 All ER 871; (1947) 64 TLR 62; *Napier v Napier* [1915] P 184; *S v S* [1962] 3 All ER 55; *Singh v Singh* [1971] 2 All ER 828; *W v W* [1967] 3 All ER 178, cited.

G v G [1924] AC 349; [1924] All ER Rep 900; 40 TLR 322; *S v A* 3 PD 72; *Vineeta v Rajeshwar Nath* (unreported, Civ App 0031/1980), considered.

D. Prasad for the Petitioner

Respondent in person

Pulea J.

Background

The Petitioner seeks an annulment of his marriage to the Respondent on the ground that the marriage has not been consummated. The Petitioner and Respondent who are both domiciled and resident in Fiji were married in Verata, Nausori on 3 July 2005.

The petition was filed on the 22 August 2005 under the Matrimonial Causes Act (Cap 51) which was repealed on the 1 November 2005 on the coming into effect of the new Family Law Act 2003. Nevertheless, proceedings commenced prior to the coming into force of the Family Law Act will be considered as "pending proceedings" under s 4(l) of the Family Law Act which states:

> pending proceedings for a decree of dissolution of marriage or for a decree of nullity of marriage on the ground that the marriage is voidable …, may be continued and must be dealt with as if this Act had not been passed.

Therefore, the Petitioner's claim to a declaration of nullity that the marriage is voidable on the ground of non-consummation is considered under the Matrimonial Causes Act (Cap 51), notwithstanding its repeal.

The petition for the decree of nullity sets out the following facts:

> (b) That the Petitioner and Respondent have never consummated the marriage as the Respondent refused to do so.
>
> (c) That the Petitioner attempted to consummate the marriage with the Respondent without any cause or reasons refused to consummate.
>
> (d) That the consummation of marriage did not take place and the said marriage has still not been consummated.
>
> (e) That the non-consummation of marriage is due to the Respondent's incapacity to consummate despite the efforts made by the Petitioner.
>
> (j) That the Petitioner had no knowledge that the Respondent had incapacity to consummate the marriage.

The law

To support an application for annulment, proof is required that one of the parties is incapable of consummating the marriage: s 9(l)(a) Matrimonial Causes Act (Cap 51). Consummation requires "*ordinary and complete, not partial and imperfect intercourse*", per *Dr Lushingtonin2 v A* (1845)1 Rob Eccl 279; *W v W* [1967] 3 All ER 178. A marriage is held to be consummated as soon as the parties have had sexual intercourse after the celebration of the marriage — see *Dredge v Dredge* [1947] 1 All ER 29, where the Petitioner husband was entitled to a decree on the ground that the Respondent wife who was pregnant by the husband when they went through their marriage ceremony, wilfully refused to consummate the marriage after the marriage.

To succeed in an application for nullity, the Matrimonial Causes Act (Cap 51) specifies that the incapacity must exist at the time the marriage was entered into (s 9(l)); one of the parties must be unable to engage in sexual intercourse (s 9(l)(a)) due to some form of genital defect, *S v S* [1962] 3 All ER 55 (*S*); and the defect must be incurable: s 36(l)(a). In *S*, the husband's petition for nullity failed as the wife's sexual organ deformity could be cured by an operation. It is not enough for the Petitioner to simply establish that they have not had sexual intercourse since the date of their marriage.

Section 36(1)(a) of the Matrimonial Causes Act (Cap 51) states that the court must be satisfied that the incapacity is incurable. The court may however require the Respondent to be medically examined to determine if the incapacity is

curable, but if the Respondent "refuses to submit to medical examination (s 36(l)(b)) or refuses to submit to proper treatment" (s 36(l)(c)), then the court may be entitled to draw an inference of incapacity. Such inference would depend on the circumstances of the case *Napier v Napier* [1915] P 184 (*Napier*).

Apart from incapacity to consummate the marriage due to physical genital deformity, there are a number of English authorities where courts have recognised that there are "rare and extreme cases … [where] incapacity is established to exist, that incapacity not being a mere hostile determination of the mind arising from obstinacy and caprice, but such a paralysis and distortion of will as to prevent … the act of consummation. From this paralysis and powerlessness the incapacity arises" In affirming incapacity, a person must be … "afflicted with such repulsion … so ineradicable and so invincible, as can be explained by incapacity" *G v G* [1924] AC 349; [1924] All ER Rep 900; 40 TLR 322 (*G*).

Such repulsion has been commonly described as a psychological defect which develops after the marriage has commenced. If a Petitioner alleges that the Respondent is impotent by reason of psychological defect, Lord Phillimore in *G* at 917 states that the evidence to prove "invincible repugnance" must be "invincible" in the full sense of an unconquerable, uncontrollable nervous condition which is physical and which creates nullity". A mere capricious refusal to consummate the marriage does not qualify as a psychological defect. There must be invincible repugnance to the sexual act. In *Singh v Singh* [1971] 2 All ER 828, the wife's dislike for her husband in an arranged marriage did not amount to invincible repugnance.

The Petitioner claims that the Respondent without cause or reason has refused to consummate the marriage. It is important to remember that the proceedings in this case are not to dissolve a marriage. Dissolving or dissolution of marriage, also known as divorce is provided for under s 14(c) of the Matrimonial Causes Act (Cap 51), which states:

> that the other party to the marriage has wilfully and persistently refused to consummate the marriage" but to annul the marriage under s 9(l) (a) of the same Act which provides that:
>
> "either party to the marriage is incapable of consummating the marriage" The court is therefore bound in this case by the principles and requirements of ss 9(l) (a) and 36 of the Matrimonial Causes Act (Cap 51) and is guided by case authorities noted above.
>
> Refusal to consummate a marriage is not sufficient to annul a marriage "unless it could be referred to impotence or incapacity existing at the time of the marriage" (*Napier v Napier* (*above* p 190). The Court further held in this case at p 186 that "refusal of marital intercourse cannot be relied upon as a ground for a decree of nullity, except so far as it may under certain circumstances be regarded as evidence of some abnormal physical condition.

Evidence

As to the evidentiary standard, the court will not grant a petition for nullity, unless the Petitioner has produced evidence of the elements and statutory requirements noted above.

Incapacity to consummate the marriage

The Petitioner states that he had no knowledge that the Respondent had incapacity to consummate the marriage *(para (f) of petition)* and that "*despite efforts made by the Petitioner*" *(para (e) of petition)* to consummate the marriage,

it has not been consummated. The Petitioner states that he has tried several times to consummate the marriage but no evidence was given about the nature or form of the Respondent's incapacity, or if such an incapacity existed, that medical assistance was explored.

From his evidence, the Petitioner's efforts appear confined to trying "*to take her to town*" and "*to his bedroom*". Both the Petitioner and the Respondent stated in their sworn evidence that they have never lived together after marriage.

Mrs Hari Deo, the mother of the Petitioner, gave sworn evidence confirming that *the* Petitioner and Respondent have never lived together. She stated that she tried to talk to the Respondent's family in an effort to bring the parties together but there was no response from the Respondent's family nor was she informed by the Petitioner as to the reasons why the Respondent refused to live with him. The Respondent, in her evidence claimed that she was forced to get engaged to the Petitioner and that she did not wish to live with him.

Refusal to consummate the marriage

The Petitioner at *paras (b) and (c)* of the petition states that the Respondent refused to consummate the marriage without cause or reason. In considering refusal in nullity proceedings, Sir James Hannen in *S v A* 3 PD 72 said that:

> The ground upon which the Court proceeds in these cases is the physical incapacity of the parties. A wilful wrongful refusal of marital intercourse is not of itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence. "Warrington LJ in *Napier v Napier* (*supra*) p 192 said that" … this must be regarded as a correct statement of the law when it is borne in mind that nullity, in its very nature, presupposes a cause existing at the date of the marriage. Wilful and persistent refusal, unless it results from incapacity, necessarily arises after marriage".

Therefore refusal of marital intercourse cannot be relied upon as a ground of nullity except in certain circumstances where the evidence shows some abnormal physical incapacity or "some abnormal condition of mind or body" *Napier* at 193 where incapacity could be inferred. The Petitioner's evidence has failed to establish that the refusal to consummate the marriage is linked to the Respondent's abnormal genital incapacity or any psychological defect amounting to the Respondent's invincible repugnance to the act of consummation.

In determining whether there has been refusal on the part of the Respondent, "the Judge should have regard to the whole history of the marriage" (*Horton v Horton* [1948] LJR 396; [1947] 2 All ER 871; (1947) 64 TLR 62). In *G* at 903, Lord Dunedin states that:

> … to determine whether we are entitled to draw the inference that refusal has been due to incapacity and not merely wilfulness is obviously a matter of delicacy and difficulty … nonetheless … it necessitates a somewhat minute examination of the married life of the parties.

Although the parties have not lived together to cause such an examination to be made, there was no evidence adduced on the circumstances surrounding this marriage and therefore no inference can be drawn on the refusal of the Respondent to consummate the marriage. The only reference that can be linked to the Respondent's refusal to consummate the marriage is her statement that she was forced to be engaged to the Petitioner. The parties were however married on 3 July 2005.

The question of whether the courts in Fiji consider wilful refusal to consummate a marriage as a ground to annul the marriage was considered by the Fiji Court of Appeal in *Vineeta v Rajeshwar Nath* (unreported, Civ App 0031/1980). The court stated that:

> We are mindful that in England wilful refusal to consummate a marriage leads to a decree of nullity of marriage, whilst in Fiji, it is a ground for divorce. However, the principles enunciated in the foregoing English authorities are in our opinion applicable in Fiji to petitions for divorce founded on wilful and persistent refusal to consummate a marriage.

Here, the Fiji Court of Appeal makes clear that wilful refusal to consummate the marriage is part of the law on divorce. In nullity proceedings, the ground of non-consummation of marriage is limited to incapacity. The Respondent's incapacity to consummate the marriage were not fully argued in this case and the Petitioner has failed to establish the relevant facts. There were no authorities cited to support the Petitioner's claims. The evidence relating to the Respondent's incapacity to consummate the marriage is less than clear. The principles upon which a marriage should be annulled must "*proceed only upon strict and thoroughly satisfactory proof*" *per Lord Chancellor* in *Cuno v Cuno* [1873] SA 301.

Decision

In light of the evidentiary burden and the material before me, the Petitioner falls far short of meeting the standard of proof required by statute and the principles and elements noted in the cases cited above to annul the marriage. This petition is accordingly dismissed.

Petition dismissed.