BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(FAMILY DIVISION)

NO. 590 of 2010

IN THE MARRIAGE OF:

LAKSHMI LAVANYA MARELLA APPLICANT/WIFE

AND

SANUSHKA DISSANAYAKE RESPONDENT/HUSBAND

Before The Honourable Mr. Justice William J. Chandler, Judge of the High Court

Date of decision: 2015: April 10

Ms. Vonda M. Pile Attorney-at-Law for the Applicant/Wife
The Respondent/Husband not appearing

DECISION

INTRODUCTION

[1] This is an application for a decree of nullity of the marriage between the parties. The application was filed on 22nd October 2010. The Applicant/Wife was born in Grenada and is a citizen of Barbados having been registered as a citizen of Barbados on 14th September 2004. She is of East Indian descent. The

Respondent/Husband was born in Sri Lanka and is also of East Indian descent.

BACKGROUND

[2] The parties married at the Registrar's General Office, 72-74 South Quay, Port-of-Spain, Trinidad on 18th March 2002. The Applicant/Wife alleges that the marriage was arranged between the families of the parties.

[3] The Applicant/Wife applied for a decree of nullity on the ground that the marriage was never consummated.

[4] The Applicant/Wife, in a supplemental affidavit filed 23 November 2012, deposed that there was no real consent to the marriage as her consent was obtained by duress. She further deposed "that the marriage was an arranged one as a result of her parents' religious practices". She deposed that "This marriage was forced upon me as I was never called upon to verbally give consent".

[5] The Respondent/Husband filed an Affidavit on 5th April 2011 in which he asked this court to grant the order applied for by the Applicant/Wife. In the said Affidavit he deposed that the marriage between the parties was an arranged one, that it was never consummated and that he too desired to have the decree of nullity of marriage granted.

[6] The Applicant/Wife was absent from the hearing of the substantive issue. The only evidence before the court is contained in the following documents:

(1) Application for the decree of nullity filed on 22nd October 2010;
(2) Affidavit of the Respondent/Husband filed on 5th April 2011;
(3) Amended application for the decree of nullity filed on 16th April 2012; and
(4) Supplemental affidavit filed by the Applicant/Wife filed on 23rd November 2012.

[7] The Application before the Court was never amended to include lack of consent as a ground for the granting of a decree of nullity.

THE ISSUES

[8] The following issues arise for determination by this Court:

(1) Whether the absence of the Applicant/Wife from the substantive hearing and her inability to give oral evidence on her own behalf is a bar to the hearing of the application for the grant of the decree of nullity? and, if the answer is in the negative,
(2) Whether the decree of nullity should be granted?

ISSUE 1

THE ABSENCE OF THE APPLICANT/WIFE

[9] Counsel for the Applicant/Wife explained in her written submissions that, at the time of the hearing, the Applicant/Wife had just taken up new employment and was unable to travel to Barbados

for the hearing. Miss Pile submitted that the Court could and ought to accept the affidavit evidence of the Applicant/Wife in this matter.

[10] Counsel relied on **Rule 76** of the **Family Law Rules 1982** of Barbados which provides that:

> **"Unless the court otherwise directs, evidence in an application for a decree of dissolution of marriage that is defended or in an application for a decree of nullity shall be given orally."**

[11] Counsel submitted that it is within the Court's discretion whether or not the Applicant/Wife should be called to give oral evidence. Counsel relied on the case of **Hall v Hall Family Suit No. 365 of 1997** (**Hall**) to support her contention that affidavit evidence can suffice to support the application.

DISCUSSION

[12] The amended application filed 16 August 2012 is for a decree of nullity. Paragraph 6 of the application alleges that the marriage is void for non-consummation. Paragraph 7 sets out the facts relied upon namely:

(a) that the marriage was an arranged marriage and
(b) that since the celebration of the marriage parties refused to consummate the marriage since they never wished the arrangement.

[13] Having regard to the nature of the application and the provisions of the **Family Law Act** (**FLA**) Chapter 214 of the **Laws of Barbados** and the **Matrimonial Causes Act** (**MCA**) formerly

Chapter 221 of the **Laws of Barbados** which will both be referred to later in this decision, I do not think that oral evidence would have been helpful to the Court in arriving at its decision. I will therefore proceed on the basis of the affidavit evidence filed in this matter.

THE LAW RELATING TO NULLITY OF MARRIAGE

[14] It is necessary to look at the law in relation to nullity of marriage before the **FLA** and after its passage into law.

[15] Prior to the **FLA** the jurisdiction of the High Court to grant a decree of nullity of marriage was contained in **Section 4** of the **Matrimonial Causes Act Chapter 221** of the **Laws of Barbados** (**MCA**) which provided that:

> "**Any married person and any person who has gone through any form of marriage may apply to the High Court for a decree of nullity of marriage on the ground either that the marriage is void or that the marriage is voidable and the court, if satisfied that the marriage is so void or voidable, as the case may be, shall grant a decree nisi of nullity of marriage, and upon such decree being made absolute as hereinafter provided, the marriage shall be treated as null and void to all intents and purposes whatsoever**".

[16] Section 5 (1) (a) of the **MCA** provided as follows:

> "**Without prejudice to any other grounds prescribed by law, a marriage shall be voidable on the ground –**
>
> **(a) That the marriage has not been and cannot be consummated owing to the incapacity of either party to consummate the marriage or that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage**;"

[17] It is trite law that the two bases upon which a decree of nullity could be brought for non-consummation of marriage were:

(1) that the Respondent wilfully refused to consummate the marriage; or
(2) that either party was incapable of consummating the marriage.

[18] The **MCA** was repealed by the **FLA** and consequently the ground of non-consummation of marriage as a basis for a decree of nullity of marriage was abolished. Consequently the basis upon which the instant application has been brought no longer exists in law.

[19] The current law in relation to nullity of marriage is contained in **section 31** of the **FLA** which provides that:

> "**An application for a decree of nullity of marriage may be presented to the court on the ground that the marriage is void within the provisions of the Marriage Act**."

[20] In consequence the only legal basis upon which a decree of nullity of marriage may now be granted is upon the void grounds contained in the **Marriage Act Chapter 218A** of the **Laws of Barbados**. **Sections 3, 4** and **5** contain these grounds, however, the relevant section for the purposes of this application is **section 5(2)(c)(i)** which provides that:

> "**A marriage solemnised between two persons is void, where … it was obtained by duress or fraud**".

[21] Counsel for the Applicant/Wife relied upon the Barbadian decision of **In the Marriage of Carl Russel Austin Perkins and Rojcoomarie Perkins, No. 13 of 1984** a decision of **Williams J. (later Williams CJ.)** in which the Australian case of **In the marriage of Deniz [1977] FLC 90 – 252 [Deniz]** was cited. In **Deniz** the marriage had not been consummated. The wife was Lebanese and the husband was Turkish, he set out to marry an Australian citizen and convinced the applicant that he loved her, she married him upon that basis. His real intention was to obtain Australian citizenship. The Court held, applying a liberal interpretation to the word "fraud" in section 23 of the Australian Marriage Act 1961 (the equivalent to section 5 (2) of the Barbados Marriage Act) that he had perpetrated a fraud upon the applicant by deceiving her into marriage for his own personal motives and with the intention of summarily rejecting her immediately after the ceremony.

[22] Likewise in **Perkins** the Court found that the applicant's consent to marriage was not real because it had been obtained by the respondent's fraud. The respondent had married the applicant solely for the purpose of obtaining Barbadian citizenship. The two cases cited are therefore inapplicable to the factual circumstances of the instant case.

[23] As previously mentioned the Applicant/Wife deposed that the marriage was forced upon her and she was never called upon to verbally give consent; it had been arranged because of her parents' religious practices and her consent was obtained by duress. There are no particulars as to the alleged duress; no evidence that the Applicant/Wife's will had been overborne by genuine fear caused by threats of immediate danger to life, limb or liberty so as to destroy the reality of the consent to ordinary wedlock (**Szechter (Orse. Karsov) v Szechter [1971] P. 286 and Singh v Singh [1971] 226 (Singh)**. There is no evidence to demonstrate that the consent to the marriage was not a genuine one. The onus is on the Applicant/Wife to establish these particulars upon the balance of probabilities and she has failed to do so.

[24] The most reasonable inference that can be drawn from the affidavit evidence is that the Applicant/Wife consented to the marriage out of a sense of obligation to her parents' wishes based upon cultural and religious values.

[25] In **(Singh)**, the facts of which are taken from the headnote of the case, the parties were Sikhs and in accordance with Sikh custom the wife's parents arranged her marriage. They told her that her husband was educated and handsome, but when she met him for the first time at the register office for the civil ceremony of marriage she

thought that he was neither. She did not wish to go through with the civil ceremony, **but out of obedience to her parents' wishes and in deference to her religious faith she went through with it** (emphasis added). In accordance with Sikh custom the parties separated after the ceremony and it was arranged that a week later they would go through a religious ceremony at a Sikh temple after which they were expected to consummate the marriage. The wife refused to attend the religious ceremony or to have anything further to do with her husband: she did not meet, see or communicate with him again. On the hearing in an undefended suit of the wife's petition for nullity on the grounds of duress induced by parental coercion or alternatively incapacity to consummate the marriage owing to invincible repugnancy, the judge held that neither ground was established and dismissed her petition.

[26] On appeal by the wife:-

Held, dismissing the appeal, (1) that to establish duress as vitiating consent to a marriage a petitioning spouse had to show that his will was overbourne by genuine fear induced by threats of immediate danger to his life, limb, or liberty and that since in the present case there were no threats of immediate danger to the wife's life, limb or liberty, there was no duress, even though she had acted out of obedience to her parents and deference to her religion.

[27] I find the observations of **Megaw LJ in Singh** apt to describe the allegation of duress as a vitiating factor in this case when he observed:

> "… **the finding of duress depended upon a finding of fear. Where, I ask, in the present case is there any possible permissible suggestion of fear on the part of this young lady? A sense of duty to her parents and a feeling of obligation to adhere to the custom of religion there may be, but of fear not a shred of a suggestion. Reluctance no doubt; but not fear**."

[28] There has been no application to amend the filed application to plead duress in accordance with the provisions of the Marriage Act. The affidavit evidence can only support the pleading, it is no substitute for it.

[29] The Court must also express its concern about the fact that this marriage was celebrated on 18 March 2002 and the application for a decree of nullity was filed on 22 October 2010 some eight years and nine months after the marriage. The distinction between a void marriage and a voidable marriage must be made. The application is for the marriage to be declared void for non-consummation. When regard is had to the provisions of the **MCA**, non-consummation of marriage rendered a marriage voidable and not void. It was therefore valid until the decree was made annulling the marriage. The length of time which elapsed between the celebration of the marriage and filing for the decree is likely to create the impression that the marriage was affirmed notwithstanding its non-

consummation. That is merely an observation and not a finding in the matter.

[30] It only remains to note that there is a contradiction in the Applicant/Wife's supplemental affidavit. She deposed that "This marriage was forced upon me as I was never called upon to give consent". There is a distinction between force vitiating consent and an allegation that there was no consent in the first place. Neither allegation has been established to the standard required by law.

Disposal

[31] In the circumstances, the application is dismissed.

William J. Chandler
High Court Judge