

CANADA / JUDGMENT

Kaur v. Singh

2021 BCCA 320

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 320 Kaur v. Singh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kaur v. Singh,

2021 BCCA 320

Date: 20210827

Docket: CA47065

Between:

Prabhjot Kaur

Appellant

(Claimant)

And

Gurvinder Partap Singh

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated September 28, 2020 (Kaur v. Singh, 2020 BCSC 1985, Rossland Docket E14599).

Counsel for the Appellant

(via videoconference):

Z. Imtiaz

The Respondent, appearing in person

(via videoconference):

G. Singh

Place and Date of Hearing:

Vancouver, British Columbia

June 25, 2021

Place and Date of Judgment:

Vancouver, British Columbia

August 27, 2021

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant sought a declaration annulling her civil marriage on the basis of non-consummation, and appeals from the chambers judge's dismissal of her petition on the basis that she had not established physical inability or a psychological incapacity to consummate. Held: Appeal allowed. The well-established common law concerning incapacity must be applied contextually. Here, the parties delayed consummation until they could have the proper ceremony that, according to their culture and religion, was necessary. In these circumstances, a true aversion to consummation arising from religious beliefs established a genuine psychological incapacity.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

Introduction and issues

- [1] The appellant, Ms. Kaur, appeals from the chambers judge's dismissal of her petition for a declaration annulling her civil marriage to the respondent, Mr. Singh. The ground advanced was non-consummation. Mr. Singh did not oppose the application in the court below, and takes no position on this appeal.
- [2] The chambers judge accepted that there had been no consummation of the marriage, but concluded that the parties had not met the common law requirement of non-consummation resulting from physical inability or psychological incapacity.
- [3] The appellant submits that the judge erred in three ways: first, she failed to give proper weight to the appellant's belief in the necessity of a Sikh Gurdwara ceremony before consummation; second, she failed to take into consideration the respondent's consent; and third, she erred in concluding that there was no psychological incapacity. In my view, this appeal turns on the first and last of these grounds in their combined effect.

Evidence at the hearing

- [4] At the hearing, the appellant testified that she had come to Canada as a student on December 18, 2017. She attended Selkirk College in Castlegar, where she met Mr. Singh, who was also a student. They decided to marry, and did so in a civil ceremony conducted on February 6, 2019. Their plan, the appellant said, was to delay consummation of the marriage until after the Sikh religious ceremony they planned to undergo later, in accordance with their tradition. She later explained that they wanted to marry in a civil ceremony so they could live together, which otherwise would be contrary to their religion, but put off consummation until they had undergone a traditional Gurdwara ceremony.
- [5] After the civil ceremony, they lived in the same house, but separately. They shared it with friends. The appellant lived with her friend, and the respondent with his friend. Then, the appellant testified, things got difficult:

And he was -- like he was suffering from depression so we start to get to so many issues with each other, and because of those issues and [indiscernible/teleconference] we get into so many fights, so we just decided to stay away from each other .

- [6] In these circumstances, the marriage still unconsummated, the appellant moved out of the house on May 25, 2019. When asked why, she responded:

Because our differences were so much and we were fighting so much that I decided to get out of that place because it was affecting my studies and my work also. So I just decided to get out of that thing because it was -- was affecting my health and my emotional health so much.

- [7] That was, effectively, the end of the relationship.

- [8] With respect to the respondent's depression, the appellant explained that she first learned from him shortly after they married that he suffered from depression that, as he described it, was not too severe. But then, she said, they were having so many issues. When asked by the judge if there were any physical or psychological or psychiatric reasons for not consummating the marriage, the appellant replied that there were not.

Reasons for judgment

- [9] In dismissing the application, the judge said this:
- [7] In *Jomha v. Jomaa*, 2010 ABQB 135 the parties entered into a civil ceremony, did not consummate the marriage. At para. 6, the Court set out the test for annulment:

To support an application for an annulment the law requires proof that the marriage is unable to be consummated, which is also referred to as proof of impotence. In other words, at least one of the parties is unable to engage in intercourse. In law, impotence can arise from physical inability or a psychological incapacity.

- [8] The Court accepted that in accordance with Ms. Jomha's religion, consummation cannot take place before the wedding banquet or a second ceremony took place. Ms. Jomha and Mr. Jomaa went before a religious leader in their Islamic community and had the Islamic bond between them severed. The court granted the annulment, stating at para. 12:

I accept the evidence of Ms. Jomha that the marriage was never consummated, that in her mind it was impossible for the marriage to be consummated before the wedding banquet or second ceremony took place and that the marriage can now never be consummated as the religious bond between them has been severed. I grant the annulment on the basis that her belief about the impossibility of consummation is akin to an invincible repugnance or psychological abhorrence to the act of consummation.

- [9] In *Grewal v. Sohal*, 2004 BCSC 1549, Mr. Justice Davies reviewed the jurisprudence and set out the test for inability to consummate at para. 61:

Having considered all of the authorities to which I have referred, I am satisfied that the present law in British Columbia concerning the granting of an annulment of a marriage on the basis of non-consummation with a specific spouse (but not to sexual intercourse generally), which is due to psychological aversion can be stated as follows: The applicant must establish on a balance of probabilities that:

- (1) there has been no consummation of the marriage;
- (2) the refusal to consummate has been persistent and is not due to obstinacy or caprice;
- (3) the applicant has an invincible aversion to sexual intercourse with the specific spouse;

- (4) the applicant's invincible aversion to sexual intercourse with that spouse has been brought about by circumstances that have resulted in a "paralysis of the will" that is consistent with incapacity; and
 - (5) the applicant's incapacity may be based upon normal, predictable reactions that need not be expressed in pathological terms.
- [10] Ms. Grewal and Mr. Sohal entered into an arranged marriage. After the marriage Ms. Grewal learned that the husband had an addiction to drugs. The court was satisfied that Ms. Grewal had a psychological incapacity to the consummation of this marriage. Davies J. continued at para. 72:

In my opinion, her reaction was a normal and predictable reaction to the contemplation of consummation with a spouse who was fundamentally different than the person he had represented himself to be. I also find that the defendant's deceit and manipulation of the plaintiff for immigration purposes both exacerbated and deepened her normal and predictable reaction that led to her understandable and natural psychological aversion to consummation.

- [11] Mr. Justice Davies granted the wife a declaration of nullity.
- [12] When I apply the principles to the case before me, I am not satisfied that they are met.
- [13] Annulment is not granted based on the agreement between the parties, or where the parties decide not to consummate a marriage despite an ability to do so. There is no evidence of either party having an aversion to consummating the marriage. While I accept that there does not have to be a pathological reason for non-consummation, it appears that the parties here simply decided that they would not consummate the marriage and made an agreement that the marriage should be annulled.
- [14] Neither am I satisfied that the facts in *Johma* have application here: Ms. Kaur said that the parties decided to wait until their religious ceremony before consummating the marriage, but she did not say that the marriage was unable to be consummated because one of the parties is unable to engage in intercourse arising from physical inability or a psychological incapacity.
- [15] While I am prepared to find that there has been no consummation of the marriage, these parties have not met the test that the non-consummation is a result of a physical inability or a psychological incapacity.
- [16] The application for a declaration that the marriage is a nullity is dismissed.

Discussion

[10] Before us, the appellant relied upon the Jomha and Grewal cases considered by the judge, though as one might expect, the issue of when non-consummation will support a declaration of annulment has been considered in a number of other cases. The seminal Canadian case on annulment is *Heil v Heil*, [1942] SCR 160. While seminal, it must be recognized as reflecting notions of gender roles that are now outdated.

[11] In *Heil*, the Supreme Court held at 160 that:

The mere refusal by a wife of marital intercourse due to her caprice is not a sufficient ground to warrant a decree of nullity of marriage; there must be an incapacity of some kind, which in some cases is a structural defect, but in some cases may arise out of a mental condition creating an invincible aversion to the physical act of consummation. Such a mental condition may be inferred from the proven facts, and justifies a decree for annulment of marriage.

[12] The *Heil* decision overruled *Dickinson v Dickinson*, L.R. [1913] P. 198, which held that persistent refusal was a legal ground for a decree. *Heil* settled the law, and stated the test for the granting of an order for an annulment: there must be an incapacity of some kind, "which in certain cases is a structural defect, but which may also arise out of mental condition, with the resulting effect of creating in the mind of the woman an aversion to the physical act of consummation" (at 163).

[13] In *Heil*, the Court looked to the evidence and concluded, at 164,

There is no alleged motive for the refusal of the respondent to consummate the marriage, and the only defence put forward is that she has performed her marital duties. The learned trial Judge who has heard her evidence, and appreciated her behaviour, has come to the conclusion that she was not telling the truth, and this finding has been unanimously upheld by the Court of Appeal, and I see no valid reason why it should be altered. This ground of defence having been rejected, we have to look elsewhere to see if the respondent's refusal is due to obstinacy or to an invincible repugnance to the act of consummation. The learned trial Judge has reached the conclusion that the proper inference to be drawn from the proven facts is that her hostility to the fulfilment of her marital duties is due to a mental condition with the resulting effect of creating an invincible aversion to the sexual act.

And the reading of the evidence which discloses her mentality, leads me to an identical conclusion. Her correspondence with her husband, and the conversations she had with some of her friends in Timmins, and even her own testimony, reveal her ideas that marriage is exclusively spiritual, eliminating all physical relations, and therefore bring the case within the principles laid by the House of Lords in *G. v. G.* We are not confronted here with an obstinacy of a momentary nature which may for a time only keep the respondent away from her husband, but with a repugnance which she has unsuccessfully endeavoured to overcome in spite of her promises to yield to the appellant's requests, and which cannot amount to anything else but to an aversion to the act of consummation itself.

[Emphasis added.]

- [14] This court affirmed the Heil test in *Juretic v Ruiz*, 1999 BCCA 417, and in *KHL v GQL*, 2003 BCCA 313. The test was applied narrowly in *Juretic*, and less so in *KHL*, but both affirmed the need to establish an incapacity amounting to an invincible aversion.
- [15] Mr. Justice Bauman, as he then was, helpfully summarized the common law principles in *C(HL) v L(MA)*, 2003 BCSC 1461:
- [12] To succeed, it must be established that one or both of the parties has a physical or psychological incapacity "such as to render intercourse impractical": J. David Fine, "Annulment of Marriage for Impotence in the Common Law of Canada" (1973), 8 R.F.L. 129.
- [13] It is not enough for the parties to simply establish that they have not had sexual intercourse since the date of their marriage (*Trenholm v. Trenholm*, [1989] N.S.J. No. 209 (QL) (N.S.C.A.), *B. v. B.* (1953), 8 W.W.R. 172 (Man. Ct. Q.B.)).
- [14] One or both of the parties must be unable to engage in sexual intercourse because of an incapacity of some kind. This incapacity may either be physical or psychological (*Heil v. Heil* [1942] S.C.R. 160, recently applied by the British Columbia Court of Appeal in *Juretic v. Ruiz* (1999), 126 B.C.A.C. 196, 1999 BCCA 417).
- [15] The incapacity must exist at the time the marriage was entered into (*Rae v. Rae*, [1944] 2 D.L.R. 604 (On. C.A.). Although, in many cases, the courts have recognized psychological impotence which has developed after the marriage has commenced. See for example, *Deo v. Kumzer*, [1993] B.C.J. No. 2051 (QL) (S.C.).
- [16] Impotence need not be a general incapacity to engage in sexual intercourse. The impotence may be with respect to that particular spouse only (*G. v. G.* (1908), 25 T.L.R. 328 (C.A.), *Greenlees v. Greenlees*, [1959] O.R. 419 (Ont. H.Ct.), *Orr v. Orr*, [1956] 2 D.L.R. (2d) 627 (N.S. Divorce Ct.).
- [17] If a plaintiff alleges that one of the spouses is impotent by reason of a psychological defect, the defect must amount to "an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity," (*Heil*, supra at 163). A mere capricious refusal to consummate the marriage does not qualify as a psychological defect (*Heil*, supra, *Juretic*, supra). However, "the refusal of a defendant to attempt consummation may have been so long continued or under such circumstances as to justify the inference of impotence" (*B. v. B.*, supra).
- [16] It is clear, then, that at common law there must be a real incapacity that is not "a mere capricious refusal". That incapacity may arise from different causes, including impotence or other physical disabilities, and psychological and emotional causes--even a psychological impotence that develops after the marriage has commenced.

- [17] In my view, in the multi-cultural society that our nation reflects, the common-law principles at issue here must be applied contextually, in accordance with the cultural norms of the parties seeking annulment. This was explored in *Jomha*. I consider that a psychological incapacity consistent with the principles discussed in these cases can arise as meaningfully from sincerely held religious and cultural beliefs as from other forms of psychological aversion, both being, contextually, a "normal, predictable reaction" as discussed in *Grewal*.
- [18] In this case, in my respectful view, the judge concentrated too heavily on the physical and psychological aspects of capacity in the traditional sense discussed in the cases. In this way, she did not fully appreciate, as we now must, the role that an honest and sincerely held religious belief can play in the incapacity determination.
- [19] The judge found "no evidence of either party having an aversion to consummating the marriage" (at para. 13). However, the appellant testified that the parties "decided to consummate after [their] Sikh religion marriage, because that's [their] tradition" (emphasis added). The appellant reiterated this point in response to further questioning:

Q Why did you decide to consummate your marriage after you complete your studies, the studies that -- and celebrate your Sikhism marriage; why did

you decide that?

A Because, first of all, it was our religious marriage. Like we both were from the same religion so we decided to get our religious marriage after our studies

Q So is -- and is this a practice in your religion, like after the civil marriage, to go through the religious ceremony as well?

A Yes, it is our practice.

Q For the Sikhism religion?

A Yes.

[Emphasis added.]

- [20] In my view, the evidence established that the parties' decisions about how to manage their relationship were based on religious and cultural considerations. They wished to live together, but in accordance with their cultural norms, could not do that without a ceremony. Hence the civil ceremony. But once living together, they could not consummate the marriage in accordance with their religion until they had undergone the traditional Sikh Gurdwara ceremony, and so did not consummate it. Though they had other reasons, including avoiding pregnancy, those did not require non-consummation. The true aversion to consummation arose from their religious beliefs, creating a genuine incapacity.

- [21] But, as we have seen, the religious ceremony never took place, because before it could, the relationship failed. Once again, this was not capricious. The appellant found herself in an unsafe place, her health at risk. To protect her well-being, it was necessary for her to leave. However, based on her evidence, it is reasonable to infer that even had the relationship not broken down, the marriage would not have been consummated until completion of the Gurdwara ceremony.
- [22] Moreover, in my respectful view, in deciding whether the appellant established an incapacity to consummate, the judge placed too much emphasis on the parties' agreement not to consummate, and gave insufficient weight to the fact that the agreement reflected an underlying aversion to consummation before completion of a Gurdwara ceremony. That was certainly the case for the appellant.
- [23] It would have been helpful to the judge, and would be helpful for any such cases in the future, to have more precise evidence concerning the parties' cultural and religious norms and, importantly, the manner and extent to which those norms impacted non-consummation of the marriage. The applicant for annulment based on a psychological incapacity to consummate, whether grounded in a sincerely held religious belief or otherwise, must establish an incapacity on a balance of probabilities.
- [24] But this was an uncontested summary application, and there was nothing in the evidence to suggest that the appellant did not sincerely believe, as she stated, that consummation was not to take place before the Gurdwara ceremony. This belief pre-existed the interpersonal struggles between the parties and there is no indication, in the record, that the appellant ever wavered from it. Contrary to the judge's finding, there was evidence of an "invincible aversion to the physical act of consummation", as required by Heil (at 160).
- [25] In these circumstances, I would allow the appeal, set aside the order of the judge, and declare the civil marriage of the appellant, Prabhjot Kaur, to the respondent, Gurvinder Partap Singh, on February 6, 2019, a nullity.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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