

CANADA / JUDGMENT

S.K.S. v. T.S.A.

2002 BCSC 1472

COURT

Supreme Court of British Columbia

DECIDED

22 October 2002

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Citation: S.K.S. v. T.S.A.

Date: 20021022
2002 BCSC 1472

Docket: E021347
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: S.K.S.
PLAINTIFF

AND: T.S.A.
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE McEWAN

Counsel for the Plaintiff:

M.G. Parent

Counsel for Defendant:

No appearance

Date and Place of Trial:

October 10, 2002

Vancouver, BC

- [1] The plaintiff seeks a declaration of nullity of her marriage to the defendant.
- [2] The parties were married February 16, 2002 in Vancouver, British Columbia. They ceased living together on April 4, 2002.
- [3] The marriage was arranged by the parties' families. They first met in about March of 2001 through a go-between and discussions followed among the parties' parents and an uncle and aunt of the defendant. The discussions included whether or not the defendant had any kind of criminal record. I accept the plaintiff's evidence that there was a direct and repeated representation that the defendant had nothing of the kind in his past. The parties themselves had virtually no opportunity to get to know each other before the marriage, the suitability of which was assessed almost entirely on the basis of the representations that passed between more senior family members.
- [4] Once the parties were married they lived in a basement suite in the home of the plaintiff's uncle and aunt. They were virtually never alone in that setting, and subsequently moved in with the plaintiff's parents.
- [5] The plaintiff says the marriage was never consummated. In the first few weeks after the wedding this was because the plaintiff felt she had had no opportunity to get to know the defendant and wanted some time. The defendant respected her wishes.
- [6] In the course of discussions during that time about who they were and what their experiences had been, the defendant had suggested that for a period of about four years he had "travelled". When he was more closely questioned, he acknowledged that this was untrue and that he had, in fact, been imprisoned in England for robbery.
- [7] This was too much for the plaintiff and a short while later the parties separated.
- [8] The defendant, by way of an improperly sworn but uncontroversial affidavit, agrees that the marriage was never consummated. He takes the position however, that the marriage should not be annulled, but that the plaintiff should simply ask for a divorce.
- [9] The plaintiff's position is that an annulment is preferable in her circumstances because a divorce significantly diminishes her reputation and prospects of marriage within her culture.
- [10] The plaintiff has offered two medical opinions to corroborate her evidence. The first, a letter from Dr. Arthur G. Willms, her family doctor, describes her condition as found on physical examination, and concludes as follows:

I can state with a high degree of confidence that this woman has not had sexual intercourse with vaginal penetration. I would support her claim that she had not been sexually active in this marriage.

- [11] The second is an opinion from a Dr. Douglas A. Steane, Registered Psychologist. His conclusions were as follows:

S.K.S.'s marriage to T.S.A. seems to have been a formal arrangement devoid of opportunities to develop a minimum amount of rapport or any psychological and emotional intimacy. While T.S.A.'s point of view is not represented in this report, it is assumed that he is still motivated to make the marriage work and that he is more emotionally involved in the relationship than his wife, since it is believed that he will object to any attempt to annul the marriage, but may not necessarily object to a divorce. However, S.K.S.'s discovery that T.S.A. was deceitful with respect to his criminal record, before getting emotionally involved with him, would naturally create an emotional barrier and repugnance to consummating the marriage. For these reasons, it is important to emphasize that Ms.S.K.S. is not refusing to consummate the marriage. She is a responsible, emotionally well-adjusted, young woman who is not psychologically capable of consummating the marriage because, from her perception of experiences with her husband, he has not succeeded in connecting with her cognitively and emotionally. Expecting a mature woman to consummate a marriage with a man with whom she has not developed a positive emotional connection is not that psychologically different from asking her to prostitute herself.

[12] I turn now to the law. The remedy of nullity is available to the plaintiff if the court has jurisdiction to hear the claim and if the proper law to be applied permits it. The court has jurisdiction where, as here, both parties were resident in British Columbia at the commencement of the proceedings. (see *Sangha v. Mander*, [1985] B.C.J. N. 2688 per Huddart, L.J.S.C. paras. 12; 15).

[13] In *Sangha*, supra, Madam Justice Huddart observed:

The personal consequences are not negligible. To Miss Sangha, as to many others, the distinction [between divorce and annulment] remains significant for religious and other personal reasons. Miss Sangha went through a ceremony of marriage expecting a marriage in every sense of the word, but the marriage could not be consummated. In her view, she was never married. She seeks that declaration from this court.

That is, of course, how the plaintiff here sees her situation.

[14] Historically, the test for nullity on grounds of non-consummation was rather high. The discussion in *Heil v. Heil*, [1942] 1 D.L.R. 652 (S.C.C.) per Taschereau J. at p. 660 sets out the terms in which such considerations have been framed:

The mere refusal of marital intercourse due to caprice is not a sufficient ground to warrant a decree in nullity. The earlier decision, *Dickinson v. Dickinson*, [1913] p. 198 which held that persistent refusal was a legal ground for a decree is overruled, and it is now settled that there must be an incapacity of some kind, which in certain cases is a structural defect but which may also arise out of a mental condition, with the resulting effect of creating in the mind of the woman an aversion to the physical act of consummation.

In *Napier v. Napier*, [1915] P. 184 at p. 193 it was held:

It is true that in recent times the Court has not always required proof of an actual structural defect as evidence of incapacity, but has considered itself at liberty to infer from the conduct of the parties or one of them an incapacity arising from some abnormal condition of mind or body.

Reference might also be made to: (Hudston v. Hudston (1922), 39 T.L.R. 108) (K. v. K., [1923] 3 D.L.R. 485) (Barnes v. Barnes (1921), 63 D.L.R. 680, 14 S.L.R. 505) (Vickery v. Vickery (1921), 37 T.L.R. 332) (Bethell v. Bethell, [1932], 2 D.L.R. 663, O.R. 300) (Szrejher v. Szrejher, [1936], 2 D.L.R. 413, O.R. 250).

In *F. v. P.* (1896), 75 L.T. 192, Sir Francis Jeune expressed his views as follows [as paraphrased by Lord Dunedin in *A.B. v. C.B.* (1906), 8 F. (5th series) 603 at p. 609, and in *G. v. G.*, [1924] A.C. 349 at p. 354]:

If it be satisfactorily proved that repeated endeavours of a potent husband, who has tried all means short of force, had been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife.

The latest pronouncement on the matter is a decision of the House of Lords in the case of *G. v. G.*, [1924] A.C. 349, where it was held that the conclusion to be drawn from the evidence [page 661] was that the wife's refusal was due, not to obstinacy or caprice, but to an invincible repugnance to the act of consummation, resulting in a paralysis of the will, which was consistent only with incapacity and that the husband was entitled to a decree of nullity. The words of Lord Phillimore are as follows (p. 376): "The evidence here seems to me to prove 'invincible repugnance,' 'invincible' in the full sense of an unconquerable, uncontrollable nervous condition which is physical and which creates nullity."

[15] More recently, in *Deo v. Kumar*, [1993] B.C.J. No. 2051 (B.C.S.C.), Lander J. articulated the test in the following terms:

The test is a practical impossibility of consummation. It must be caused by physical or psychological defect. Wilful and persistent refusal amounting to caprice or obstinacy is not a ground for annulment. See *Heil v. Heil*, [1942] 1 D.L.R. 657 (S.C.C.).

The words "invincible repugnance" are commonly used to describe such a psychological defect. It has been held that such a repugnance may be toward the particular spouse, and not the act of sexual intercourse generally, see *Orr v. Orr* 1956), 2 D.R. (2d) 627 (N.S.), and *Greenlees v. Greenlees*, [1956] O.R. 419, as well as *Koelman v. Lansdaal* (1953), 9 W.W.R. 381 (NS). I find that, due to Ms. Deo's discovery of Mr. Kumar's pre-marital sexual activities, compounded by his contraction of a sexually transmitted disease, she has developed an overpowering psychological abhorrence for him, rendering her incapable of even the contemplation of consummation. She psychologically required no more of her prospective mate than she demanded of herself: a completely disciplined abstinence from pre-marital sexual relations.

- [16] Here, the plaintiff is in the position that a clear precondition or premise upon which the marriage was founded did not exist, and had, in fact, been actively misrepresented. I think it quite understandable that this, and the fact that in this particular arrangement, the parties remained effectively strangers until after they were married, renders consummation a practical impossibility for the plaintiff. I do not think it necessary for the court to describe her normal, predictable reaction to the situation in pathological terms in order to grant the declaration sought. There can be no basis in public policy for promoting marriage to the extent of denying this application.
- [17] Accordingly, I declare the marriage of the plaintiff and defendant which took place February 16, 2002 and was registered in British Columbia under No. 2002-59-001294 (Certificate #66328767) annulled.
- [18] I direct that the exhibits on this file be sealed, and that they remain sealed unless there is a further order of this court.
- [19] I make no order for costs.
- [20] The plaintiff shall have liberty to apply should further directions be necessary.

"T.M. McEwan, J."

The Honourable Mr. Justice T.M. McEwan

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