
CANADA / JUDGMENT

S.Z. v. X.J.

2020 BCSC 1336

COURT

Supreme Court of British Columbia

DECIDED

10 September 2020

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2020 BCSC 1336 S.Z. v. X.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.Z. v. X.J.,

2020 BCSC 1336

Date: 20200910

Docket: E200129

Registry: Vancouver

Between:

S.Z.

Claimant

And

X.J., also known as J.X.

Respondent

Corrected Judgment: the text of the judgment was corrected
at paragraph 2 and paragraph 6 on September 24, 2020

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

(In Chambers via Teleconference)

Counsel for the Claimant:

A. Rebane

Counsel for the Respondent:

K. Lee

Place and Date of Hearing:

Vancouver, B.C.

September 1, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 10, 2020

- [1] The parties were married on August 11, 2018. On this application, the claimant seeks an order annulling her marriage to the respondent on the grounds that their marriage has not been consummated and cannot be consummated due to the respondent's impotence.
- [2] 150 years ago, the inability to consummate a marriage was described as a canonical disability, which rendered a marriage voidable at the instance of the party who claimed their partner was incapable of consummating the marriage. Before 1857, a claim for annulment in these circumstances could only be addressed by the ecclesiastical courts. Since 1857 the courts of common law have assumed jurisdiction of such actions. Pursuant to the domestic law of British Columbia, a marriage is voidable where a claimant has established their spouse lacks the capacity to consummate the marriage: *Sangha v. Mander* (1985), 65 B.C.L.R. 265 (S.C.)
- [3] The roots of an action for annulment in the ecclesiastical courts is significant in the case at bar. Here, the parties have not lived together for a year and no longer wish to be married to each other. The claimant does not seek a divorce, however. She seeks an annulment for reasons based in her faith. The marriage contract which she entered into with the respondent is, in her submission, void as a result of his inability to complete an essential implied term of the contract, namely engaging in sexual intercourse.
- [4] An action for annulment seeks a declaration that the marriage is void, and must be based on facts which existed as at the date of marriage. If the facts arose only after the date of marriage, the remedy for the claimant is an order for divorce.
- [5] The essential question before me is whether the claimant has satisfied the burden upon her to establish that the respondent is and was incapable of consummating their marriage.

- [6] The quality of evidence required to meet the burden of proof on a claimant seeking an annulment has changed over time. In the 17th century, Trials by Congress were undertaken by the Spanish and French courts, where the act of copulation was attempted before a jury of medical professionals and others. In 1921, in *C. (otherwise H.) v. C.*, [1921] P. 399, Lord Birkenhead stated in somewhat florid terms:

The petitioner must remove all reasonable doubt, for she has undertaken the burden of proof, and it is important in such a case that she should be compelled to discharge the burden, for the charge made, though physical and not moral, is nevertheless a grave and wounding imputation that the respondent is lacking, at least quoad hanc, in the power of reproducing his species, a power which is commonly and rightly considered to be the most characteristic quality of manhood.

(page 400)

- [7] In *Tice v. Tice*, [1937] O.R. 233, Hogg, J. relied on cases from 1863, *E. v. E.* (1863), 3 Sw. and Tr. 240 and *Edgecombe v. Edgecombe* (1863), 32 L.J.P.M. 153, to conclude that incapacity to consummate a marriage would not be found "unless the incapacity may be considered permanent. If there is a possibility that it may be cured or will terminate, the marriage will not be annulled".
- [8] I am satisfied that the extremely strict standard of proof required in earlier centuries resulted from an apparent horror of impotency within the cultural norms of those times. I am not satisfied that this extremely strict standard of proof is necessary or appropriate today.
- [9] The more modern cases reflect a lessening of the burden. In *C. v. L.*, 2003 BCSC 1461 [*C. v. L.*], Mr. Justice Bauman, as he then was, reviewed the law relevant to an action for annulment on the grounds of a failure to consummate. He confirmed that such a common law action remains available in British Columbia: para. 11. He noted the onus is on the claimant to establish that one or both of the parties is incapable of engaging in sexual intercourse due to a physical or psychological incapacity: *C. v. L.*, para. 14; *Razavian v. Tajik*, 2019 ONSC 5662. Further, the impotence need not be a general incapacity to engage in sexual intercourse, but can be with respect to the particular spouse only: *C. v. L.*, para. 15.
- [10] As an alternative to a declaration of annulment, the claimant seeks an order requiring the respondent to submit to a medical examination to determine his ability to maintain an erection so as to achieve sexual penetration, and the consummation of their marriage. The respondent consents to this alternative order on certain terms.
- [11] I have determined that it is not necessary for the claimant to provide this evidence to support her claim. Both the claimant and respondent have provided affidavit evidence on this application. The respondent could have obtained his own medical opinion if he wished to refute the allegations of the claimant, but he has not chosen to do so.

- [12] In *Jones v. Jones*, [1948] O.R. 22, the court concluded that there was no rule which required a defendant to give evidence contrary to the evidence of the claimant. If the claimant presents sufficient evidence to satisfy the court that her husband was incapable, and the court is satisfied that such evidence is bona fide and true, the order should be allowed. The claimant is not required to obtain medical evidence of the respondent's incapacity in order to establish her claim.
- [13] I find that the claimant has the onus of establishing that the respondent was incapable of consummating the marriage at the date of the marriage, and remained so throughout the marriage. The incapacity of the respondent need only be established within the marriage to the claimant, and may be an incapacity based in physical or psychological reasons.
- [14] The evidence before me establishes the following:
- a) The parties attended pre-marriage counselling sessions at the Chinese Alliance Church, and in those sessions the respondent did not disclose to the claimant that he had any sexual health issues.
 - b) Before their marriage, the parties discussed having children together.
 - c) The parties did not live together before the marriage.
 - d) The marriage was never consummated.
 - e) The first time the parties attempted sexual intercourse was after their marriage, but the respondent was unable to maintain an erection.
 - f) From August 2018 to approximately March 2019 the parties attempted sexual intercourse each month. The claimant deposes that they attempted sexual relations approximately twice a week. The respondent says he attempted to initiate sexual relations at least three times a week, but the claimant was only willing to attempt sexual relations once a month. Throughout this period, they were unable to have sexual intercourse, as the respondent was unable to obtain or maintain an erection to allow penetration.
 - g) In June 2019 the claimant asked the respondent to see a doctor about his sexual problems, but the respondent kept putting off visiting a doctor. The parties met with a doctor who did a blood test on the respondent, and that doctor assured the parties that there was nothing wrong with the respondent. This doctor also told the claimant that there was no such thing as a sexual health test which could be done. Following this doctor's visit, the claimant asked the respondent to get a second opinion.
 - h) The parties ceased living together in September 2019.
- [15] The claimant deposes that in July 2019, the parties attempted sexual intercourse four to five times a week, but the respondent was not able to maintain an erection. She says that the respondent refused to get a second opinion following the doctor's visit in July 2019.

- [16] The respondent says that the claimant refused to have sexual intercourse with him after March 2019 unless he signed a marriage agreement. He says he did agree to get a second opinion from a doctor and went to such a doctor in November 2019, after the parties had separated. He says that this second doctor did not perform any examination of him.
- [17] On these disputed facts, I prefer the evidence of the claimant. The fact that the parties went to see a doctor in July 2019 about the respondent's impotency supports her evidence that they continued to attempt sexual intercourse, and contradicts the respondent's assertion that the claimant refused to attempt sexual intercourse unless he signed a marriage agreement. The respondent did not produce any evidence of a second opinion from a doctor, and produced no medical evidence whatsoever to contradict the claimant's evidence that he was incapable within their marriage.
- [18] The respondent blames the claimant for the couple's failure to consummate the relationship. However, he does not dispute the fact that at no time in the marriage was he able to maintain an erection and achieve penetration.
- [19] The respondent deposes that he has a new girlfriend, and they have sexual intercourse regularly. There was no evidence from this girlfriend to corroborate the respondent's evidence. Further, even if he is able to have sexual intercourse with his current girlfriend, this does not contradict the claimant's evidence that he was incapable of having sexual intercourse with her.

Conclusion

- [20] I find that at the time the parties were married in August 2018, the respondent was not capable of maintaining an erection and achieving penetrative sexual intercourse with the claimant. Notwithstanding months of attempts during their marriage, at no time was the respondent able to perform sexual intercourse with the claimant. The incapability of the respondent arises not from a refusal to have sexual intercourse, but rather from a disability of some sort, whether physical or psychological.
- [21] I am satisfied that the claimant has met the burden on her to establish that the respondent is, and was at the time of the marriage, incapable of having sexual intercourse with her.
- [22] The marriage contract made August 11, 2018 between the claimant and respondent is null and void.
- [23] I award costs to the claimant.

"Baker J."

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