

**IN THE FAMILY DIVISION OF THE HIGH COURT OF FIJI**  
**AT SUVA**

**ACTION NO.: 0483 OF 2008**

**BETWEEN:**

**NILOFA NATASHA BANO**

***Applicant***

**AND:**

**MOHAMMED NAZAM**

***Respondent***

**Counsel: Applicant in Person**  
**Ms. R. Lal for the Respondent**

**Date of Hearing: 11 September, 2008**

**Date of Judgment: 20 February, 2009**

## **JUDGMENT**

### **Introduction**

[1] This is an application for an order of nullity of marriage between Nilofa Natasha Bano (NNB) and Mohammed Nazam (MN). The application is made by NNB on a single ground that no real consent was given by her. NNB is a citizen of Fiji while MN is a citizen of United States of America. The application was filed on 7 June 2008. At the time the application was filed, MN resided in California, USA. He was effectively served with the application by postal service, after which he instructed counsel to represent him at the hearing. Counsel for the respondent did not oppose the application.

### **Evidence**

- [2] NNB and her mother, SB, gave evidence.
- [3] NNB said her marriage with MN was arranged by her mother's family. She first met MN at her aunt's home in Makoi, Nasinu. She cannot recall the exact date but it was sometime in 2007. She did not speak to MN in the first meeting. According to NNB, MN and his family came fully prepared for an engagement. They brought engagement suit and ring for NNB. They had an engagement ceremony in Sigatoka. The ceremony was arranged by MN's family. NNB said MN and his family were rushing into marriage. She was not consulted, nor asked for her views. A day after the engagement, MN returned to United States of America. Shortly after in October 2007, MN returned to Fiji with his father, to legally marry NNB. On 20 October 2007, MN and NNB were legally married and the marriage was registered on 8 November 2007. NNB was 19 years old at the time of the legal marriage. MN returned to United States of America and NNB was supposed to prepare for "nikah" (religious wedding) in July 2008. All these times, NNB believed MN was 27 or 28 years old and was a bachelor. NNB was told by her own relatives that MN was about 27 or 28 years old. NNB said she was not given a copy of the marriage certificate until June 2008 when she received the migration documents from United States of America. In the Certificate of Marriage, MN's date of birth is recorded as 10 June 1975 and conjugal status as divorcee. When NNB sighted the marriage certificate and other migration documents NNB learnt MN was 33 years old and a divorcee. NNB spoke to MN on the telephone and informed him that she did not want to go ahead with the religious wedding. On the same weekend, NNB's photo was published in the local newspaper, Fiji Times, as a missing person. NNB suspects the publication was by MN to humiliate her for refusing to marry him. That was the evidence of NNB.
- [4] SB is the mother of NNB. SB said her cousin sister had made the arrangement for the marriage of her daughter to MN. When the families met for the first time at the

cousin sister's house, there was no discussion about MN's age or conjugal status. SB was told by her own relatives that MN is about 27 or 28 years old. It is only after the legal marriage that SB learnt that MN was 33 years old and previously married. SB said if she would have known the true age of MN and his previous conjugal status, she as a mother of NNB would not have agreed to NNB marrying him. That was the evidence of SB.

[5] NNB and SB were not cross examined by counsel for the respondent. The respondent elected not to call any evidence. The application has to be considered on the basis of the evidence led by the applicant.

### **Law**

[6] Consent of the partners is an essential prerequisite for existence of a valid contract of marriage. Under section 32(2)(d) of the Family Law Act 2003, the consent of either of the parties is not a real consent under the following categories:

- (i) it was obtained by duress or fraud;
- (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
- (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony.

[7] The relevant issue in this case is whether NNB's consent was obtained by fraud? If it was, then NNB is entitled to annulment, and thereby returning her to her original status before marriage.

[8] "Fraud" is not defined by the Family Law Act. English cases have restrictively applied the concept of fraud in family law. The case of **Moss v Moss** (*Otherwise Archer*) [1897] P. 263, at pp 268-9 summarizes the principles as follows:

"But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in **Rex v Burton-on-Tent** [3 M&S 537] of a man assuming a name to conceal himself for the person to whom he is to be married. In **Portsmouth v Portsmouth** [1 Hagg Ecc 355] and **Harrod v Harrod** [(1854) 1 K&J 4] the fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce in the one case a man, in the other a woman, to enter into a contract, which ... he or she did not understand... In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. This is illustrated by the imaginary case suggested...in **Reg. v Mills** [(1844) 10 CI&F 534, 785] of a mock marriage in a masquerade where the kind of result which fraud might have produced would be produced by mistake. In such an instance there would be no fraud, but for want of real consent the marriage would be declared void. But when there is consent no fraud inducing that consent is material."

[9] In **KN v EG** (Case No.0029/08, 6 May 2008), Scutt J considered in detail the application of fraud in the context of the Family Law Act (Fiji). Scutt J took the view that the English cases ignores the cultural and social ores existing within another jurisdiction such as Fiji and therefore the principles enunciated in those cases should be applied with caution in Fiji. Her Ladyship at paragraph 7.31 of the judgment said:

"In my opinion, this is correct – and individual marriage participants cannot themselves determine what goes 'to the root of the marriage

contract'. Rather, this must be determined by the Courts in the context of the terms of the legislation, the country in which the legislation applies, the culture and social ores existing within that country, and any Parliamentary debates pertaining to the legislation."

[10] Later at paragraph 7.34, her Ladyship said:

"Whilst it is my view that the Courts of Fiji can (as they do) properly have regard to decisions of courts from other jurisdictions and should do so – in this way the law can be developed and grow, and jurisprudence can be advanced in a positive way – it is also important not to simply apply authorities from overseas jurisdictions as if there is no option but to do so, particularly where Fiji legislation itself is illuminating."

[11] **KN v EG** was a case where the husband failed to disclose to the wife about his impotency before the marriage. Scutt J annulled the marriage by reason of fraud saying that had the wife known that she would be depriving herself from sexual union with her husband due to his impotency, she would not have married him.

### **Analysis**

[12] Albeit the facts in this case are quite different from that in **KN v EG**, the principles are applicable to this case. I agree with my sister Justice Scutt that the relationship between the marriage partners should be examined in the cultural context of Fiji, the Family Law Act (Fiji) and the Fijian Constitution.

[13] Among other values, the importance of the family is one that the Constitution supports. The preamble of the Constitution states:

"Reaffirming our recognition of the human rights..., and our respect for human dignity and for the importance of the family,"

- [14] The institution of marriage is a partnership between two individuals. Before the marriage partnership is entered, the parties have social obligations to disclose all relevant facts about each other so that genuine consent is obtained. In many cultures, marriage is arranged by families of the marriage partners. In arranged marriages, the social obligation to disclose all relevant facts about the marriage partners extend to their family members who contribute in some way or other towards the arrangement. This is so because in arranged marriages, the marriage partners have very limited input in the decision making process which leads to the arranged marriage.
- [15] In this case, the marriage was arranged in accordance with the customs and traditions of NNB and MN. Both shared Indian culture. Although NNB was present when the proposal to marry MN was accepted by her family, she was not privy to any discussions before the acceptance. She accepted what her family was led to believe MN's age and conjugal status to be.
- [16] I accept NNB and her mother's evidence that they were not disclosed the actual age and the conjugal status of MN by him and or his family. I also accept that if they had known that MN was more than 13 years older than NNB and that he was previously married, NNB and her family would not have consented to the marriage.
- [17] Whilst age may not always be an important factor in the union of two adults, in this case, I find that for NNB it is was a material fact because she was of a very young age while MN was 13 years older than her and previously married, and that the age and conjugal status of MN should have been disclosed to her before her consent was obtained. I further find that the non disclosure of his previous marriage by MN was a material non disclosure because had NNB known about it,

she would not have consented to the marriage. For these reasons I am satisfied that NNB's consent was obtained by fraud.

**Conclusion**

[18] It is therefore ordered, adjudged, and decreed that the legal marriage between Nilofa Natasha Bano and Mohammed Nazam entered on the 20<sup>th</sup> day of October, 2007 at Valelevu, Nasinu and registered on 8<sup>th</sup> day of November, 2007, is hereby annulled under section 32(2)(d)(i) of the Family Law Act 2003.

[19] No order for costs.

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**Daniel Goundar**  
**JUDGE OF THE HIGH COURT**

**At Suva**  
**Friday 20 February, 2009**

**Solicitors:**

In Person for the Applicant  
Jamnadas & Associates, Suva for the Respondent