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Judgment
40/1965

IN THE PRIVY COUNCIL No. 25 of 1963

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N :

ANTOINE CHOPPY and LOUISE CHOPPY (Plaintiffs) Appellants

- and -

1. MERICIA ANGELA BIBI (s) otherwise Choppy
2. MERICIA ANGELA BIBI (s) (here acting in her capacity as legal quardian of the minors ANDREA BIBI, MARY BIBI, ROBERT BIBI, MICHEL BIBI, and BENJAMIN BIBI
3. AUGUSTE BIBI acting in his capacity of sub-guardian of the minors ANDREA BIBI, MARY BIBI, BENJAMIN BIBI, ROBERT BIBI and MICHEL BIBI
4. HARRY BIBI
5. MAD. DOLY BIBI (m)
6. LUCE BIBI (m)
7. NOE BIBI
8. HARRY BIBI here acting in his capacity of "TUTEUR AD HOC" of the minors ANDREA BIBI, ROBERT BIBI, MICHEL BIBI, MARY BIBI and BENJAMIN BIBI (Defendants) Respondents

C A S E FOR THE APPELLANTS Record

1. This is an appeal from the Judgment and Order p.107

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of the Supreme Court of Mauritius, dated the 7th day of September, 1960, whereby the appeal of the Respondents from the Judgment and Order of the Supreme Court of Seychelles, dated the 6th day of November, 1959, was allowed and the action entered by the Appellants dismissed with costs.

2. On the 2nd day of November 1957 one Augustin Choppy is purported to have contracted a marriage in articulo mortis with the first Respondent, Mrs. Mericia Angela Bibi, and to have acknowledged the other Respondent and the infants represented by them as his natural children by the first Respondent in order that they might be legitimated as if they had been born in marriage.

3. The said Augustin Choppy died on the 12th day of November 1957.

pp.1,9,14,15 4. By their Plaint, the Appellants, who are the brother and sister of the deceased and had until his death been joint owners with the deceased in full ownership of certain properties, prayed for a declaration:

(a) that the purported marriage of 2nd November 1957 was null and void to all intents and purposes:

(b) that the document setting out the said marriage was null and void to all intents and purposes;

(c) that the registration of the said document in the special register be struck out;

(d) that the purported legitimation of the said children was invalid in law; and

(e) that any entry showing such legitimation made by the Civil Status Officer on the Childrens' Acts of Birth be erased on the following grounds:-

(1) because the conditions necessary for a marriage in "articulo mortis" did not exist;

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(2) because the formal requirements of the Civil Status Ordinance Chapter 26 were not complied with;

(3) because the said Augustin Choppy, before and at the time of and after the purported marriage was suffering from mental infirmity; and

(4) because at the time of the marriage the said Augustin Choppy was by reason of mental infirmity and not being in full possession of his mental faculties, unable to know the nature and quality of the purported marriage.

5. The Respondents by their Defence set up the validity of the marriage in articulo mortis and denied that the conditions necessary did not exist or that the formal requirements had not been complied with or that the said Augustin Choppy was mentally infirm or did not know the nature and quality of his acceptance of the fact of marriage and set up three pleas in limine litis:- p.12

(1) That the Appellants had no right of action in law to have the document of the 2nd day of November 1957 declared null and void and therefore the action must be struck out;

(2) that the action was against public order and therefore should be struck out; and

(3) that the grounds contained in the Statement of Claim are not sufficient to annul a marriage.

6. The said pleas in limine litis were heard by Rassool Ag. C.J. as preliminary points and were held to fail in a ruling given on the 11th day of November 1958 wherein the learned judge ruled that the Appellants had properly brought this action under Section 103 of the Civil Status Ordinance which reads as follows: p.32.

"Nothing herein contained shall prevent any interested person from asking by action before the court of

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Seychelles for the restification or cancellation of any act"

an act being an act of the Civil Status; and that although the Appellants being collaterals of the deceased had no interest to attack the validity of the marriage itself they had sufficient interest to attack the legitimation of the children; that no argument had been advanced on the second point and that the third point was not sufficient to strike out the pleading.

7. From the said ruling there was no appeal.

8. At the hearing on the merits the Defendants made default under Sec:138 of the Sychelles Code of Civil Procedure, did not appear and were not represented.

pp.62-79

9. At the hearing on the 3rd, 4th, 5th and 6th days of November 1959, witnesses were called as to the mental and physical state of the deceased at about the time of the purported marriage and the learned trial judge E.H. Taylor, Judge ad hoc, gave an oral judgment as follows:-

"Court delivers oral judgment as follows:-

In my view the Plaintiffs have discharged the onus on them - heavy though it is. The deceased was clearly not capable of giving a valid consent on 30th October or 4th November - it is, on the medical evidence improbable that he could have had a sufficient lucid interval and on the other evidence - particularly that of Roubion Camille highly improbable that he in fact had one. Three of the witnesses were interested persons. Judgment for the Plaintiffs with costs. Declaration that the purported marriage was void. Order that the Register of the Civil Status be rectified accordingly by expunging the act of marriage and the memoranda of legitimation in the birth certificates of the children. Formal minutes of the Judgment to be settled in Chambers if necessary. Draft to be submitted to Chief Civil Status Officer before sealing."

10. From the said judgment the Respondents appealed, the principal grounds of appeal being - Record pp.80-84

(a) that the proper procedure had not been followed to challenge the validity of a marriage; and

(b) that the Appellants as collaterals were not entitled to sue for the nullity of a marriage vitiated for want of consent.

11. The Appellants submitted to the Supreme Court of Mauritius that as the Respondents had made default at the trial, their correct remedy was to apply for re-instatement of the case and not an appeal, but the Supreme Court held that this was a preliminary point that should have been raised on a preliminary objection, and this not having been done the Court overruled the objection. pp.96,110

12. The Supreme Court summarized the arguments as follows:-

> "The real issue therefore relates to a suit for the nullity of a marriage based on the absence of consent of one of the spouses. p.110 l.28
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> Mr. Koeng for the Appellants /the Respondents herein/ submitted that the legitimation of the children flowed from the existence of the marriage itself and such legitimation could not lose its effect except by a definite action to pronounce the nullity of the marriage, and further that the procedure relating to a suit for nullity of marriage was governed by the Matrimonial Causes Ordinance according to which such a suit must be initiated by petition supported by affidavit, and he added that this procedure was a matter of public order in view of the language of the Ordinance and the imperative character of its provisions. He argued that it made no difference that a marriage for want of consent was void since it was clear from the pleadings that the nullity of marriage was the principal action and the effect on the legitimation merely consequential. Mr. Thomas /for the Appellants herein/ argued that the remedy

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sought was the bastardization of the children, that it was really not necessary to obtain from the court a decree of nullity of marriage, all that was required was a mere declaration of its nullity, a pronouncement which the Court was entitled to make on the strength of the principles obtaining under English case-law in the matter since the marriage was void ipso jure for want of consent".

13. The Supreme Court Judgment contained the following passages:-

p.11 l.41 "The question concerning the proper procedure to be followed was argued before us on the assumption that a marriage contracted without the consent of one of the parties was void ipso jure and also that in such a case the collaterals having an interest to do so could ask for the nullity of such a marriage. We shall therefore in the first instance consider the case on these assumptions."

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p.112 l.36 "We have reviewed the case-law on this point and have come to the conclusion that where the question of nullity of a marriage arises incidentally if the marriage is void ipso jure it can be so declared but where a suit is initiated for the specific object of declaring a marriage null and void, the question of nullity cannot be treated as an incidental matter and the normal procedure must be followed".

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p.113 l.33 "In the present case it is clear from the pleadings that the main purpose of the action is to obtain a judgment decreeing the nullity of the marriage for want of consent of one of the spouses and that the result which the respondents seek as a remedy, i.e. the removal of the legitimation of the

children, is consequent upon the pronouncement by the court that the marriage is null and void and is based on no other ground". Record

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"It is evident therefore that the proper remedy is by way of principal action to secure a judgment of the court decreeing the nullity of the marriage and that if the marriage is declared null and void its registration in the Civil Status Register and the legitimation of the children automatically lose their effect". p.116 l.5

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"We must finally refer to Rayden on Divorce 17th Edn. (at p.67 note 6) where a comment is made on the application of Section 12(1) of the Matrimonial Causes Act, 1950, which is similar to Section 18(1) of the Seychelles Matrimonial Ordinance. p.116 l.12

But every decree of nullity even where the marriage is void ipso jure shall in the first instance be a decree nisi, Matrimonial Causes Act, 1950, Section 12(1).

We have reached the conclusion that this action is to all intents and purposes for the nullity of a marriage under the Matrimonial Causes Ordinance.

This being so, the question arises whether non compliance with the procedure traced out in the Ordinance is fatal to the action as entered. Mr. Koenig submitted that the enactment regulating the procedure was mandatory and that disobedience to it entailed nullification of the suit. We think that the wording of Rule 2 of the Matrimonial Causes Rules 1949, which lays down that a matrimonial cause shall be commenced by way of petition is mandatory. Hence granting that the Court of Seychelles had jurisdiction to try the subject matter of this action, it could only do it subject to the rules of procedure laid down, namely that suit should commence by

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petition. Failure to follow that procedure meant that the judge could no longer have jurisdiction (Maxwell, Interpretation of Statutes, 10th Edn. p.380; see also cases cited in note (m))".

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p.118 l.32

"Before the passing of the Matrimonial Causes Ordinance, the matter of nullity of marriage was regulated by Statute (i.e. the Civil Code, Articles 180-193) and not by common law and when these articles were repealed and replaced by new substantive law, new forms of procedure were also laid down thereby by necessary implication ensuring the repeal of the forms laid down by Section 28 of the Code of Civil Procedure. It is difficult to escape the conclusion that the new procedure created was exclusive. This is illustrated by the fact that where formerly a judgment of nullity was final in the first instance, as from the passing of the Matrimonial Causes Ordinance the pronouncement of the decree was nisi in the first instance and only absolute after a certain lapse of time in order to give the Attorney-General and such other persons as had the right to do so to intervene and show cause why the decree should not be made absolute; (Section 16 and 18(2) of the Ordinance.) We have thus reached the conclusion that there is in the Seychelles no other remedy for pursuing a suit in nullity of marriage than that traced out in the Matrimonial Causes Rules and that such suit must commence by Petition."

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p.120 l.9

"We can consider both questions together, namely, whether there is a remedy to have marriages made without consent declared null and void and if so what is the nature of that remedy, and also

whether it is avoidable to collaterals.

Before the enactment of the Matrimonial Causes Ordinance marriages made without consent were principally governed by article 146 of the Civil Code which is reproduced in Section 42 of the Civil Status Ordinance (Cap.26) (Supra) and by article 180 which reads as follows:

'Le mariage qui a ete contracte sans le consentement libre des deux epoux, ou de l'un d'eux, ne peut etre attaque que par les epoux, ou par celui des deux dont le consentement n'a pas ete libre.

Lorsqu'il y a eu erreur dans la personne, le mariage ne peut etre attaque que par celui des deux epoux qui a ete induit en erreur.'

The right of collatarals to impugn such a marriage stemmed from article 184 which reads:

'Tout mariage contracte en contravention aux dispositions contenues aux articles 144, 147, 161, 162 et 163, peut etre attaque soit par les ministere public'.

We have already indicated the French origin of a number of provisions relating to capacity to marry and to the celebration of marriage. Except for the minor modifications made by the Matrimonial Causes Ordinance, the institution of marriage in the present state of the law of Seychelles as regards its juridical character and effects remains essentially French, this is still more manifest by the fact that rights and obligations arising therefrom as laid down in the relevant provisions of the Civil Code remained unimpaired. The juridical character of marriage and the legal nature of the matrimonial bond it creates can therefore be interpreted, subject to any changes made by the Matrimonial Causes Ordinance, according to the principles of French doctrine and case law.

In the first place there is no such concept known under the French system as a marriage void ipso jure. Every marriage duly celebrated is considered to be effective until a decree is pronounced

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by the court nullifying it".

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p.121 l.39 "Certain authors expressed the doctrine of a "mariage inexistant' to support the view that such a marriage could be treated as such, requiring no decree for its avoidance and could be declared null and void incidentally in a suit where the issue arises. Demolombe, for example, mentions the case of a marriage celebrated by a priest without the authority given to a civil Status Officer to perform a valid civil marriage (Demolombe, Du Mariage, Vol. 1 pp. 378-379). The fallacy of this doctrine is demonstrated by other authors who observe that cases of nullity of marriage really arise not when there has been a sham celebration or no marriage at all but where there has been a marriage actually celebrated and which has a de facto existence. (See Beudant, Cours de Droit Civil Francais, Vol. 2, p.487 paragraph 606).

Be that as it may, in so far as marriages which have been properly celebrated French case law refused for paramount social considerations to accept the doctrine of 'mariage inexistant'.

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p.124 l.19 "We have now to examine the nature of a nullity of marriage based on absence of consent and of the remedy available to collaterals. Nullities of marriage under the French system fall into two classes: 'nullite absolue' and 'nullite relative'. The importance of the distinction is that collaterals have a remedy only in cases of 'nullite absolue'. The right of collaterals to impugn the validity of a marriage was conferred by article 184 of the Civil Code which gives a list of causes of 'nullite absolue' and it must be observed that the nullite arising from

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the breach of article 146 is not therein included. In France the law was amended in 1933 (loi du 19 Fevrier 1933) to insert article 146 in the list of causes of nullity mentioned by article 180 thus making the nullity for want of consent 'absolue' instead of 'relative'. (See Encyclopedie Dalloz, Vo. Mariage, Nos. 886 and 983).

Even therefore if we take an extreme case of mental infirmity equivalent to insanity, the nullity would only be a 'nullite relative'.

Article 146 of the Civil Code enacts that "Il n'y a pas de mariage lorsqu'il n'y a point de consentment."

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Thus, even if article 184 of the Civil Code had remained on the statute book of Seychelles, collaterals would still not have a remedy because want of consent would cause a "nullite relative" and not a "nullite absolue". Furthermore a "nullite absolue" does not render a marriage void ipso jure, meaning that it has no effect whatsoever. p.126 l.9

Before the repeal of article 184 of the Civil Code in Seychelles collaterals were not entitled to sue for the nullity of marriages vitiated for want of consent and there is nothing in the Matrimonial Causes Ordinance to indicate that the Ordinance has given them such a remedy. Mr. Thomas has mentioned to us the principles of English law by which a marriage without consent could be questioned by any person having an interest to do so and Mr.Koenig conceded that this might be the position, but we find no text on the Seychelles statute book which introduces either expressly or impliedly by direct legislation or through legislation by reference the common law of England and the residual powers of the Ecclesiastical Courts to afford substantive remedies in respect of nullity of marriage other than those provided by the statute law of Seychelles.

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The position therefore is that the saving in section 15 (3) of the Matrimonial Causes Ordinance does not help the Respondents since collaterals had no remedy before it was enacted and have no remedy now."

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p.128 l.3 "In the result we are of opinion that even if the Respondents could, as collaterals, have sought to impugn the the marriage under reference they could only have exercised their rights by following the procedure prescribed in the Matrimonial Causes Rules, 1949. Failure to do this is fatal to their case.

We have also reached the conclusion that the Respondents are not competent as collaterals to sue as they have done in this case for the nullity of the marriage impugned, so that the Court of Seychelles had no jurisdiction to entertain this action.

In these circumstances there is no need for us to examine the other grounds of appeal.

The judgment of the Supreme Court of Seychelles is accordingly reversed and the action entered by the Respondents is dismissed with costs including the costs of this appeal."

14. The Appellants humbly submit that the Judgment of the Supreme Court of Mauritius of the 7th September 1960 should be reversed with costs and a declaration granted as prayed for the following among other

R E A S O N S

(a) BECAUSE the Supreme Court was wrong in holding that the main purpose of the action was to obtain a decree of nullity of the marriage for want of consent by one of the spouses, but that the main purpose of the action was to remove the legitimation of the children who had become heirs as a result of the marriage.

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(b) BECAUSE the Supreme Court failed to distinguish between the procedure to be adopted in suits brought by a party to a marriage the validity of which is being challenged where a decree of nullity is sought and suits brought after the death of one spouse to the marriage where a delcaration of nullity is sought.

(c) BECAUSE by Section 5 of the Matrimonial Causes Ordinance of Seychelles the Supreme Court has jurisdiction with respect to declarations of legitimacy and validity of marriage as is vested in the High Court of England and that this declaration could properly be granted by the High Court of England.

(d) BECAUSE the Supreme Court was wrong in applying French law when the said Matrimonial Causes Ordinance shows that English law should be followed.

(e) BECAUSE the Supreme Court were wrong in holding that collaterals were not entitled to sue for nullity of marriages.

(f) BECAUSE the Supreme Court was wrong in failing to uphold the submission of the Appellants that as the Respondents had made default in the Supreme Court of Seychelles their proper course was to apply for reinstatement of the case to the trial judge.

(g) BECAUSE the Supreme Court was wrong in holding that with the repeal of Articles 180-193 of the Civil Code and their replacement by new substantive law, the form of procedure prescribed by Section 28 of the Code of Civil Procedure was by implication repealed.

(h) BECAUSE the Supreme Court was wrong in its judgment.

THOMAS O. KELLOCK.
H. DANIELL.

No. 25 of 1963

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN:

ANTOINE CHOPPY and Another (Plaintiffs) Appellants

- and -

MERICIA ANGELA BIBI (otherwise Choppy) and Others (Defendants) Respondents

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C A S E

FOR THE APPELLANTS

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