P.C. -
GM2.G 2-

Judgment
40/1965

IN THE PRIVY COUNCIL No. 25 of 1963

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS

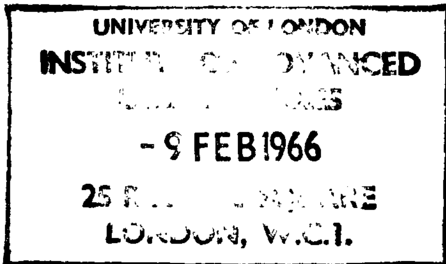
B E T W E E N:-

ANTOINE CHOPPY

- and -

LOUISE CHOPPY Appellants

- and -



80979

1. MERICIA ANGELA BIBI (s) otherwise Choppy
2. MERICIA ANGELA BIBI (s) (here acting in her capacity as legal guardian 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 Respondents

CASE FOR THE RESPONDENTS

p.130 No.58 1. This is an appeal in forma pauperis by Special Leave of the Judicial Committee granted on the 30th day of May, 1963, from a Judgment of the Supreme Court of Mauritius dated the 7th day of September 1960, whereby the said Court reversed the Judgment of the

Supreme Court of Seychelles dated the 6th day of November 1959 declaring a marriage void and ordering that the register of the Civil Status be rectified by expunging the act relating to that marriage and the memoranda of legitimation in the birth certificates of the children legitimated by such marriage.

2. The principal questions raised in this appeal are:-

(a) Whether the action originally instituted by the Appellants (who were Plaintiffs in the Court of First Instance) is one for the nullity of a marriage under the Matrimonial Causes Ordinance.

(b) Whether the only procedure in the Seychelles for pursuing a suit in nullity of marriage is by way of petition under the Matrimonial Causes Ordinance.

(c) Whether failure to comply with the procedure under the Matrimonial Causes Ordinance is fatal to the action.

(d) Whether the appellants are competent as collaterals to sue for the nullity of the marriage impugned.

p.1, No.1
3. In their original Statement of Claim with the
p.107, 1.18
heading "Nature of Action: Nullity of Marriage", the Appellants averred:

p.3, 1.8-12
(1) that they were the brother (frere germain) and

the sister (soeur germaine) respectively of Augustin Choppy who died on the 12th November, 1957, leaving large immovable properties;

p.5, 1.28-33

(2) that on the 2nd November, 1957, the Reverend Father Maurice, a Roman Catholic priest, executed a document which purports to show that Augustin Choppy was married by him <u>in articulo mortis</u> to the first Respondent Mrs. Mericia Angela Bibi;

p.5, 1.33 - p.6, 1.1

(3) that in the said document it was stated that Augustin Choppy acknowledged that the acknowledged children of Mrs. Mericia Angela Bibi were his children born to them before the marriage;

p.6, 1.1-8

(4) that the aim and effect of the said document, if valid and legal, was to make the said children the legitimated children of Augustin Choppy and Mrs. Mericia Angela Bibi; and

p.6,1,8-18

(5) that the act of the Civil Status witnessing the marriage was null and void for the following reasons:-

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

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

(c) because the said Augustin Choppy, before and at the time of the purported marriage was

suffering from mental infirmity;

(d) because at the time of the purported marriage, Augustin Choppy was unable by reason of mental infirmity to know the nature and quality of his purported acceptance of the act of marriage.

p.6, 1.28-50

The Appellants prayed for a judgment declaring the document of 2nd November, 1957, witnessing the marriage to be null and void to all intents and purposes and that it be struck off from the register of the Civil Status with consequential rectifications in the act of birth of the said children. By their amended Statement of Claim the Appellants further prayed that the purported legitimation of the said children be declared invalid in law.

p.46,1.36-41

p.12,No.9
p.52,No.32

4. In their Defence, the Respondents averred that the document of the 2nd November, 1957, is a valid act of marriage witnessing a valid marriage in <u>articulo mortis</u> between Augustin Choppy and Mrs. Mericia Angela Bibi in accordance with law and that the said Mrs. Mericia Angela Bibi, the 1st Respondent, is the widow of Augustin Choppy and the other Respondents are the legitimated children of the said Augustin Choppy and the 1st Respondent. The Respondents denied :-

(a) that Augustin was not in <u>articulo mortis</u> at the time of the marriage or that a medical

practitioner or competent witnesses had to be present to make Augustin Choppy _in articulo mortis_;

(b) that the witnesses to the document of the 2nd November were incompetent or that Augustin Choppy must sign the document. They averred that Augustin Choppy had put his mark to the document to evidence his consent to the marriage.

(c) that Augustin Choppy was suffering from mental infirmity at the time of his marriage on the 2nd November, 1957;

(d) that Augustin Choppy did not know the nature and quality of his acceptance of the act of marriage. They averred that Augustin Choppy fully knew and understood that he was contracting marriage with the 1st Respondent on the 2nd November, 1957.

p.12, 1.23

The Respondents' Defence also raised three pleas _in limine litis_ as follows :-

"1. The Plaintiffs have no right of action in law to have the document of the 2nd November 1957 declared null and void and therefore the action must be struck out. 2. The above action is against public order and therefore should be struck out. 3. The grounds set out in paragraph 9 of the Claim for claiming the

document of the 2nd November, 1957 to be null and void are not sufficient to annul a marriage contracted in accordance with the law and the action must be dismissed."

5. On the 11th November 1958, Rassoul, Ag. C.J., ruled that the three pleas *in limine litis* failed and that the case should proceed on its merits.

p.32,1.28 - p.36,1.51.

p.40, No.24

6. On the 10th July, 1959, the Respondent gave Notice of Motion for an Order that the Statement of Claim be set aside and the plaint dismissed on the following grounds :-

"1. The suit was entered as an action under the Code of Civil Procedure 1919, and not as a petition supported by affidavit, and no affidavit was served on the defendants. 2. The suit should have been entered as required by the Matrimonial Causes Ordinance and the Rules made thereunder by proclamation, as it is in reality, under the disguise of an action for cancellation of an ACT of the Civil Status, a request for a decree of nullity of marriage. 3. The court has no jurisdiction to entertain the action filed otherwise than as required by the Matrimonial Causes Ordinance."

p.47, No.27

7. On the 27th July 1959, the Respondents gave a

second Notice of Motion for an order that the proceedings in the suit before Mr. Justice Rassoul be taken off the record and the case be started afresh before Mr. Justice Taylor on the ground that the argument before Rassoul J. was conducted, on the point of nullity, mainly on law which had been repealed, namely Articles 180 to 193 of the Code Napoleon and that all three counsel and Rassoul J. had participated in that error.

p.59, 11. 25-35

8. In a ruling dated the 11th August 1959, Taylor J. dismissed both motions without giving reasons and refused leave to appeal therefrom.

p.64 Nos. 34,35

9. At the hearing of the case on the merits, the Respondents made default under s. 138 of the Seychelles Code of Civil Procedure. Evidence for the Appellants was heard on the 4th, 5th and 6th November 1959 and on the 6th November 1959, Taylor J. delivered the following oral judgment:-

p.64,1.40 - p.77,1.27.

p.79,1.29

> "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 the 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 on Roubion

Camille highly improbable that he in fact had one. Three of the witnesses were interested persons. Judgment for 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."

p.80,No.53

p.81,1.11 to p.82,1.14

10. The Respondents appealed to the Supreme Court of Mauritius on several grounds. The first five grounds raised the point in relation to the question of the proper procedure which should be followed to challenge the validity of a marriage. In their judgment dated the 7th September 1960 the Supreme Court of Mauritius said: "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 nullity of such a marriage. We shall therefore in the first instance consider the case on these assumptions."

p.111,1.41

11. The Supreme Court of Mauritius held as follows:-

p.112,1.37-45

1. "Where the question of the nullity of a marriage arises incidentally, if the marriage is void ipso jure, it can be so declared, but where a suit is instituted for this 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":-

p.113,1.33-41

2. "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 the result which the Appellants seek as a remedy, i.e. the removal of the legitimation of the children, is consequent upon a pronouncement by the Court that the marriage is null and void and is based on no other ground."

p.116,1.22-25

3. "This action is to all intents and purposes one for the nullity of marriage under the Matrimonial Causes Ordnance."

p.116,1.33-43

4. "Rule 2 of the Matrimonial Causes Rules, 1949, which lays down that a matrimonial cause shall be commenced by 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 rule of procedure laid down, namely that the suit should commence by petition. Failure to follow that procedure meant that the judge could no longer have jurisdiction."

p.119, l.6-10

5. "There is in 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."

p.126, l.19-41
p.127, l.26-29

6. "The Appellants were not competent as collaterals to sue for the nullity of marriage."

p.128, l.3-9

7. "Even if the [Appellants] could, as collaterals, have sought to impugn the marriage under reference, they could only have exercised their right by following the procedure prescribed in the Matrimonial Causes Rules, 1949. Failure to do this is fatal to their case."

It is respectfully submitted that this appeal should be dismissed for the following among other

R E A S O N S

1. BECAUSE this was an action brought for the specific purpose of decreeing the nullity of a marriage and could only be brought under the Matrimonial Causes Ordnance.

2. BECAUSE the procedure laid down in the Matrimonial Causes Ordnance and the Matrimonial Causes Rules which lay down that a matrimonial cause shall be commenced by a Petition was not followed.

3. BECAUSE failure to follow that procedure resulted in the Judge no longer having jurisdiction

4. BECAUSE the procedure by way of Petition laid down in the Matrimonial Causes Rules is the only procedure available in the Seychelles for pursuing a suit in nullity of marriage.

5. BECAUSE the Appellants are not competent as collaterals to sue for the nullity of the marriage.

6. BECAUSE even if, which is not admitted, the collaterals could sue for the nullity of the marriage,they could only have exercised that right by following the procedure prescribed in the Matrimonial Causes Ordnance and the Matrimonial Causes Rules, i.e. by way of Petition.

7. BECAUSE the Supreme Court of Seychelles had no jurisdiction to entertain this action.

8. BECAUSE the marriage in articulo mortis of the 2nd November, 1957, was valid and was not vitiated because of failure to comply with any legal provision or for want of consent.

9. BECAUSE the judgment of the Supreme Court of Mauritius is right for the reasons stated therein.

DIMITRY TOLSTOY
LEARIE CONSTANTINE

25 OF 1963

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS

ANTOINE CHOPPY and
LOUISE CHOPPY

- and -

1. MERICIA ANGELA BIBI (s) otherwise Choppy
2. MERICIA ANGELA BIBI (s) (here acting in her capacity as legal guardian 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

C A S E

FOR THE RESPONDENTS

HY. S.L. POLAK & CO.
46 Museum Street,
London, W.C.1.
Solicitors for Respondents
Nos.1, 2, 4, 5, 6, 7 and 8.

MATTHEW MORRIS,
46 Museum Street,
London, W.C.1.
Solicitor for Respondent No.3.