Privy Council Appeal No. 25 of 1963

Antoine Choppy and another– – – – – – *Appellants*

v.

Mericia Angela Bibi (otherwise Choppy) and others – – *Respondents*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH DECEMBER 1965

Present at the Hearing:
LORD HODSON
LORD GUEST
LORD PEARCE
(*Delivered by* LORD HODSON)

This is an appeal from an order of the Supreme Court of Mauritius dated September 7th 1960 allowing an appeal of the respondents from an order of the Supreme Court of Seychelles and dismissing with costs the action entered by the appellants.

The appellants are the brother and sister of one Augustin Choppy who died on the 12th November 1957 and had been until his death joint owners with him of certain landed properties in the Seychelles Archipelago.

On November 2nd 1957 Augustin Choppy purported to contract a marriage *in articulo mortis* with the first respondent Mrs. Mericia Angela Bibi, who had lived for many years with him in concubinage. The marriage if valid would have the effect of legitimating the remaining respondents who are the natural children of Mrs. Mericia and Augustin Choppy.

The claim of the appellants was originally for a declaration that the document which purports to record the purported marriage is null and void and that it be struck off from the register of Civil Status with consequential rectification in the acts of both of the children who were legitimate. This claim was confined within the limits of section 103 of the Civil Status Act 1893 which refers to the amendment of acts of Civil Status of which the document assailed is one. Finally by amendment it was plainly averred that the marriage was void and a declaration sought to that effect, but the facts pleaded in the statement of claim make it plain that the object of the appellants is and has been throughout to assert their title to the landed properties which had been jointly held and to defeat any claim thereto which might be made by the respondents who derived their title from the marriage and the legitimation of the children by such marriage.

In order to bastardise the children it was necessary to obtain first from the Court a declaration that the marriage was void. The ground upon which it was sought to obtain such a declaration was originally two-fold (1) lack of formality in the marriage ceremony; (2) lack of consent to the marriage because of mental infirmity. The plea of lack of formality has not been persisted in but the appellants succeeded at first instance in the Supreme Court of Seychelles in obtaining a declaration of nullity of marriage on the ground of want of consent, the respondents' plea *in limine* that the Court had no jurisdiction to entertain such a claim having failed.

The respondents took no part in the trial of the action on its merits and allowed judgment to go by default and the Supreme Court of Mauritius has

given judgment in their favour on the preliminary point only. Accordingly their Lordships are not concerned to discuss the respective merits of the dispute but only to adjudicate on the question of jurisdiction.

The difficulties of the case have been created, as the judgment of the Supreme Court of Mauritius recognised, by the superimposition of the Matrimonial Causes Ordinance (Cap. 91 of 1949), borrowed from the law of the United Kingdom, on the existing law, and the repeal of certain sections of the Code Napoleon which was applicable to the Seychelles at and after the time of the Treaty of 1814 by which the Territory was ceded.

The broad contentions of the parties are these:—

On the one hand the appellants contend that they are entitled to obtain the declaration they seek by virtue of the applicability of the relevant English law relating to incidental declarations. In the language of Sir J. P. Wilde in *A. v. B. and another* (1868) L. R. 1 P. & D. 559 at 561 it is said that " all questions as to the intrinsic validity of a marriage, if arising collaterally in a suit instituted for other objects, are determined in any of the temporal courts in which they may chance to arise. Though at the same time a suit for the purpose of obtaining a definitive decree declaring a marriage void which should be universally binding, and which should ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the ecclesiastical courts or the Divorce Court alone."

On the other hand the respondents contend that upon the true construction of the Matrimonial Causes Ordinance as it has affected the pre-existing legislation there is no room for any attack by the appellants upon the marriage which took place on the 2nd November 1957 they not being either of them parties to that marriage which is a voidable marriage and only assailable by means of the procedure laid down by the Ordinance itself, that is to say by Petition in a Matrimonial Cause.

The qualifications and conditions necessary for contracting marriage, the oppositions to marriage, the celebration of and nullity of marriage were governed originally by articles 144–193 of the Civil Code. Article 146 reads:—" There can be no marriage where consent is wanting." The Civil Status Ordinance (Cap. 26) of 1893 repealed articles 144 to 179 but these provisions were substantially reproduced in sections 41 *et seq.* of the Ordinance Section 42 reads " There is no marriage where there is no consent." At this time articles 180 to 193 still remained unrepealed and article 180 under the heading " Of Petitions for Nullity of Marriage " reads:—" A marriage contracted without the free consent of the married persons or of one of them can only be impeached by the married persons or such one of them whose consent has not been free . . . . . " This article therefore so long as it survived made it impossible for anyone in the position of the appellants to assail the marriage. A marriage without consent was not void *ab initio* but voidable notwithstanding the language of section 42 declaring that there is no marriage without consent. That the legislature had not closed its eyes to the unrepealed articles is shown by the language of section 136 of the Civil Status Ordinance which refers in terms to unrepealed enactments. What then is the effect of the Ordinance of 1949 which repealed sections 180 to 193 of the Code and introduced a procedure imported from the United Kingdom?

The appellants referred in support of their contention to sections 4, 5 and 6 of the Ordinance which read as follows:—

> " 4. Except where hereinafter specially provided this Ordinance shall be construed according to the principles and rules followed in the High Court of England.
>
> 5. The Supreme Court of Seychelles shall have and continue to have such jurisdiction:—
>
> (a) in relation to matrimonial causes and matters;
>
> (b) with respect to declarations of legitimacy and validity of marriage; as is vested in the High Court of England.

6. The jurisdiction vested in the Supreme Court relating to matrimonial causes and declarations of legitimacy and validity of marriages shall, so far as regards procedure and practice, be exercised in the manner provided by this Ordinance or by rules of court, and where no special provision is contained in this Ordinance or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it is exercised by the High Court of England."

Thus it was said that there was jurisdiction under the rules of the Supreme Court in the United Kingdom to make a declaration as to the validity or otherwise of any marriage or divorce. See R.S.C. Order 15 rule 17 and *Har-Shefi v. Har-Shefi* [1953] P. 161. If the marriage in question is a void marriage as opposed to one voidable at the instance of the parties or either of them it was contended there was no objection to the appellants seeking the declaration they ask with the consequence which would follow *inter partes* as a result of such a declaration.

It is necessary now to consider in detail the effect of the Matrimonial Causes Ordinance 1949 which was borrowed from the Matrimonial Causes Act 1937 of the United Kingdom and made special provision for matrimonial causes including nullity of marriage as well as repealing the greater part of Chapter IV of the Civil Code consisting of articles 180–193 which afforded remedies for the avoidance of certain marriages.

Nullity of marriage is a matrimonial cause within the meaning of section 3 of the Matrimonial Causes Ordinance, and Rule 2 of the Matrimonial Causes Rules 1949 made under the Ordinance lays down that every matrimonial cause shall be commenced by a petition.

Section 15 provides that a decree for nullity must be in the first intance a Decree Nisi to be made absolute after an interval.

Section 14 of the Ordinance provides:

" A marriage shall be declared null and void *ab initio* and to all intents and purposes if:

. . . . . .

(2) the petitioner did not at the time of marriage freely consent to intermarry with a proper understanding of the contract;"

. . . . . .

The other grounds of nullity which number eleven in all, including (2) supra, consist of cases which in English parlance would be cases both of voidable marriages and of void marriages. The distinction is not however taken in the Ordinance between void and voidable marriages, and as the Chief Justice pointed out in his learned judgment French law does not recognise " marriage inexistant " in so far as marriages properly celebrated are concerned for paramount social considerations. The result is that all such marriages are recognised until they are declared void by a competent Court or in other words are merely voidable if they are assailable at all.

It is unnecessary to refer in detail to the other grounds of nullity to which reference has been made. It is sufficient to look at 14 (2) which is concerned with consent and to note that it is the petitioner alone who can obtain a declaration on the ground that he or she did not at the time of marriage freely consent to intermarry with a proper understanding of the contract. If this construction is accepted it is plainly not open to third parties to such a declaration, to stand in the shoes of one who would or could be a petitioner if he were still alive. 14 (2) is to the same effect as article 180 of the Civil Code which it replaces. The opening words of the section " a marriage shall be declared null and void *ab initio* " etc. are colourless and are not equivalent to a statement that the marriages referred to are void *ipso jure*.

Their Lordships are of opinion in agreement with the Supreme Court of Mauritius that the Marriage Ordinance, in particular section 14, forms a complete Code regulating declarations of nullity of marriage and that there is no room for a declaration in favour of collaterals such as is sought in this case.

This view is supported by reference to section 15 (1) which provides that any child of a marriage avoided pursuant to paragraphs (1), (2), (3), (4), (5), (6), (7), (9) and (10) of section 14 shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided. The use of the word "avoided" indicates that a step must be taken before a marriage becomes void *ab initio*, in other words that it is a voidable marriage to which the Ordinance refers throughout.

This construction is consistent with the language of section 15 (3) which provides:—" Nothing in sections 14 and 15 shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted." The object of this subsection is obscure but it may refer as the Chief Justice thought to cases of marriages which are assailable but not included in the list enumerated in section 14. The language of the corresponding United Kingdom legislation may be contrasted with that of section 15 (1) of the Ordinance. Section 2 of the Legitimacy Act 1959 provides:—" . . . . . the child of a void marriage . . . . shall be treated as the legitimate child of his parents."

It is clear that before the repeal of article 180 of the Civil Code collaterals were not entitled to sue for nullity of marriage initiated for want of consent, and there is nothing in the Matrimonial Causes Ordinance which has substantially replaced the repealed articles of the Code to indicate that such a remedy has been given by the terms of the Ordinance.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be dismissed.

(93179) Wt. 8052/124 75 12/65 Hw.

In the Privy Council

ANTOINE CHOPPY AND ANOTHER

v.

MERICIA ANGELA BIBI OTHERWISE CHOPPY AND OTHERS

DELIVERED BY

LORD HODSON

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