



COURT OF APPEAL

**HIS HONOUR THE CHIEF JUSTICE
SILVIO CAMILLERI**

**THE HON. MR. JUSTICE
ALBERT J. MAGRI**

**THE HON. MR. JUSTICE
TONIO MALLIA**

Sitting of the 3rd December, 2010

Civil Appeal Number. 158/2007/1

George Baldacchino

v.

Yingchun Duan

The Court:

Having seen the sworn application filed by George Baldacchino on the 13th day of April, 2007, which reads as follows:

“1. Illi l-partijiet izzewgu fil-25 ta’ Ottubru 2005, u minn liema ghaqda ma twieldu ebda tfal.

“2. Illi l-intimata tat il-kunsens taghha ghall-kuntratt taz-zwieg bl-eskluzjoni pozittiva taz-zwieg innifsu, jew ta’ xi wiehed jew aktar mill-elementi essenzjali, jew ohrajn tal-hajja mizzewga, jew tad-dritt ghal att taz-zwieg, izda ghamlet dan bi skop unikament qarrieqi kif ser jirrizulta waqt it-trattazzjoni tal-kawza.

“3. Illi l-kunsens tal-intimata ghal dan iz-zwieg kien vizzjat b’difett serju ta’ diskrezzjoni ta’ gudizzju fuq il-hajja mizzewga taghhha u jew b’anomalija psikologika serja li jaghmilha impossibbli ghall-intimat li jaqdi l-obbligazzjonijiet essenzjali taz-zwieg.

“Ghaldaqstant, l-esponenti umilment titlob lil din l-Onorabbli Qorti joghgobha:

“1. Tiddeciedi u tiddikjara ghar-ragunijiet premissi li z-zwieg bejn il-partijiet huwa null u bla effett ghall-finijiet u effetti kollha tal-Ligi.

“Bl-ispejjez kontra l-intimata ngunta ghas-subizzjoni.”

Having Seen the sworn reply filed by Yingchun Duan by virtue of which she pleaded, in Maltese

“1. Illi t-talbiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt u ghandhom jigu respinti bl-ispejjez kontra tieghu stante illi kif ser jirrizulta fit-trattazzjoni tal-kawza mhux minnu illi l-kunsens tal-intimata kien ivvizzjat kif allegat u/jew li din b’xi mod pozittivament eskludiet iz-zwieg innifsu jew xi wiehed jew aktar mill-elementi essenzjali tieghu kif qed jipprova jghhid ir-rikorrenti.

“2. Salv eccezzjonijiet ohra.”

Having seen the judgment delivered by the Civil Court, Family Section, on the 29th October, 2009, whereby it rejected plaintiff’s request, with costs;

That Court gave its decision after it made the following considerations:

“That from the evidence produced it results that the parties got married on the 25th October 2005. At that time, Plaintiff, a Maltese national was 41 years old, whilst Defendant, a Chinese national was 40 years old. Both parties have children from their previous marriage¹. After a very short and turbulent period of married life, the parties separated de facto in December 2006 when Defendant left definitely the matrimonial home.

“Plaintiff’s Version

“Plaintiff met Defendant, who has been in Malta since July 2004, in September of that same year, and in October they started a relationship. At that time Defendant was in Malta as a student of English. The parties had started discussing marriage, and Plaintiff states that Defendant was determined to get marriage. However, in May 2005 she went back to China, because her visa had expired, and she wanted to see her family, promising to return to Malta.

“Subsequently, Plaintiff had arranged the necessary documents, and had also found a job for Defendant enabling the latter to stay in Malta, Defendant returned, and eventually they got married. At that time, there appeared to be no radical problems between the parties, who already had intimate relations prior to the marriage; however, after five or six months into the marriage, problems arose resulting in constant quarrelling between the parties.

“Plaintiff explains that, although Defendant never refused the marital act, she showed that she was unhappy because she was obsessed with the idea of living near Sliema where her friends lived. Eventually, Plaintiff found her a job in a catering establishment, and as she began to earn money, she became more insistent in her demands. She also wanted Plaintiff to open a business, but he could not afford to, and this continued to give rise to much

¹ Plaintiff had obtained an annulment of his marriage, whilst Defendant had obtained a divorce.

quarrelling between them. Plaintiff says that on five occasions Defendant left the matrimonial home 'voluntarily', at his request, but then he would call her back and arrange matters temporarily.

"In December 2006 Defendant left the matrimonial home for good, and refused to return, telling Plaintiff that she did not love him any more. In his evidence Plaintiff speaks of Defendant's interest in acquiring Maltese citizenship; he states that: "qisu ftit qabel ma zzewwigna [hi] bdiet tinsisti kemm se ddum biex taqleb ic-cittadinanza Maltija."²

"Defendant's Version

"Defendant confirms the contents of the first two paragraphs of Plaintiff's version.

"She denies that she could not have anymore children because of a surgical intervention, stating that it was Plaintiff who did not want to have children from this marriage.

"Her chief complaint was the bad temper and dominant character of Plaintiff who, during their short-lived marriage expected to be obeyed leaving no room for discussion. She accused him of beating her many times, and of "kicking" her out of the matrimonial home eight times when she would have to stay with friends. Defendant mentions one particular occasion when she found two condoms in Plaintiff's jeans, arousing her suspicions that he was cheating on her with other women. On this occasion he started beating her.

"In these cases, after a few days, Plaintiff would phone her, asking her, at times tearfully, to return to the matrimonial home. Finally, on December 2006, after one of these rows, she left for good.

² Pg.49 " some time close to the date of the marriage, Defendant began asking in an insistent manner as to how long will it take her to acquire Maltese citizenship."

“Defendant explains that Plaintiff’s bad side came out immediately after marriage. She states: “First when we got to know each other, he was very kind, and I was moved by his behaviour. He was so kind, and so we fell in love. After marriage he changed a lot, he was not kind to me anymore.”³ He used to take all the money she earned, and as stated above used to beat her, and occasionally throw her out of the house.

“In her evidence Defendant says that she wanted to have children from this marriage, and that she was aware of her obligation as a married woman to live with her husband. “I do my best to take care of the family, to do most of the home [house] work. I think I did very well.

“Consideration of the Court

“The Court considers the following observations to be relevant in the determination of this case:

“First, the Plaintiff is basing his request for the annulment of his marriage to Defendant, on the two legal basis contemplated in paragraphs [d] and [f] of article 19[1] maintaining that these exist in regard to the latter. These are the judicial parameters of this action.

“Secondly, the burden of proving the facts supporting his claim lies on the Plaintiff alleging these facts. On him lies the onus of proving that at the time Defendant gave her matrimonial consent she was lacking in the discretio iudici in terms of the first part of paragraph [d]; or that her consent was simulated in terms of paragraph [f].

On the merits of the case, the Court observes that the only evidence produced by Plaintiff in support of his claim are the bare assertions contained in his testimony which in substance has been contradicted by that given by Defendant. Besides, the Court is more inclined to accept the version of facts as given by the latter rather than that given by the former, and in particular is more inclined to

³ Fol.62

accept as truthful Defendant's assertion that the marriage broke down due to Plaintiff's abusive behaviour.

"The Court observes that on the part of Defendant, even though the latter may have had further motives in accepting to marry Plaintiff, there is no evidence, even from his testimony alone, supportive of his claim that at the time of the marriage she was unaware of, or incapable of assuming, the matrimonial rights and obligations. In her evidence she states quite clearly that she was aware of her obligation to live with her husband and to help in the running of the family. In fact, even Plaintiff admits that Defendant never refused the conjugal act, and lived with Plaintiff as husband and wife. Besides, though Plaintiff says that when she used to leave the matrimonial home she did so voluntarily, he admits that it was he who used to 'tell' her to leave. In this respect, Defendant's version that she used to be kicked out of the matrimonial home, is more acceptable to this court.

"Plaintiff says that Defendant was keen in trying to open a business in Malta, and that this gave rise to quarrelling between the parties, and that she wished to live in the Sliema area; and he seems to imply that Defendant through marriage wanted to obtain Maltese citizenship. The Court observes that even if these were true, as they most probably are, still the evidence shows that Defendant did not simulate her matrimonial consent in terms of paragraph [f]. In fact, on marriage the parties lived together and for the first few months, there appeared to be no problems; and it was Plaintiff who in fits of bad temper used to throw Defendant out of the matrimonial home.

"On the strength of the above, the Court is of the opinion that Plaintiff has failed to prove his case in terms of the afore-mentioned paragraphs and article of law.

Having seen the application of appeal filed by plaintiff through which, for the reasons set out in the said application, he requested this Court to annul and reverse the judgment appealed by accepting the appellant's

Informal Copy of Judgement

demands thus declaring that the marriage contracted between the parties is null and void;

Having heard the submissions of counsel;

Having seen all the acts of the proceedings, including the affidavits and documents presented;

Now therefore, considers:

That this is an action for a declaration of nullity of the civil marriage contracted by the parties on the 25th October, 2005; no children were born from this marriage. Plaintiff is requesting a declaration of nullity on the basis of Article 19(1)(d) and (f) of the Marriage Act, which provide, in the official Maltese text, that a marriage can be declared null:

“(d) Jekk il-kunsens ta’ xi wahda mill-partijiet ikun vizjat b’difett serju ta’ diskrezzjoni ta’ gudizzju fuq il-hajja mizzewga, jew fuq id-drittijiet u d-dmirijiet essenzjali taghha, jew b’anomalija psikologika serja li taghmilha impossibbli ghal dik il-parti li taqdi l-obbligazzjonijiet essenzjali taz-zwieg;

“(f) Jekk il-kunsens ta’ xi wahda mill-partijiet ikun inkiseb bl-eskluzjoni pozittiva taz-zwieg innifsu, jew ta’ xi wiehed jew aktar mill-elementi essenzjali tal-hajja mizzewga, jew tad-dritt ghall-att taz-zwieg;”

If should be noted from the outset that, technically, this case should not have been discussed on its merits, as the two grounds put forward to support a claim for nullity cannot stand together and mutually exclude each other. While claiming that the spouses had sufficient discretion to exclude an intention to marry (simulation), plaintiff is automatically excluding the grounds of lack of discretion; similarly, while claiming a lack of discretion, he is automatically rebutting the ground under paragraph (f), as this implies a positive act of discretion to exclude marriage.

The First Hall of the Civil Court, in the case **Zammit v. Zammit**, decided on the 27th January 2006, said this on this issue,

“Rigward id-dispozizzjoni kontenuta fis-subinciz (f) fuq imsemmi, biex dan id-difett ikun jirrizulta jkun jehtieg li jigi provat sodisfacentement li z-zewg partijiet jew wahda minnhom fil-mument ta’ l-ghoti tal-kunsens matrimonjali tkun eskludiet iz-zwieg innifsu jew eskludiet element essenzjali tal-hajja mizzewga jew id-dritt ghall-att taz-zwieg u din l-eskluzjoni tkun saret b’att pozittiv tal-volonta` ta’ dik il-parti. Huwa evidenti li din id-dispozizzjoni tirraviza sitwazzjoni ta’ simulazzjoni u ghandu jigi enfasizzat li nullita` ta’ zwieg bazata fuq il-kawzali ta’ simulazzjoni proprjament tkun teskludi kawzali bazata fuq nullita` ta’ zwieg minhabba nuqqas ta’ diskrezzjoni ta’ gudizzju. L-inkomplattibilita` bejn dawn iz-zewg kawzali tohrog mill-fatt li n-nuqqas ta’ diskrezzjoni ta’ gudizzju timplika inkapacita` li wiehed jaghraf, jifhem u jirrifletti filwaqt li l-kawzali tas-simulazzjoni tehtieg li jkun hemm tali kapacita` intellettuali, proprju l-att pozittiv tal-volonta` li jwassal ghas-simulazzjoni, totali jew parzjali.”

Furthermore, this Court, in the case **Arqueros v. Arqueros Moreno**, decided on the 30th July, 2010, pointed out that when these two grounds are raised simultaneously there is an inherent contradiction which nullifies plaintiff’s request. This Court put the issue in these terms:

“L-attrici ma apprezzatx, pero`, li l-kawzali li resqet bhala bazi ghat-talba taghha huma kontradittorji. Jekk, kif qed tallega, il-partijiet ma kellhomx diskrezzjoni biex jgharfu x’inhuma l-elementi essenzjali taz-zwieg, ma jistax jinghad, fl-istess nifs, li huma kienu maturi bizzejjed tant li uzaw id-diskrezzjoni taghhom biex, b’att pozittiv, jeskludu z-zwieg innifsu jew xi elementi tieghu. Din il-kontradizzjoni apparenti fit-tezi tal-attrici ddghajjed mhux ffit it-tezi taghha, ghax bl-argumenti taghha favur dawn iz-zewg kawzali qed twaqqa l-argumenti kollha taghha stess. Hi, fil-fatt, tghid li hi u zewgha, b’att pozittiv u b’impenn tal-volonta`, eskludew z-zwieg u l-elementi tieghu, u dan ifisser, ovvjament li huma gharfu x’inhuma dawn l-

elementi u riedu jwarbuhom. Fl-istess hin, tghid li fil-mument li fih huma kkuntrattaw iz-zwieg ma kellhomx apprezzament sufficjenti tal-portata tal-kuntratt ta' zwieg! Din il-Qorti tista' tieqaf hawn fit-trattazzjoni ta' dan il-kaz, ghax bl-argumenti taghha stess, l-attrici waqghet kull argument favur l-applikazzjoni ta' wahda jew l-ohra mill-kawzali."

One can indeed say, even in this case, that appellant's arguments in favour of a declaration of nullity of his marriage in terms of paragraph (d), nullifies his own arguments in favour of a declaration of nullity based on paragraph (f), and his arguments on the basis of paragraph (f), nullify what is said under paragraph (d), leaving plaintiff with no valid argument in support of his request!

Having said this, this Court did examine the scant evidence produced, and finds nothing to support a decision different from that reached by the first court. Plaintiff in this case appears to want to be awarded an annulment on the basis of his testimony only, and submits no evidence to support his case. As repeatedly pointed out by our courts, marriage is an institute of public order, is presumed to be valid once the parties manifest their consents thereto, and should not be set aside on the whim of any of the parties, but only on proof of some defect or error at the time of marriage.

In this case, no such proof has been forthcoming. The parties met in September 2004, and married in October 2005, during which, apart from a spell when defendant returned to China to meet her family, they had a relationship and even had intimate relations. Both parties wanted to get married, and both "fell in love" with each other. It is true that plaintiff's aggressive behaviour led to him "asking" defendant to leave the matrimonial home for about eight times, but on each occasion he would, soon after, phone her and ask her to return home, which she dutifully did. This does not mean neither that the parties did not want to marry, nor that they did not have sufficient discretion to understand the implications of marriage. The

parties where 41 and 40 years old respectively at the time of marriage, and both where previously married – plaintiff’s first marriage ending in a declaration of annulment, while defendant’s first marriage had ended in a divorce. Both parties where aware of what marriage entails, and what was needed of them to make it work – the fact that they did not try hard enough to make their marriage work is no ground for declaring the marriage null *ab initio*.

This Court also finds no reason to disturb the first Court’s decision to accept the version of facts as given by defendant rather than that given by plaintiff, as that Court was definitely in a far better position than this Court to analyse the evidence given by the parties before it, and sees that its analyses of the facts and law are correct.

For these reasons, this Court dismisses the appeal filed by plaintiff and confirms the decision of the first Court *in toto*.

All costs are to be borne by plaintiffs/appellant.

< Final Judgement >

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