

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
NULLITY PETITION NO: WA-33-708-12/2022**

Dalam Perkara
Seksyen-seksyen 68 dan 70
Akta Membaharui Undang-Undang
(Perkahwinan & Penceraian) 1976

**KIRTHIGA SUTHAN A/L KATHIRAVELLU
SHAALINI A/P GAJENDRAN**

..PETITIONERS

GROUND OF JUDGMENT

The factual background

- [1]** This was a joint petition for nullity of marriage filed by both petitioners (“the Petitioners”) on the premise of non-consummation as stipulated in section 70 the Law Reform (Marriage & Divorce) Act 1976 (“Law Reform (Marriage & Divorce) Act”).
- [2]** The Petitioners had registered their marriage on 9 June 2022. They claimed that they had never lived as husband and wife, and soon after,



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made the joint decision to have their marriage annulled on the basis that they had no interest in remaining married to each other.

- [3] In December 2022, the Petitioners filed a joint petition (“this Petition”) seeking a nullity of their marriage. This Petition was dismissed for the following reasons.

Contentions, evaluation, and findings

- [4] The first flaw I had noticed in this Petition was that there was no indication of which particular paragraph of section 70 of the Law Reform (Marriage & Divorce) Act that was relied upon.
- [5] In my view, a petition for nullity under section 70 of the Law Reform (Marriage & Divorce) Act has to be specific and precise. In fact, Counsel appeared to be unsure of the applicable provision, and when questioned, he responded that he would seek to rely on both paragraphs (a) and (b) of section 70 of the Law Reform (Marriage & Divorce) Act. The uncertainty displayed by Counsel in itself spoke volumes of this Petition.

Whether there was evidence of incapacity of either party to consummate the marriage

- [6] Paragraph (a) of section 70 of the Law Reform (Marriage & Divorce) Act reads:

Section 70 – Grounds on which a marriage is voidable

A marriage which takes place after the appointed date shall be voidable on the following grounds only, that is to say –



.....

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;

...

[Emphasis added]

- [7] A perusal of paragraph (a) of section 70 of the Law Reform (Marriage & Divorce) Act indicates that proof, that either party was incapable of consummating the marriage, is required.
- [8] According to the case of *L v L* [1956] 1 LNS 52, the words “incapacity...to consummate” found in paragraph (a) of section 70 of the Law Reform (Marriage & Divorce) Act, refers to the ‘inability to have sexual intercourse based on physical abnormality or psychological impotence’. A person who suffers from ‘invincible repugnance to the act of intercourse with the other’ may thus be regarded as incapable of consummating the marriage: see *SY v SY* [1963] P 37.
- [9] Be that as it may, the gist of paragraph (a) of section 70 of the Law Reform (Marriage & Divorce) Act is that there must be some element of psychological or sexual aversion.
- [10] In the present case, a perusal of the Petition indicated that the Petitioners had consented to have the marriage annulled on the basis that they had both agreed not to consummate the marriage, and as such, to end it. The relevant parts of the Petition read as follows:

4. *Kedua-dua Pempetisyen telah bersetuju sesama sendiri bahawa perkahwinan mereka sepatutnya dibatalkan dan mereka dengan*



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relanya bersetuju ke atasnya kerana Pempetisyen Suami dan Pempetisyen Isteri tidak berniat dan/ atau enggan melakukan sebarang persetubuhan untuk menyatukan perkahwinan (refusal to consummate the marriage).

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7. *Pempetisyen-pempetisyen bersetuju bahawa Perkahwinan tersebut dibatalkan seperti di dalam seksyen 68 dan 70 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 sebab tidak mahu bersama lagi dan tidak berminat untuk melakukan persetubuhan untuk menyatukan perkahwinan (refusal to consummate the marriage).*

[Emphasis added]

[11] There was no evidence whatsoever to indicate that either party was incapable of consummating the marriage pursuant to paragraph (a) of section 70 of the Law Reform (Marriage & Divorce) Act. As such, reliance on paragraph (a) of section 70 of the Law Reform (Marriage & Divorce) Act was untenable.

Whether there was evidence of willful refusal on the part of the Respondent to consummate the marriage

[12] Counsel had also proceeded to rely on paragraph (b) of section 70 of the Law Reform (Marriage & Divorce) Act, which reads:

Section 70 – *Grounds on which a marriage is voidable*

A marriage which takes place after the appointed date shall be voidable on the following grounds only, that is to say-



.....
...

(b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;

...

[Emphasis added]

[13] The glaring mistake in this Petition was the fact that the petition was filed jointly when it was premised on paragraph (b) of section 70 of the Law Reform (Marriage & Divorce) Act.

[14] It is clearly stated in paragraph (b) of section 70 of the Law Reform (Marriage & Divorce) Act, that the refusal to consummate must be on the part of the respondent and not petitioner. A petition for nullity, therefore, has to be made by a petitioner, on the basis that the respondent had wilfully refused to consummate the marriage.

[15] In the present case, as evident from this Petition itself, there was no respondent, as the Petition was filed by both Petitioners, with both admitted to refusing to consummate. In my view, it would make a mockery of the provision to allow a petitioner to file a petition for nullity on the basis of his or her own refusal to consummate the marriage.

[16] In any event, on the meaning of 'wilful refusal', I drew guidance from the case of *Horten v Horten* [1947] 2 All ER 871, in which the phrase was defined as 'a settled and definite decision come to without just excuse'. Reference was made also to the case of *Jodla v Jodla (otherwise Czamomska)* [1960] 1 All ER 625, where Hewson J, in



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referring to *Horten v Horten*, described 'wilful refusal' as a refusal to consummate without just excuse.

- [17]** In the present case, a perusal of the Petition, as alluded to earlier, indicated that both Petitioners had consented to have the marriage annulled on the basis that they had both agreed not to consummate the marriage, and as such, to end it. The only reason provided was that the Petitioners had no interest in consummating or remaining in the marriage. In my view, that did not amount to a just excuse that fell within the purview of 'wilful refusal'.
- [18]** Under such circumstances, reliance on paragraph (b) of section 70 of the Law Reform (Marriage & Divorce) Act was untenable.
- [19]** At this juncture, I am compelled to state that a petition for nullity is not, and should never be filed as a shortcut to divorce. Both Petitioners were of sound mind and above the age of majority when they had registered their marriage in 2022, and should realise that registration renders a marriage valid, and with legal consequences. It is not something that should be viewed lightly.
- [20]** It was unfortunate that both Petitioners had a change of heart after registration of the marriage, which was solemnised at the Sri Subramaniam temple. However, this Court is not in a position to churn out 'quickie divorces' clothed in nullity petitions filed by couples who, after registration, are flippant about their obligations and decide at their whim that they are no longer interested in remaining in their marriage. I would have expected Counsel or the solicitors for the Petitioners to have advised them accordingly, on the law and facts.



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[21] The Petitioners' disregard for the law was also evident by the prayer for their marital status to revert to 'single', which goes against section 73 of the Law Reform (Marriage & Divorce) Act, which reads:

Section 73 – Effect of decree of nullity in case of voidable marriage

(1) If the court finds that the petitioner's case has been proved it shall pronounce a decree of nullity.

(2) A decree of nullity granted after the appointed date on the ground that marriage is voidable shall operate to annul the marriage only as respects any time after the coming into operation of the decree, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time.

[Emphasis added]

[22] Since this Petition was filed pursuant to section 70 of the Law Reform (Marriage & Divorce) Act, the Petition, if allowed, would have rendered the marriage voidable, and as such, the marriage would have existed up to the time the Petition was allowed. Allowing the Petitioners to revert to 'single' status, therefore, would not be in accordance with section 73 of the Law Reform (Marriage & Divorce) Act.

[23] However, if the Petitioners persist in abandoning their marriage, they are free to do so by filing a joint petition for divorce pursuant to section 52 of the Law Reform (Marriage & Divorce) Act, as and when the time arises. The provision reads:

Section 52 – Dissolution by mutual consent

If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage



.....

present a joint petition accordingly and the court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit.

[Emphasis added]

Conclusion

[24] In fact, I would go as far as to state that this Petition was nothing but an abuse of the process of Court, and, as such, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of the affidavit evidence before this Court, this Petition was dismissed.

Dated: 28 March 2023

SIGNED

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(EVROL MARIETTE PETERS)
Judge
High Court, Kuala Lumpur



Counsel:

For the Petitioners – Muhammad Iman bin Johar; Messrs Selva Mookiah & Associates

Cases referred to:

- *Horten v. Horten* [1947] 2 All ER 871
- *Jodla v. Jodla (otherwise Czamomska)* [1960] 1 All ER 625
- *L v L* [1956] 1 LNS 52
- *SY v SY* [1963] P 37

Legislation referred to:

- Law Reform (Marriage & Divorce) Act 1976 – sections 52, 70(a), (b),
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