(30)

SAINT VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 of 1985

BETWEEN:

LESLINE BESS - Appellant

and

ARDON BESS - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: O.R. Sylvester, Q.C., and Mark Williams for the Appellant
B.E. Commissiong and S.C. Commissiong for the Respondent

1986: Dec. 10, 11.

JUDGMENT

ROBOTHAM, C.J.

On November 21, 1983, the appellant Lesline Bess brought an action against the defendant/respondent Ardon Bess, in which she sought the revocation of the grant of letters of administration in the Estate of Norton Wilfred Bess, on June 27, 1983 to the respondent Ardon Bess, (Numbered 91 of 1983) consequent upon the death intestate of his father Norton Wilfred Bess (hereinafter referred to as the deceased), on June 17, 1982.

In its place she sought a grant of the Letters of Administration to her as his lawful widow. The action was dismissed by the learned trial Judge on September 23, 1985 and from this decision she has appealed to this Court.

The deceased was born in St. Vincent on July 11, 1921, and his birth certificate which was tendered in evidence gave his mother's name as Isolen Wilson. Being apparently illegitimate, no father's name was recorded.

On April 23, 1939 deceased went through a ceremony of marriage in St. Paul's Anglican Church, St. Vincent with Doreen Hyacinth Hinds and a duly authenticated certificate of marriage was put in evidence.

This certificate showed that the marriage was performed by one Arthur D. Castor. a marriage officer, and it gave the age of the deceased at the time of the marriage as 21. This could not have been his correct age if he was born on July 11, 1921 as the birth certificate showed, but

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rather, he would then have been 17 years and 9 months old. The witnesses to the marriage were Claude Hinds and Herminia John. His father's name was given on that certificate as Danley Bess. Nothing further is known of him in this case, nor of the mother of the defendant, Isolen Wilson.

Arising out of this union between the deceased and Doreen Hinds, the defendant/respondent was born on January 12, 1941, whilst the marriage was still subsisting.

The deceased met the appellant in Jamaica in August 1960 and a relationship was formed between them. By the year 1965, they were both living in Canada, and on December 7, 1965, they went through a ceremony of marriage in Cleveland, Ohio, U.S.A. In the application and in answer to the question Number of times previously married, the deceased answered "None".

At the time when the deceased went through the ceremoney of marriage with the appellant, whose maiden name was Ho Young, the marriage celebrated between the deceased and Doreen Bess, in 1939 was still subsisting, and there had been no proceedings taken by anyone questioning the validity of this marriage.

Doreen Bess testified at the trial that she and the deceased separated in the year 1951.

On July 14, 1977, she obtained a Decree Nisi against the deceased in the Supreme Court of St. Vincent on the ground that the marriage had irretrievably broken down in that since the celebration of the marriage they had lived apart for a continuous period of 5 years immediately preceeding the presentation of the petition. This decree was made absolute on July 29, 1977 and was exhibited at the trial. Its validity has never been questioned.

The deceased and appellant lived in Oakville, Canada until 1978 when they returned to live in St. Vincent. On June 17, 1982 the deceased died intestate leaving the respondent as his lawful son by the marriage to Doreen Bess in 1939, as well as the plaintiff/appellant, who in her Statement of Claim described herself as the "widow and last relict of Wilfred Norton Bess".

From the foregoing, it is established that the deceased's marriage to the appellant on December 7, 1965 took place at a time when the marriage to Doreen Bess in 1939 was still subsisting, and it subsisted up to the time of the granting of the decree absolute in 1977. Neither

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party or anyone else had taken any steps questioning the validity of this 1939 marriage. Indeed up to the time of his death in 1982, there was no such challenge and the undisputed legal implication from the foregoing facts is that the marriage of the deceased and the plaintiff Lesline Dess (nee Ho Young) on December 7, 1965, could only be regarded as a valid marriage if the 1939 marriage between the deceased and Doreen Dess was void ab initio, for whatever cause.

The claim of the plaintiff/appellant to have the Court award her the grant of Letters of Administration, based on the fact that she was the lawful widow of the deceased, is to be found in paragraphs 5 and 6 of the Statement of Claim.

Para 5 reads:-

> The deceased on 23rd April 1939 forged and/or falsely represented his age as 21 years when he was (as the fact was) a minor and lacked the capacity to marry.

Para 6 reads:-

> By virtue of the want of age of the deceased the purported marriage, on 23rd April, 1939, was a meretricious union and not a matrimonial union in contemplation of law and the said purported marriage was void ab initio.

In her judgment the trial Judge found that there was no evidence to lead to the conclusion that the deceased forged and/or falsely represented his age to be 21 for the purpose of his intended marriage to Doreen Hinds. No such evidence was given at the trial, and how and under what circumstances the age came to be stated in the certificate as 21, was not explained. Further, no evidence was put before the Court to show whether any consent of the parents or guardian of the deceased was or was not obtained prior to the marriage, or whether there were any such persons then alive who could have given such consent as contemplated in section 23 of the St. Vincent Marriage Act Chapter 151.

Section 23(1) states:

> Persons who have reached the age of twenty-one and widowers and widows may marry without the consent of others.
>
> (2) Where a person under twenty-one years of age not being a widower or widow intends to marry, the father, or if the father is dead the lawful guardian, the mother of such person shall have authority to consent to the marriage of such person and such consent is hereby required unless there is no person authorised to give it resident in the Colony.
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> Section 23(4) makes provision for the matter to be recerred to a Judge of the Supreme Court where consent is being unreasonably withheld.

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Doreen Bess the survivor of the 1939 marriage was not asked at the trial any questions about the deceased's age being stated as 21. Counsel for the appellant submitted that on the state of the evidence before the Court and on looking at the marriage certificate, and the birth certificate, it is clear that if the age given as 21 is correct then no consent was necessary. If however the birth certificate was correct, then consent was necessary and the burden of proving that there was such consent, would shift to the respondent as the birth certificate would have had the effect of making the marriage "a doubtful one". Counsel referred to the case of Taylor v Taylor 1967 Probate, page 25.

It is not necessary to go into the facts of Taylor's case as I do not think it can help this appellant in the face of the presumption in favour of the validity of a marriage as enunciated by Barnard J in the case Russell v Attorney General 1949 Probate 391 at 394 where he said:-

> "Where there is evidence of a ceremony of marriage having been performed followed by cohabitation of the parties, the validity of the marriage will be presumed in the absence of decisive evidence to the contrary."

In this case it was the appellant who was seeking to have the 1939 marriage declared void ab initio for lack of capacity and it was in my view incumbent on her to have adduced some credible evidence in this respect to the trial Judge.

Counsel for the appellant said at the outset of his submissions that the appeal turns strictly upon the capacity of a person to contract a marriage i.e., the capacity to enter into a marriage. In order he said, for a man and a woman to become man and wife, two conditions must be satisfied: (1) They both must possess the capacity to contract the marriage and (2) they must obsrve the formalities.

He suibmitted that one must make a clear distinction between the capacity to contract a marriage and the solemnization of a marriage. In England a person under the age of 16 cannot enter into a contract of marriage as such a marriage would be void ab initio. In the State of St. Vincent, by Act No. 7 of 1966, a marriage solemnized between persons one of whom is a female under the age of 15, or a male under the age of 16, is void ab initio. I must point out at this stage that in 1939 when the marriage of Doreen Hinds and the deceased took place, the only restriction on the age at which a person could marry was contained in section 23 supra. This brings us therefore to the crux of this appeal and that is, was the 1939 marriage void ab initio as has been submitted by Counsel for the respondent. If it was then the 1965 marriage of the deceased and the plaintiff/appellant was a good and valid marriage even

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without any decree having been pronounced against the validity of the 1939 marriage.

On the other hand, if it was not void ab initio, at its highest it could only have been voidable at the instance of either party during their lifetime, and we know that it subsisted until 1977.

From the evidence before the trial Judge, the plaintiff was not unaware of the existence of the 1939 marriage. She testified that she had heard of such a marriage, and that she and the deceased took legal advice from an attorney-at-law in Oakville, Jack Isard. She said she did not consult with Walter Telfar another Canadian attorney and social acquaintance, although her husband could have. Telfar however testified that in 1965, he advised the plaintiff/appellant when he was asked, that she could not legally get married unless the 1939 marriage was dissolved.

Counsel for the appellant endeavoured to weave an ingenious argument around the provision of section 23(1) by submitting that the only persons who had the capacity to contract a marriage, were (1) persons over the age of 21, and (2) widowers or widows. In the case of this marriage, the certificate showed that the deceased was 21 but when one looks at the birth certificate it shows that he was under 21. On the face of the marriage certificate he said, the question of consent does not arise as deceased purported to bring himself within the provisions of section 23(1) when in fact he was under 21, and therefore lacked the capacity to marry. This lack of capacity he submitted made the marriage void ab initio, unless the respondent on to whom the burden shifted, could prove that the deceased had the consent required under section 23(2) or that it was not required. He referred us to the case of In re Paine (1940) 1 Ch. 46. In that case, a woman domiciled in England married her deceased sister's husband in Germany on June 1, 1875. Although valid in Germany, it was held that the mariage was one prohibited (at that time) by English law and therefore she lacked the capacity to marry. Again this case does not help.

Counsel for the respondent submitted that the appellant was faced here with two presumptions namely the presumption of regularity, and the presumption in favour of the validity of a marriage. If the birth certificate shows that the deceased was under 18 at the time of the 1939 marriage, then in the absence of evidence to the contrary, it must be presumed that the necessary consents were given or that there was no one in St. Vincent who could have given such consent in which case the deceased could freely marry. The burden of explaining these presumptions by

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decisive evidence rested on the person seeking to impeach the marriage. Until 7 of 1966 came into force there was no minimum age of marriage in St. Vincent. That Act settled on 16 years in the case of a male person. That Act also specifically made the marriage of a male person under 16 years void. This case he said, despite Counsel's submission to the contrary fell squarely within the decision of the Court in Da Silva v Da Silva - 28 W.I.R. 357, which dealt with the validity of marriages. That case established that there were only two sections in the marriage Act Cap. 151 which are nullifying sections and they are sections 5, where both parties knowingly and wilfully marry before a person who is not a marriage officer or in the absence of two witnesses, or section 54 where they knowingly and wilfully inter-marry without a proper licence as required by section 17, or are within the prohibited degree of consanguinity.

This Court is bound by the decision in Da Silva's case, it having been upheld by the Judicial Committee of the Privy Council. As was said in Da Silva's case at page 368, letter j, "The Maxim omnia praesumuntur pro matrimonio is as forceful and sensible in its application today as it was centuries ago". Where the formalities of a marriage are challenged there is equally the strong presumption that they were properly observed. Absence of consent where such consent is required under section 23, would be no more than a formality and section 6 of the Marriage Act Cap. 151 is designed to save marriages otherwise lawful from being declared void on the ground that any of the conditions directed to be observed by the Act had not been duly complied with. There is no provision which makes the marriage of a person under 21, without the necessary consent void ab initio.

It follows that the marriage of the deceased and Doreen Hinds in 1939 was in my view a valid marriage which remained so until it was desolved by a competent Court in 1977. The 1965 marriage of the deceased and the plaintiff/appellant was not a valid marriage and the appellant is not the lawful widow of the deceased. I am in agreement with the findings of the learned trial Judge.

I would dismiss the appeal with costs to be taxed fit for one Counsel.

L.L. ROBOTHAM,
Chief Justice

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I agree.

E.H.A. BISHOP,
Justice of Appeal

I also agree.

G.C.R. MOE,
Justice of Appeal.