IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 4 of 1980

Between:

ARVINDBHAI ZAVERBHAI PATEL — Appellant
s/o Zaverbhai Purshottambhai Patel

and

PUSHPA WATI BEN — Respondent
d/o Babu Bhai Patel

Mr. A.J. Singh with Mr. M.K. Sahu Khan
for the Appellant

Date of Hearing: 24 June 1980
Delivery of Judgment: 27/6/80

JUDGMENT

Speight J.A.

The petitioner husband filed a petition for dissolution of marriage on the ground that the respondent had wilfully and persistently refused to consummate the marriage (section 15(c) Matrimonial Causes Ordinance).

Evidence was heard in the First Class Magistrates Court at Ba on 14th August 1979 by Mr. Z.K. Dean, Senior Magistrate, and on 14th September 1979 he delivered his findings of fact and his recommendation in the following terms:

"FINDING:

1. Petitioner and Respondent both domiciled in Fiji were on the 7th day of May 1979 lawfully married to each other at the Registrar's office, Lautoka, he then being a bachelor and she a spinster.

2. This marriage was to be followed by a ceremonial marriage on 20/5/79 before the parties could consummate marriage.

3. No consummation has taken place of this marriage and this was due to the wilful refusal of the Respondent to consummate despite repeated attempts by the Petitioner for the ceremonial marriage and consummation.

4. There are no children of the marriage.

5. No prior proceedings in respect of this marriage in any Court.

6. Petitioner has not condoned or connived at ground relied upon and petition is not presented in collusion with the Respondent.

7. Petitioner has not committed adultery and is still living alone.

RECOMMENDATION

In view of the findings of fact above mentioned it is respectfully recommended that the petitioner be granted a decree nisi of dissolution.

Prayer for costs has been abandoned.

I certify that Section 59 of the Matrimonial Causes Act has no application as there are no children issue.

(Sgd) Z.K. Dean
Resident Magistrate
14/9/79.

The matter was placed before Dyke J. in the Supreme Court at Lautoka but he declined to make a decree. His reasons appear in writing as follows:

"20/9/79:

There seems to be some confusion in the record. Marriage ceremony was on 7/5/79, religious ceremony said to be set for 25/4/79. Presumably that is wrong and date should be 25/5/79.

Petitioner said he went three times to respondent to get her to join him, on 15/5/79, 17/5/79 and 19/5/79 - each of these occasions being prior to the date set for the religious ceremony. I understand that it is not the done thing for husband and wives - even though married according to law to cohabit before the religious ceremony.

Now then can respondent's refusal to join petitioner on these dates be regarded as 'wilful and persistent refusal to consummate the marriage'? From the record therefore there are no grounds for granting a decree nisi and the petition must be dismissed.

(Sgd.) G.O.L. Dyke
JUDGE "

The petitioner appealed to this Court. His counsel's submission was that there had been an agreement, implied if not expressed, that consummation would not occur until after the religious ceremony, and we were told from the bar that this is recognised practice amongst Hindu people. The submission was however that failure to go through with the second ceremony was tantamount to abandonment of the original understanding as to temporary postponement of the full marital rights and duties and constituted wilful and persistent refusal to consummate.

Authority for this proposition was cited from Jodla v. Jodla (1960) 1 All E.R. 625 and Kaur v. Singh (1972) 1 All E.R. 292. We accept the proposition that on the facts of those cases continual postponement may amount to evidence that the avoiding party has resiled

from his or her matrimonial obligations, including the consummation of the marriage.

It is of course recognised in law that parties may contract marriage on the pre-arranged basis that there shall be no consummation. This may occur in cases of parties of advanced years or physical incapacity where a marriage of companionship only is agreed upon beforehand. But save in such exceptional cases, in those where there has been only temporary postponement for religious or health grounds it is implicit that in due course upon the occurrence of the agreed circumstances consummation will take place. Accordingly if by evasion or deliberate delay there is indefinite postponement so that it becomes apparent that the unwilling party is only using the agreed deferment as a sham it may amount to wilful and persistent refusal - and it is a matter of the inference to be taken from all the circumstances - and this we take to be the effect of the cases cited, and the principle enunciated in England is applicable under the Fiji Ordinance, although in this jurisdiction it would lead to a decree for dissolution, where in England nullity would follow.

But as has been said it is a question of whether what has occurred leads to the conclusion of "wilful and persistent refusal". In Horton v. Horton (1947) 2 All E.R. 871 at 874 Lord Jowitt said "the words connote I think a settled and determined decision come to without just cause .....". In Napier v. Napier (1915) p. 184 at 204 it was said that it meant more than temporary unwillingness which might be overcome by patient forbearance, care and kindness - it meant a wilful determined and steadfast refusal.

Now if we turn to the matters so clearly set out by Dyke J. in his recital of the dates of the ceremonies, and the approaches made by appellant to his wife, it is quite apparent that this petition was

premature. As we have said it is recognised that a temporary deferment is in accordance with certain religious beliefs and the learned judge held that that situation applied here. On the evidence the date for the religious rites had not yet arrived so the overtures made by the husband, and the rejection at that very early stage did not prove "determined and steadfast" refusal in the way referred to in the authorities quoted.

Mr. A.J. Singh pointed to a passage in the evidence that the wife and or her family had intimated a change of heart within two days after the civil ceremony and he submitted that sufficed as proof. For the reasons set out in the previous paragraph, the Court cannot accept this as being valid.

Finally the Court was asked to exercise its derived power to remit the matter to the Magistrate for further hearing of evidence of what may or may not have happened since the 25th of May 1979. In our view this is not an appropriate case for such action for the entire proceedings were, we think, misconceived.

The appeal is dismissed.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL