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IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 31 of 1980

Between:

VINEETA
d/o Brij Deo Sharma

Appellant

and

RAJESHWAR NATH
s/o Rameshwar Nath

Respondent

Mr. A.S. Singh with Miss A. Prasad
for the Appellant
No appearance for the Respondent

Date of Hearing: 24th June 1980
Delivery of Judgment: 30/6/80

JUDGMENT OF THE COURT

This is an appeal by a wife - the appellant - against the dismissal of her petition seeking a divorce on the ground that the husband - the respondent - wilfully and persistently refused to consummate the marriage (section 15(c) Matrimonial Causes Ordinance 1968).

The wife alleged in her petition that she and Rajeshwar Nath were married on 11th October 1978, in a civil ceremony at the Registrar General's Office Suva; the marriage was an arranged marriage. The petition alleged that the husband had refused to consummate the marriage; and the facts relied upon and stated in the petition as constituting the ground of divorce are:

- (i) that the respondent refused to attend a religious ceremony; and

- (ii) his refusal to provide the wife with a matrimonial home.

Evidence was given in the Magistrates' Court (Second Class); the husband entered no appearance before the Court. The wife stated in evidence that it was agreed between them as they were both of the Hindu faith that a religious ceremony should be conducted according to Hindu rites after the civil ceremony and that consummation of the marriage should be postponed until after the religious ceremony. It was stated from the Bar that the religious ceremony was to have been held about one month after the civil marriage and this is confirmed in the judgment of the learned Judge in the Supreme Court. The religious ceremony did not take place a month after the civil ceremony; it is clear from the wife's evidence that after repeated requests the husband finally agreed that the religious ceremony should take place on 8th September, 1979 and invitation cards were sent out; the husband later resiled from this agreement and the religious ceremony was never held due to his refusal to proceed therewith. The appellant stated that the husband did not call at her home after the civil marriage and refused to consummate the marriage.

The father of the appellant gave evidence supporting her evidence that the husband persistently refused to proceed with the religious ceremony despite visits made to the respondent. The respondent finally told appellant's father that he did not want his daughter.

Saraswati Pande an aunt of the respondent gave evidence that she endeavoured over a period of 8-9 months after the civil ceremony to persuade the respondent to have the religious ceremony but all efforts were unsuccessful. The appellant, she stated, was willing to consummate the marriage.

At the conclusion of the hearing the learned Magistrate gave his findings and recommended that a decree nisi in divorce be granted to the appellant.

The petition together with the Magistrate's findings and recommendation came before the Supreme Court and the learned Judge dismissed the petition upon the grounds (inter alia) that there was no evidence that the respondent had refused to consummate the marriage or that the wife was prepared to consummate the marriage. The learned Judge in dismissing the petition stated that the facts established desertion and not wilful failure to consummate.

From this judgment the wife appeals to this Court; appellant argued Ground 2 only of the notice of appeal which reads:

" That the learned Judge erred in law and in fact by holding that the facts could amount to desertion but not wilful refusal to consummate the marriage."

Miss Prasad for the appellant, submitted that the learned Judge was wrong in concluding that the evidence did not support the allegation that the husband had wilfully and persistently refused to consummate the marriage.

We turn now to consider the authorities cited to us.

Wilful refusal to consummate the marriage connotes a settled and definite decision come to without just excuse, but, in order to determine whether there has been a refusal regard must be had to the whole history of the marriage; (Horton v. Horton (1947) 2 All E.R. 871) and the wilful refusal to consummate must have persisted up to the date of the presentation of the petition and the petitioner must prove that the marriage has not been

consummated owing to the wilful refusal of the respondent (S. v. S. (1954) 3 All E.R. at p. 744). In Jodla v. Jodla (1960) 1 All E.R. 625 both parties to the marriage were Roman Catholics who were married in the Registry Office it being agreed that a church ceremony should follow; failure by the husband to arrange for that ceremony, in spite of repeated requests by the wife for him to do so amounted to wilful refusal on his part.

In Jodla v. Jodla (supra) Newson J. at p. 626 said:

" Therefore, it seems to me that by his refusal to proceed with the church ceremony, the necessity for which was understood by both, in particular circumstances of this case, which I must underline, he made it impossible for her, with a good conscience, to live with him as his wife, and this refusal, or this failure to proceed with the church ceremony was, in this case, a reasonable and just cause for her to refuse intercourse, even if it had ever been requested."

In Kuar v. Singh (1972) 1 All E.R. 292 the parties who were Sikhs were married at a registry office. The marriage had been arranged between the petitioning wife's brothers and her father on the one hand and the respondent husband on the other. In order fully to marry according to the Sikh religion and practice it was necessary to have not only a civil ceremony in a registry office but also a Sikh ceremony in a Sikh temple. This was understood by all the parties concerned. After the ceremony the wife returned to the home of one of her brothers and the marriage was not consummated. It was the husband's duty to arrange the Sikh ceremony. The wife's brothers on a number of occasions approached the husband and asked him what he proposed to do about the religious ceremony. The husband gave various excuses

until eventually he told the wife's brothers that he had no intention of arranging for the religious ceremony at all. The husband had never tried to persuade the wife to have sexual intercourse with him. The wife sought a decree of nullity on the ground of wilful refusal by the husband to consummate the marriage. Davies L.J. at p. 295 said:

"This husband from the time of the register office ceremony entirely refused and failed to implement the marriage, and in failing to implement the marriage I think it is clear that he wilfully failed to consummate it."

We return now to the facts of this case. The appellant gave evidence that the respondent had refused to consummate the marriage. She said:

"He did not call in at our family home after the civil marriage. I have waited for about a year and was obliged to revere my marital bond with the respondent.

He refused persistently and wilfully to consummate the marriage.

.....

I have honoured my promises to the respondent althroughout this period but the respondent has failed to do so."

Supporting evidence was given by the appellant's father who confirmed that the respondent had refused to attend the religious ceremony and kept postponing the event. The father said:

"I made calls to that house for a date for the religious ceremony to be fixed. The respondent and his family evaded and did not like to honour their words. I made several attempts but all my efforts received very cold reception. Eventually the respondent indicated to have the

religious ceremony. Preparation for invitation cards were made. Later the respondent sent a letter to petitioner saying he did not want to have the marriage ceremony. He did not want my daughter as his wife. He telephoned me advising of his refusal. I went to him. He told me that in no terms would he marry my daughter and I should cancel all the marriage arrangements. It is almost 18 months since their lawful marriage."

Evidence was given by Saraswati Pande the respondent's aunt, who negotiated the marriage, that the respondent refused to proceed with the religious ceremony. She stated.

"I was one of the witnesses to their marriage. It was arranged that a religious ceremony would follow in a month. I tried to arrange for a religious ceremony. He kept on putting it off. Eventually he said he would want the petitioner as his wife. On the 6.2.79 I went to U.S.A. I connected U.S.A. plane from Nadi. I went to respondent's place. I tried to persuade respondent to have the religious ceremony but he ignored my request. On the 7.6.79 I went again to the respondent. He again refused giving no reasons for the refusal. All my efforts were unsuccessful. Petitioner was even willing to consummate the marriage. Her parents have always been ready to send petitioner even without religious ceremony."

A decision of the Supreme Court of Fiji in Veena Kumari v. Narendra Prasad Singh Supreme Court of Fiji No. 51 of 1978 is apposite and Kermode J. said:

" She and the respondent were married in the Registrar General's Office on 11th January, 1977. This civil ceremony was to be followed by a religious ceremony a week later. Over a period of 11 months requests by the petitioner's family to the respondent and his family for the religious

ceremony to be performed were refused. The respondent made no attempt to collect his wife or consummate the marriage despite repeated requests to do so. It is also abundantly clear that the petitioner would have consummated the marriage if the respondent had fully performed the marriage contract by going through the religious ceremony. The marriage has not been consummated and that is the sole fault of the respondent."

With respect we agree with the comments immediately above and consider they have particular application to the facts of this case.

Although the learned Judge in his judgment in the instant case stated that the appellant did not say she was willing to consummate the marriage, the respondent by his refusal to proceed with the religious ceremony put it out of the power of the wife to request intercourse. In Jodla v. Jodla (supra) the view was taken that that did not amount to wilful refusal by the wife, because she had a legitimate and proper excuse in the circumstances, and that it was the husband's conduct in failing to arrange the religious ceremony that resulted in the non-consummation of the marriage. It is manifestly plain in this case that the wife and her witnesses requested the respondent on numerous occasions over a period in excess of nine months to proceed with the religious ceremony. The husband refused and this refusal persisted until the time the petition in divorce was presented.

The evidence of the petitioner and her witnesses was unchallenged and we agree with the finding of the learned Magistrate when he said:

" The petitioner seeks dissolution of her marriage with respondent on the ground of non consummation.

The petition was uncontested.

I am satisfied that the petitioner has told the truth and her evidence is substantially corroborated by her witnesses. The manner in which she has given evidence has been very impressive and praiseworthy. I find the respondent has persistently and wilfully refused to consummate the marriage. I find the allegation proved to the Court's satisfaction.

It is respectfully recommended that a decree nisi be granted to the petitioner and a dissolution under section 59 be made."

We are mindful that in England wilful refusal to consummate the marriage leads to a decree of nullity of marriage while in Fiji it is a ground for divorce. However, the principles enunciated in the foregoing English authorities are in our opinion applicable in Fiji to petitions for divorce founded on wilful and persistent refusal to consummate a marriage.

We appreciate that circumstances will vary infinitely but on the facts in this case we are satisfied that the appeal should be allowed. Accordingly we allow the appeal and set aside the judgment of the Supreme Court. The petition is remitted to the Supreme Court to direct the making of a decree nisi in divorce and to make any other appropriate orders.

The appellant is allowed her costs of this appeal to be fixed by the Chief Registrar.

Wood

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VICE PRESIDENT

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JUDGE OF APPEAL

Bozovic

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JUDGE OF APPEAL