IN THE FIJI COURT OF APPEAL
Civil Jurisdiction

361

Civil Appeal No. 24 of 1982

BETWEEN: MOTI CHAND Appellant

and

ARUN DEVE Respondent

Date of Hearing: 14 July, 1982
Date of Judgment: 30th July, 1982

M.V. Bhai and M. Krishna for the Appellant
No Appearance for the Respondent

JUDGMENT OF THE COURT

Marsack, J.A.

This is an appeal against a decision by the learned Judge who agreed with the finding of the Magistrate that the petitioner - the appellant - had not proved that the respondent had wilfully and persistently refused to consummate the marriage, and as a result of which finding the appellant's petition for dissolution of marriage was dismissed.

The petition was based on the ground set out in section 14(c) of the Matrimonial Causes Act, Cap. 51:

> "That the other party to the marriage has wilfully and persistently refused to consummate the marriage."

This is the second time that the parties have been before the Court asking for a dissolution of the marriage. On the first occasion the present respondent was the petitioner; and on the 26th March, 1980 the learned Judge, disagreeing with the finding of the Magistrate, dismissed her

petition on the ground that her evidence had not established that the respondent - the present petitioner - had wilfully and persistently refused to consummate the marriage.

The learned Magistrate in the present case made the following findings:

1. Parties were married on 2.2.79.
2. Petitioner and Respondent have never cohabited.
3. There are no children of the marriage.
4. The marriage has not been consummated.
5. Petition No. 196/79 by the Respondent on similar ground was dismissed.
6. I am not satisfied on the evidence that the Respondent has wilfully and persistently refused to consummate the marriage.

At the hearing on 3rd December, 1981 both parties were present. The record shows that the respondent said "no religious marriage. I don't want to live with him." The petitioner in his evidence said "respondent has wilfully and persistently refused to consummate the marriage. Not guilty of collusion." No evidence was given for the respondent to counter this.

In the course of his decision the learned Judge said:

> "I note that the respondent upon the petition being read to her replies "No religious marriage. I don't want to live with him." I understand this to mean that she refuses to live with him without a religious ceremony."

It is not clear what is meant by the respondent's statement (which was not given as evidence). It may mean what the learned Judge suggested, but it might have an entirely different meaning.

It is not part of the civil law of Fiji that there must always be a religious as well as a civil ceremony - indeed this is only so in a minority of cases. Once a civil marriage has been proved, together with

persistent refusal to consummate on the part of the respondent, then there is an onus on the respondent to prove that the marriage arrangements came within the special category, and that through no fault on her part, the religious ceremony has not been performed.

There is in fact no evidence, appearing in the record, that there had been any agreement to hold a religious ceremony, in the absence of which consummation of marriage would not be permitted. In any event, petitioner has sworn that he has always been ready to consummate the marriage; and if there had been a prior arrangement by the parties that consummation could take place only after such a ceremony, then this could well be taken to mean that he was at all times ready to take part in one. That being so, then it must be held that respondent - for what reason, apart from her stated objection to live with her husband, does not appear from the evidence - has wilfully and persistently refused to consummate the marriage.

The relevant legal authorities in cases of this nature are fully considered in the judgment of this Court in Vineeta v. Rajeshwar Nath (Appeal 31 of 1980) and we do not consider it necessary to repeat them now.

Once the Court concludes that the respondent has wilfully and persistently refused to consummate the marriage, then the facts necessarily come within the provisions of section 14 of the Matrimonial Causes Act. It is certainly desirable that the tie of matrimony should not continue to make it impossible for either of the parties to set up another marital household. That fact in itself would of course not justify granting a decree in divorce unless the grounds set out in the Matrimonial Causes Act were held to exist. As we are satisfied that the evidence establishes a wilful and persistent refusal to consummate the marriage on the part of the respondent, then the petitioner is entitled to the relief he seeks.

Accordingly, the appeal will be allowed and the judgment of the Supreme Court set aside. The petition is remitted to the Supreme Court to direct the making of a decree nisi and to make such other orders as may be appropriate.

There will be no order as to costs.

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Vice-President

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Judge of Appeal

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Judge of Appeal