IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

IN DIVORCE

Action No. 50 of 1981

Between :

GHAN SHYAM f/n Yenkat Raju — Petitioner

- and -

OLENI LEMUSU f/n Lemusu — Respondent

Mr. S. D. Sahu Khan — Counsel for the Petitioner

J U D G M E N T

This is a husband's petition for divorce on the ground of his wife's wilful and persistent refusal to consummate the marriage.

He is an Indian motor mechanic, 24 years of age, who went to New Zealand on a year's "employment" visa on 17th August, 1980. He married a Samoan woman at Wellington on 15th August, 1980 two days before his visa expired.

Immediately after the marriage he asked the Immigration Department for permission to stay in New Zealand but it was refused. Next day, 16th August, he went to Auckland and left Auckland on 17th August, 1980 for Fiji.

He says he did not marry simply to remain in New Zealand but that being in love they married just before he had to leave. I do not believe his evidence that the marriage was based on love. Had they been so much in love I would have expected her to be anxious to be with her lover and to be ready and willing to come to Fiji.

It is apparent that they never intended the respondent to come to Fiji. They did not share the same bed even on their wedding day at Wellington nor the following day at Auckland prior to his departure. There was no attempt at even a brief honey moon. In my view they never intended to behave as lovers.

When the petitioner left New Zealand his bride did not follow him but requested the immigration authorities to re-admit him. Her failure did not result in her hastening to join him in Fiji or in the dispatch of emotional letters. Her reaction was not that of a loving bride whose newly wed husband has been "taken from her". Instead she wrote a practical letter, Exhibit 2, to her husband stating that her approach to the immigration had failed and that she did not intend to pursue the matter with them.

I have no doubt that the real object of the marriage was to enhance the petitioner's chances of remaining in New Zealand. There was opportunity for consummation on 15th and 16th August, 1980 but no reason is given for not using that opportunity. It is not suggested that the respondent wilfully refused to have intercourse on those dates. Therefore, even if this was not a marriage of convenience, there is no evidence that the respondent wilfully refused to have intercourse with the petitioner and the petition fails on that basis.

However, there is nothing in the petitioner's evidence which leads me to believe that cohabitation as man and wife was in the minds of the parties. His demeanour was void of emotion.

I have to apply the law, as I see it, to the alternative aspect that this was a marriage of convenience.

Marriage creates contractual obligations some of which are implied and others are imposed by statute. If one party is in breach of the marital contract the other can take steps to enforce the obligation or have the marriage dissolved. The obligations are not identical in all marriages and the law will not imply an obligation which has never arisen and which was never contemplated. Thus if an extremely wealthy woman marries a poor man, she is unlikely to succeed where her petition alleges that he has habitually failed to support her.

The parties may agree not to have intercourse for the first two or three years of their marriage. In such a case neither can be guilty of a wilful and persistent refusal to consummate during that period - Horton v Horton 1947 2AER 871 at 872 D. Once the reason for not having intercourse has ceased then the parties can insist on normal co-habitation. In the instant case I find that the parties had accepted that this marriage was arranged to assist the petitioner to stay in New Zealand. They knew on 15th August, 1980 when they married that he would probably leave New Zealand in 48 hours and may not return; they accepted that if he could not reside in New Zealand they would not cohabit because the respondent would not come to Fiji. By remaining in New Zealand the respondent is not wilfully and persistently remaining away from the petitioner but is behaving as they had agreed and cannot on that basis be regarded as the guilty party.

In Horton v Horton supra, the House of Lords held that wilful refusal to consummate was conduct "connoting a settled and definite decision arrived at without just excuse, and in determining whether there has been such a refusal, the judge should ~~not~~ have regard to the whole history of the marriage".

Nowadays divorce is common; the attitude of the legislature and of the Courts is more relaxed and one should not oblige unwilling persons to continue in matrimony. Nevertheless one cannot flout the divorce laws or act contrary

to ~~the~~ public policy.

It must be contrary to public policy for parties to marry for the sole purpose of enabling one party to adopt the nationality of the other in order to overcome the policy of immigration. Where the improper object is not achieved they cannot ask the Divorce Court for a dissolution by pretending that one party has failed in a marital duty which it was mutually agreed he or she need not perform.

The parties are not bound for ever and in due course the petitioner may have his divorce but it will then be on legitimate grounds created by statute.

The petition is dismissed.

J. T. Williams.

(J. T. Williams)
Judge

LAUTOKA,
25 November, 1981