'Ofa-ki-Mala'e'aloa v Fiula

Privy Council
Appeal No 5/1985

21 April 1986

Divorce - separation for 5 years or more - lack of intention of both parties not to resume cohabitation.

The parties were married in 1952, but in 1979 the wife went to Australia and lived with another man there. She was deported back to Tonga in 1985 as an overstayer, but returned to Australia after filing a petition for divorce in Tonga.

The Supreme Court declined to grant a decree for divorce, even although the parties had been separated for over 5 years, because it considered that the husband still genuinely wished his wife to return to him, and the Divorce Act precluded the granting of a decree unless both parties lacked a wish to resume cohabitation. The wife appealed to the Privy Council.

HELD
Dismissing the appeal

That the Divorce Act prevented the granting of a decree for divorce on the ground of 5 years' separation unless both parties lacked a wish to resume cohabitation, and in this case, the husband still maintained a wish to resume cohabitation.

Statutes considered

Divorce Act, section 2(f)
Counsel for Appellant : Mr Koloamatangi

Privy Council

Judgment

This is an appeal against Harwood J's refusal to grant a decree in divorce on a petition which relied on this ground:

> "That the Respondent and Petitioner have been separated for five years or more without both of them maintaining or intending to maintain or renew normal marital relations or cohabitation with each other." (S. 2(f) Divorce Act (Cap. 12).

Thar parties were married in January 1952 and have had eight children. In about 1971 the husband suffered some sort of disease or accident and since that time has been confined to a wheelchair. In 1979 the wife left home and went to Australia on a 3-month visitor's permit but became an overstayer. Her reason for remaining in Australia was that she was fed up with her husband's excessive drinking, which was accompanied by violence towards her. For all that it seems to have been a sad parting for both of them when she left for Australia, and at that time it is very doubtful that the wife intended the separation to be permanent. The husband certainly did not contemplate it. In 1980 the wife met another man in Australia and lived with him, and it is probably at that time that she decided that Australia had more to offer than Tonga. In 1985 someone reported the wife as an overstayer and she was arrested and deported to Tonga. This petition was filed in March 1985. The wife has since returned to Australia.

There can be no doubt that the wife has not maintained any intention to return to her husband, but S. 2(f) of the Act requires the Court to be satisfied that both parties have abandoned the intention to reconcile, and that is where the problem is in this case. The husband has not given up hope of a reconciliation and desires that it be brought about. His hope may be a vain one but Harwood J. expressed himself satisfied that the husband's hopes of reconciliation were honestly held and genuine, and that he was not simply motivated by spite. It appears that religious reasons have played a part in the husband's decision.

Mr Koloamatangi's submissions on the wife's behalf were short but very much to the point. Professed intention is not enough, he said. It must be matched by deeds. In other words, one must look at his actions and behaviour to determine whether the intention is honestly held. In that regard there was evidence that the husband got one of his daughters, who was going to Australia in 1984, to try to persuade her mother to return; and he made further attempts at reconciliation in 1985.

In the circumstances we are not satisfied that the Trial Judge was wrong in holding that the terms of S. 2(f) had not been complied with and the appeal is dismissed.