A PURPOSIVE ANALYSIS OF CONFLICT OF LAWSOF DIVORCE: APPROACH OF THE INDIAN JUDICIARY

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Abstract

In India even after nearly seven decades of independence, there is still not a special statutory enactment addressing conflict of laws involved in marriage and matrimonial reliefs. Due to this legislative inertia, it has fallen upon the Indian Judiciary to evolve principles governing such cases. Divorce is a particularly complex subject in this regard due to its far reaching implications involving right to remarry, custody of child etc. Furthermore, in India different personal laws provide for divorce on the grounds specified therein which has been a cause of conflict not only from the point of view of private international law, but from the point of view of conflict between the interpersonal laws as well; but a study of such conflict of interpersonal laws in India would be beyond the scope of the present article. The articlefocuses on the judicial approach in India towards divorce in cases involving an international element. The article aims to understand the challenges posed before the courts, the view taken by the courts and the way ahead for divorces in the international context when they come up before Indian courts.

INTRODUCTION

Due to the advancements made worldwide and the increased connectivity of India with the rest of the world, there has been a dramatic increase in the number of marriages and consequently, divorces, having an international element. Today, a population of over one billion Indians lives in twenty nine states and seven union territories within India. In addition, about twenty five million Indians called non-resident Indians, reside in foreign jurisdictions. It is important to see here that the personal law of an individual in India is governed or determined by his membership of a community and not by his domicile. The courts have adopted multiple criteria in settling disputes arising out of divorces where there is at least one Indian party or in cases of marriages between non-Indian parties which were solemnized in India.

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JURISDICTIONAL ADJUDICATION

Whenever a case comes up before the court, it has to first ascertain its jurisdiction to try that particular case. In order to determine the jurisdictional capacity of the court it has to ascertain the substantial connecting factors which connect the court to the party or issue in dispute.[1] These factors can be broadly summed up as:[2] Domicile and Residence.

1. Domiciles as a ground for jurisdiction

Domicile is a juristic concept used for the purpose of establishing the connection between a person and the law of the country with which he is most intimately connected and this connection is primarily drawn from where a person resides.[3]India has different matrimonial laws as per the community. Under Indian Divorce Act, 1869 the domicile has significance in respect of those Hindus who are outside India.[4] Under the Special Marriage Act, l954, domicile is important only in respect of those Indian citizens who are outside India.[5]For instance, where two Indian domiciled persons solemnize their marriage abroad, but after sometime their marriage fails and wife alone comes to India. In such a case, she cannot file the petition under the main jurisdictional rules, but she can do under this special provision.

The above preposition of wife's domicile was recently reiterated in LaliMondal (Sanyal) v. Swapan Kumar Mondal[6] that private international law of the different countries with regard to jurisdiction and merits is based variously on domicile, the nationality, residence-permanent or temporary or ad hoc, forum, proper law etc., and ensuring certainty in the most vital field of national life and conformity with public policy.Above all, it gives protection to women, the most vulnerable section of our society whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that

[1]Gajendragadkar, P.B., et al, Recognition of Foreign Divorces, Sixty Fifth Report of the Law Commission of India, 1976, Government of India Press, Nasik at 14 (2.2).
[2]These heads are again a reflection of the processes of Political Obligation between Nation- States and Individuals. The Power of the State with respect to its Nationals is exercised through the legal notion of *Nationality* in International Law. *Territorial Sovereignty* over individuals finds expression through the concept of *Domicile*, accords importance to "Residence".
[3]PARASDIWAN&PEEYUSHIDIWAN, PRIVATE INTERNATIONAL LAW 149 (2nd ed. 1993).
[4]Section 1(2) of Indian Divorce Act, 1869.
[5]*Id.* Section 4, 31(2) and Part III.
[6]C.O. No. 3356 of 2012 (Calcutta High Court, Mar, 2016).

wife's domicilefollows that of her husband and that it is the husband's domiciliary law which determines the jurisdiction and judges the merit of the case.

Hence generally it can be said that a divorce petition can be filed within the local limits of whose jurisdiction-

a. the marriage was solemnized,

b. the parties last resided together,[7]

c. the respondent, at the time of presentation of petition resides, and

d. the petitioner is residing at the time of presentation of petition, in a case where the respondent is, at the time, residing outside the territories to which the Act extends has not been heard of being alive for seven years.

However, the rule of domicile replacing the nationality rule in most of the countries for assumption of jurisdiction and granting relief in matrimonial matters has resulted in conflict of laws. What is this domicile rule is not necessary to be gone into. But feasibility of a legislation safeguarding interests of women may be examined by incorporating such provisions as[8]-

1. No marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;
2. Provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.
3. The decree granted by Indian courts may be made executable in foreign courts both on principle of comity and by entering into reciprocal agreements like Section 44-A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court.

[7] Some of the cases under the Indian Divorce Act on residing togethermay be noted: Murphy v. Murphy, 1951 All. 180; Robey v. Robey, 1931 Cal. 121; Leaden v. Leaden, 1926 Oudh 319; Borgonah v. Borgonah, 22 Bom. L.R. 361: Henerjtta v. James, 47 P.R. 1911; Walsh v. Walsh, 29 Bom. L.R. 308. Cases on parties are residingare: Murphy v. Murphy, 1951 All. 180; Premlatika v. Provash, 1953 Cal. 242; Morton v. Morton, 1916 Lah. 256.

[8] NeerjaSaraph v. JayantSaraph,1994 (6) SCC 461.

This preposition has been discussed in case RupakRathi v Anita Chaudhary[9],whereinhusband instituted proceedings for divorce in UK and also obtained the decree of divorce,whereas wife instituted proceedings for divorce in India saying that India has jurisdiction to try the case, since both the parties are domiciled in India and their marriage was solemnized in India too. Court held that both parties are Hindus by religion, Indians by nationality and have a permanent domicile in India. It stated that the Hindu Marriage Act, 1955 will apply to parties in the present case. The parties were married according to Hindu Marriage Act, 1955 and have a permanent domicile of India. Further it was said that even viewed from this angle, it would be difficult to stretch the application of English law of divorce to the parties who are Hindus by religion and have a permanent domicile in India.

2. *Residence as a ground for jurisdiction*

As far as matrimonial jurisdiction is concerned the word 'residence' means the place where the parties have set up their permanent matrimonial home or abode where they live together[10], and where no such permanent home exists then it will be the place where they last resided together, though for few hours[11]. Even if it found that these conditions are not met with then the court will apply general provisions of the Civil Procedure Code.[12] Under the Indian Divorce Act, 1869 a petition in any matrimonial cause may be present to the District Court or the High Court,[13] on the basis of the residence of the parties within the jurisdiction or that the parties last resided together within the jurisdiction of the court,[14] or for dissolution of marriage, the parties are domiciled in India at the time of the presentation of the petition.[15] Further mandatory condition is that such a petition can be presented only if the marriage was solemnized in India, and further that the petitioner was resident in India at the time of the presentation of the petition.[16] In respect of a petition for judicial separation or restitution of conjugal rights, the additional requirement is that at the time of the presentation of the

[9]CR-3130-2013 (O&M) (Punjab & Haryana High Court, Apr, 2014).
[10]JagirKaur v JaswantKaur, AIR 1963, SC 1521.
[11]Murphy v. Murphy, AIR 1921, Bom.211.
[12]Hariram v Jasoti, AIR 1963, Bom.176.
[13]Section 10, 18, 23 and 32 ofIndian Divorce Act, 1869.
[14]*Id.* Section 3(3).
[15]*Id.* Section 2, para. 2.
[16]*Id.* Section 2, para. 3; Taylor v. Wenkenbasch (1937) Cal, 417; Agnes v. Paul, 59 Mad. 509.

petition the petitioner must be residing in India.[17] Thus, the main basis of jurisdiction is 'residence' which has been used in a broad sense.[18]

A recent judgment on this point clears this concept of residence in Niklesh Anil Rodrigues v Rachelle Anne Ornillo Montero[19]where the appellant was residing in Dubai at the moment for the purpose of service and permanently residing in Mumbai.The appellant had annexed a copy of his passport and all other relevant documents, which showed that he is permanentresident of India and he is an Indian citizen. The petition was presented by him in person to seek divorce from his wife who residedin Philippines. Family court came to a conclusion that the Family Court did not have jurisdiction to entertain the petition for divorce. However, Apex Court set aside the judgment referring to Smt. Satyav. Teja Singh[20], wherein husband had gone to the state of Nevada in U.S.A. for the purpose of obtaining a degree from the college. While he was staying there, he filed a petition for divorce and obtained an ex-parte decree in the Court of Nevada. The wife filed a petition in the Indian Court, and challenged the said foreign decree. The Apex Court then considered the law on the point and came to a conclusion that the husband was residing temporarily in Nevada and he was not a permanent resident. It was held that learned Judge of the Family Court had misinterpreted the provisions of Section 31 of Special Marriage Act, 1954 and had not taken into consideration the meaning of the terms "ordinarily residing" and "permanently residing", and also the word "domicile".

Lastly, it is manifest from ArathiBandi v. JagadrakshakaRao and Ors[21]that if a party initiates proceedings in a foreign court,the other party has the option of either accepting the jurisdiction of the foreign court or of refusing to submit to the foreign court and seek justice under Indian judicial system. The choice is a tacit one and is rarely presented on a platter by the concerned lawyer. Nevertheless, the choice is real and must be exercised with due care and thought. Once the choice is exercised and one presents oneself or some documents to the foreign court, the doors of Indian judicial system are largely shut.

CHOICE OF LAW

[17]*Id.* Section 2, para. 4.
[18]Panthaky v. Panthaky, 1941 Bom. 330.
[19]FCA No. 42 of 2016 (Bombay High Court, Sept, 2016).
[20]1975 S.C. 105.
[21]Cr. A. No. 934-36 of 2013 (Supreme Court of India, July, 2013).

After determining the question of jurisdiction courts have to decide the applicable law to the given case. In case of India, once the Indian court assumes jurisdiction to entertain a petition for divorce, it will be for the court to make choice of law if there is no general law on the point. In case there is any statutory direction making a particular choice of law obligatory, it will be bound to make choice of law accordingly. In the absence of such direction, the court will make its own choice of law in accordance with the general juristic principles as best as it can.[22] Where the parties are Indian residents or of Indian domicile then the dispute will be settled according to their personal law being the *lexfori*. If the marriage is a civil marriage whether performed in India or abroad or even if it has some foreign element, the court will apply the provisions of the Special Marriage Act, 1954, even if both the parties are Hindus, Christians or Parsis.[23] Hence, once the court has assumed its jurisdiction appropriately over a particular case under an Indian personal law statute in any matrimonial dispute which involve a foreign element then the dispute shall be ruled by Indian Law of the Statute under which jurisdiction has been assumed. In MandeepKaur v. Dharam Lingam[24]the respondent was a Canadian citizen. The appellant wife filed apetition for dissolution of marriage against the respondent husband under Hindu Marriage Act, 1955. Question was raised as to the extent and applicability of the Hindu Marriage Act, 1955as per Section 1(2) of the Act. On the basis of the provisions of Section 1(2) of the Act, it was held by the Court that the Act will apply to a Hindu outside of the territory of India only if such a Hindu is domiciled in the territory of India.In the absence of the pleadings on the part of the respondent, it could not be assumed that he was not aHindu domiciled in India by origin and residing outside the territory of India.

RECOGNITION OF FOREIGN DIVORCES IN INDIA

An important domain which remains once a foreign court has granted a decree of divorce is its recognition. In India since there is no separate legal enactment regarding recognition of foreign divorces, generally the principles given in section 13 of the Code of Civil Procedure[25] and section 41 of the Indian Evidence Act[26] operate in this regard. A foreign divorce is also recognized on the basis of existence of a real and substantial connection between the parties and

[22] Ayesha Bibiv.Subodh Chandra Chakravarty, 49 C.W.N.439.
[23]Christopher Neelkantham v Annie Neelkantham, AIR 1959, Raj.133.
[24]FAO-M No. 217 of 2015 (O&M) (Punjab & Haryana High Court, Oct, 2016).
[25]Section 13 of Code of Civil Procedure, 1908.
[26]Section 41 of Indian Evidence Act, 1872.

the court which exercised the divorce jurisdiction.[27] The approach taken by Indian judiciary regarding the recognition of foreign divorce decrees has been varied and not uniform in its application.

An interesting instance of an Indian court applying age old principles of English law is Teja Singh v. Smt. Satya[28], where the court gave an observation that: ". . . it now seems to be beyond all dispute that the domicile of the husband at the time of the suit for divorce is the sole test for the purpose of giving jurisdiction to the matrimonial court. Whatever doubts existed had long been laid to rest by the decision of the Privy Council in Le Mesurier v. Le Mesurier[29]…"[30] The court on this basis held that a decree of divorce pronounced by the court of domicile will be accorded recognition universally and would be recognized in India. Here, the court not only failed to take in consideration the changes in common law over nearly a century since Le Mesurier[31] was delivered but also failed to take any steps in developing Indian jurisprudence on the topic.

Although this decision was reversed by the Supreme Court on the finding of fact that husband was not actually domiciled in the foreign country and also on the ground that the foreign judgment is vitiated by fraud in relation to jurisdictional facts[32] , the concerns of not having a separate enactment dealing with recognition and enforcement of foreign divorces were widely felt and the Law Commission was set up which delivered its recommendations on the recognition of foreign divorces in its 65th report. But unfortunately, despite more than forty years having elapsed, no law along the lines of the recommendation of the Law Commission has been enacted yet and thus, it has been left to the judiciary to evolve principles governing the recognition of foreign divorces in India.

The Supreme Court in Y. NarasimhaRao v. Y. Venkata Lakshmi[33] was concerned with the recognition of the decree of dissolution of appellant's first marriage from the Missouri court in U.S.A when both parties were Indians and had been married in India, with the appellant-husband working in U.S.A and the respondent-wife who joined the appellant for some time returning to

[27]Marggarate v. Chacko AIR 1971 Ker 1.
[28](1970) 72 P.L.R. 235.
[29](1895) A.C. 517.
[30]*Id.*
[31]*Id.*
[32]Satya v. Teja Singh, 1975 S.C. 105.
[33](1991) 3 SCC 451.

and living in India. Having obtained the divorce decree from the Missouri court, the appellant had a second marriage in India. The respondent-wife soon thereafter filed a criminal complaint for the offence of bigamy against the appellant-husband. If the Supreme Court recognized the foreign divorce decree, the appellant's second marriage would become valid in India. If not, the appellant-husband would be liable for bigamy under the Indian penal laws for having contracted a second marriage during the subsistence of his first marriage. Further, in effect, the appellant and the respondent would be considered as legally wedded in India, while they are treated as divorced under the Missouri laws in United States.

The Apex Court unequivocally held that Indian courts will not recognize a foreign judgment if it had been obtained by fraud, which need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts. The court also held that a divorce obtained from a foreign court was invalid in India unless the basis was in accordance with provisions of the Indian divorce laws.[34] The court also went on to observe that "we cannot lose sight of the fact that today more than even in the past, the need for definitive rules for recognition of foreign judgments in personal and family matters, and particularly in matrimonial disputes, has surged to the surface....A large number of foreign decrees in matrimonial matters is becoming order of the day. A time has, therefore, come to ensure certainty in the recognition of the foreign judgments in these matters."[35]

In RupakRathi v. Anita Chaudhary[36], the Punjab and Haryana High Court has ruled that any judgment passed by a court of another country in a matrimonial dispute would not be considered conclusive in relation to the same matrimonial dispute pending before an Indian court.

Guidelines evolved by Supreme Court in Y. NarasimhaRao v. Y. Venkata Lakshmi[37]

The Supreme Court in Y. NarasimhaRao v. Y. Venkata Lakshmi[38]has made attempts to give guiding principles as to how Section 13[39] is to be interpreted in cases of recognition foreign divorce decrees in India.

[34]*Id.*
[35] *Id.*
[36] CR-3130-2013 (O&M) (Punjab & Haryana High Court, Apr, 2014).
[37](1991) 3 SCC 451.
[38]*Id.*
[39]Section 13 of Code of Civil Procedure, 1908.

1. The court interpreted section 13(a) of CPC, dealing with the competence of the foreign court's jurisdiction to pronounce the judgment that was sought to be recognized by the Indian court, to mean that only that court will be court of competent jurisdiction which the Act or the law under which the parties are married recognizes as a court of competent jurisdiction to entertain the matrimonial dispute. Further, any other court should be held to be a court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that court.
2. The court interpreted section 13(b) of C.P.C. to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. Furthermore, the latter requirement for the purpose of considering a judgment on merit will be fulfilled only when the respondent is duly served and voluntarily and unconditionally submits to the jurisdiction of the foreign court and contests the claim, or agrees to the passing of the decree with or without the appearance. Furthermore, mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court or an appearance in the courtfor objecting to the jurisdiction of the court should not be considered as a decision on the merits of the case.
3. The court interpreted the only law that could be applicable to the matrimonial disputes as the one under which the parties are married, and no other law under section 13(c). The court pointed out thatwhen a foreign judgment is founded on a jurisdiction or on a ground not recognized by such law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and therefore, unenforceable in India. For the same reason, such a judgment will also be unenforceable under clause (f) of section 13 since such a judgment would obviously be in breach of the matrimonial law in force in India.
4. Referring to section 13(d) dealing with recognition of the foreign decree based on the compliance of principles of natural justice by the foreign court, the Supreme Court gave consideration to their actual practice particularly in family law matters. The court pointed out that these principles should be applied at all stages of the litigation including the appellate proceedings. The court also called upon the foreign courts to ascertain and ensure such

effective contest by requiring the petitioner to make all the necessary provisions for the respondent to defend including the cost of travel, residence and litigation where necessary.

5. The court stated that Section 13(e), which requires that the courts in this country will not recognize a foreign judgment if it has been obtained by fraud, is self-evident. The court in this regard reiterated the position in Smt. Satya v Teja Singh[40] to be included in the definition of fraud.

It is evident that the Indian courts have evolved certain principles to guide the courts in uniform application in case of recognition of foreign divorces but a special statutory enactment would go a long way in solving the problems created in recognition of foreign divorces in India. Justice Chandrachud has suggested that the Hague Convention of 1970[41] which contains a comprehensive scheme for relieving the confusion caused by differing systems of conflict of laws may serve as amodel for evolving a statutory enactment on the subject.[42]

This would clearly be helpful and Article 10 of the Hague Convention expressly provides that the contracting States may refuse to recognize a divorce or legal separation if such recognition is manifestly incompatible with their public policy, so the considerations unique to the Indian context are also taken care of. But the Convention has certain provisions like clause (a) of paragraph 2 of Article 6 which provides for the recognition of a divorce or legal separation not being refused because the internal law of the State in which such recognition is sought not allowing divorce orlegal separation upon the same facts, which if implemented would result in recognition of foreign divorces on grounds like irretrievable breakdown of marriage which are still not recognized in India. But in RupakRathi v. Anita Chaudhary[43] the court has held that no decree of divorce obtained from a foreign court could be sustained on ground of irretrievable break down of marriage. Hence, there is a cause of understandable hesitation in enacting a law along the lines of the Convention.

Furthermore, clause (b) of paragraph 2 of Article 6 of the Convention provides that the recognition of a divorce or legal separation not being refused because of application of law other than that applicable under the rules of private international law of that State, which is manifestly

[40] *Id.*
[41] Hague Convention on the Recognition of Divorces and Legal Separations, 1970.
[42] Smt. Satya v. Teja Singh, 1975 S.C. 105.
[43] CR-3130-2013 (O&M) (Punjab & Haryana High Court, Apr, 2014).

contrary to the ruling of the Supreme court of India in Y. NarasimhaRao v. Y. Venkata Lakshmi[44]. Therefore, there is a need of enacting a law which takes into consideration the conditions peculiar to Indian circumstances although the Hague Convention of 1970 may serve as a general model.

RECOGNITION OF FOREIGN CUSTODY AND GUARDIANSHIP ORDER

An Indian court will recognize and give effect to a foreign court's order as to the custody and guardianship of a minor, if the foreign order satisfies the requirements of Section 13 of the Code of Civil Procedure, 1908, [21]accordingly the rights of a guardian appointed under the law of a foreign country will be recognized in India. Probably, an Indian court will recognize the jurisdiction of a foreign court to appoint a guardian if and only if, the circumstances leading to the exercise of jurisdiction on the part of the foreign court correspond to those that would prompt an Indian court to exercise its inherent jurisdiction. This position of law has been explained briefly by reference to two recent judgments of the court:

In JitenderArora v. SukritiArora[45] marriage was solemnized in India and later parties shifted to UK. Due to some bitter relations between them they sought divorce and their daughter started to live with her father in India. Mother who lived in UK pleaded for custody of her child in India, which was granted. However, the Apex Court set aside this judgment and allowed the father to continue to live with his child as she was mature enough to decide what is best for her and unequivocally decided to stay with father and she did not want to go to U.K.Further the respondent was given an opportunity to rebuild her relationship with her child, but even after this the child decided to stay with her father. The court emphasized that welfare of the child is the paramount consideration that the court has to consider while appointing a guardian.

In ArathiBandi v. JagadrakshakaRao[46], the wife disobeyed the orders of the USA court and brought the child to India. After she had come to India, the husband followed her and moved the Andhra Pradesh High Court with a habeas corpus petition asking for custody of the child. The High Court issued orders in favor of the husband. The Apex Court confirmed the orders of the High Court. The court here specifically approved the modern theory of conflict of laws, which prefers the jurisdiction of state which has the most intimate contact with the issue arising in the

[44](1991) 3 SCC 451.
[45]Cr A. No. 717 of 2013 (Supreme Court of India, Feb, 2017).
[46]Cr. A. No. 934-36 of 2013 (Supreme Court of India, July, 2013).

case otherwise it will lead to forum shopping. It was also held that merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. The court also observed that it would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.

CONCLUSION

It has indeed been unfortunate that Indian courts have in some cases blindly followed the age old common law principlessuch as on the point of the unity of domicile of the wife and husband. There is a need that the courts adjudge cases by evolving principles more suited to the Indian scenario and with regard to considerations peculiar to the Indian context.

A need for a special statutory enactment is especially felt to reconcile the views of different courts regarding issues involved in conflict of laws governing divorce as the courts have not been consistent in their approach.

But in the meanwhile, until the legislature overcomes its legislative inertia in enacting a statutory law on the subject; the Indian courts have, especially since the 1990s done a proactive job in setting guidelines and evolving principles to develop jurisprudence on conflict of laws of divorce which is more suited to Indian circumstances. This is why that the future of development of Indian jurisprudence on conflict of laws of matrimonial reliefs is in no way bleak and it is our hope that the Indian judiciary would continue to maintain a balance in ensuring that divorces with an international element do not become unnecessarily difficult while at the same time also safeguarding the interests of innocent spouses abandoned by forum shopping.