LL.B. III Term

LB-3032 - Private International Law

Cases Selected and Edited by

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LL.B. III TERM
PRIVATE INTERNATIONAL LAW

BOOKS RECOMMENDED

1. Paras Diwan, Private International Law, 4th Ed., Deep and Deep (1998)
2. Atul M Setalvad, Conflict of Laws, 3rd Ed., Lexis Nexis(2014)
3. V. C. Govindaraj, Conflict of Laws in India, 2nd Ed. Oxford University Press (2019)
4. Cheshire, North & Fawcett: Private International Law, 15th Ed. Oxford University Press (2017)

I. DEFINITION, NATURE AND SCOPE OF PRIVATE INTERNATIONAL LAW

Definition, Nature , Scope, Foreign Element;

Unification of Private International Law, Hague Conventions of Private International Law; blurring the distinction between Public and Private International Law;

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Immovable properties- S.16 CPC

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M. V. Elizabeth v. *Harwan Investment and Trading Goa,* 1993 AIR 1014

Matrimonial matters - as per the applicable law

Custody of child - Guardians and Ward Act, 1890 – S.9 (ordinary residence)

Ruchi Majoo v. *Sanjeev Majoo,* AIR 2011 SC 1952

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Modi Entertainment Network v. *W.S. G. Cricket Pvt. Ltd.,* AIR 2003 SC 1177; *Piramal healthcare Ltd.* v. *Dia Sorin S.p.A*, Delhi HC, decided on 26 Aug, 2010

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Amin Rashid Shipping Corporation v. *Kuwait Insurance Company,* [1983] AC *50*
1980 Rome Convention on the Law Applicable to Contractual Obligations

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Neeraja Saraph v. *Jayant V. Saraph,* 1994(4) SCALE 445 **86**

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VII. ARBITRAL AWARDS

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Note: The above topics/cases are not exhaustive. The teachers teaching the course have liberty to add new topics/cases.

Kedar Pandey v. Narain Bikram Seth
AIR1966SC160

Ramaswami, J. - 1. Both these appeals are brought by certificate against the judgment and decree of the High Court of Judicature at Patna dated March 26, 1964, pronounced in Election Appeals Nos. 8 and 10 of 1963.

2. The appellant - Kedar Pandey and the respondent - Narain Bikram Sah (hereinafter called Narain Raja) were the contesting candidates in the year 1962 on behalf of the Congress and Swatantra Party respectively for the election to Bihar Legislative Assembly from Ramnagar Constituency in the district of Champaran. The nomination papers of the appellant and the respondent and two other - Parmeshwar Prasad Roy and Suleman Khan - were accepted by the Returning Officer without any objection on January 22, 1962. Later on the two candidates - Parmeshwar Prasad Roy and Suleman Khan - withdrew their candidatures. After the poll the respondent, Narain Raja was declared elected as member of the Bihar Legislative Assembly by majority of valid votes. On April 11, 1962 Kedar Pandey filed an election petition challenging the election of the respondent. It was alleged by Kedar Pandey that the respondent was not duly qualified under Art. 173 of the Constitution of India to be a candidate for election as he was not a citizen of India. According to Kedar Pandey the respondent, his parents and grand-parents were all born in Nepal and, therefore, on the date of the election, the respondent - Narain Raja-was not qualified to be chosen to fill the Assembly seat for which he had been declared to have been elected. According to Kedar Pandey the respondent was related to the royal family of Nepal and the father of the respondent - Rama Raja - owned about 43 bighas of land and a house at Barewa in Nepal in which the respondent had a share along with his three other brothers. The election petition was contested by the respondent who said that he was an Indian citizen and there was no disqualification incurred under Art. 173 of the Constitution. The further case of the respondent was that he had lived in India since his birth and that he was a resident of Ramnagar in the district of Champaran and not of Barewa in Nepal. The respondent claimed that he was born in Banaras and not at Barewa.

3. Upon these rival contentions it was held by the Tribunal that the respondent - Narain Raja - was not a citizen of India and, therefore, was not qualified under Art.173 of the Constitution for being chosen to fill a seat in the Bihar Legislative Assembly. The Tribunal, therefore, declared that the election of the respondent was void. But the Tribunal refused to make a declaration that Kedar Pandey was entitled to be elected to Bihar Legislative Assembly for that Constituency. Both the appellant and the respondent preferred separate appeals against the judgment of the Election Tribunal to the High Court of Judicature at Patna. The High Court in appeal set aside the judgment of the Tribunal and upheld the election of the respondent - Narain Raja. The High Court found, on examination of the evidence, that Narain Raja, the respondent before us, was born in Banaras on October 10, 1918 and the respondent was living in India from 1939 right upto 1949 and even thereafter. The High Court further found that long before the year 1949 Narain Raja had acquired a e of choice in Indian territory and, therefore, acquired the status of a citizen of India both under Art. 5(a) and (c) of the Constitution. On these findings the High Court took the view that Narain Raja was duly qualified for being elected to the Bihar Legislative Assembly and the election petition filed by the appellant - Kedar Pandey- should be dismissed.

4. The main question arising for decision in this case is whether the High Court was right in its conclusion that the respondent - Narain Raja - was a citizen of India under Art. 5 of the Constitution of India on the material date.

5. The history of the family of Narain Raja is closely connected with the history of Ramnagar estate. It appears that Ramnagar estate in the district of Champaran in Bihar originally belonged to Shri Prahlad Sent after whose death the estate came into the possession of Shri Mohan Vikram Sah, popularlyknown as Mohan Raja. After the death of Mohan Raja the estate came into the possession of Rani Chhatra Kumari Devi, the widow of Mohan Raja, and after the death of Rani Chhatra Kumari Devi, the estate came into the possession of Rama Raja alias Mohan Bikram Sah, the father of the respondent - Narain Raja. It is in evidence that the daughter of Prahlad Sen was married to Shri Birendra Vikram Sah, the father of Mohan Raja. Mohan Raja died without any male issue but during his lifetime he had adopted Rama Raja, the father of the respondent and by virtue of a will executed by Mohan Raja in the year 1904 in favour of his wife Rani Chhatra Kumari Devi the Rani became entitled to the Ramnagar estate on the death of Mohan Raja (which took place in 1912), in preference to the adopted son Rama Raja since the properties belonged to Mohan Raja in his absolute right and not as ancestral properties. After the death of Rani Chhatra Kumari Devi in 1937 Rama Raja came into the possession of the Ramnagar estate. In the year 1923, Rani Chhatra Kumari Devi had filed R.S. No. 4 of 1923 against Rama Raja in the Court of Sub-Judge, Motihari with regard to a village which Rama Raja held in Ramnagar estate on the basis of a Sadhwa Patwa lease. Rama Raja in turn filed T.S. No. 34 of 1924 in the Court of Subordinate Judge of Motihari against Rani Chhatra Kumari Devi and others claiming title to Ramnagar estate and for possession of the same on the basis of his adoption by Mohan Raja. The Title Suit and the Rent Suit were heard together by the Additional Sub-Judge, Motihari who, by his judgment dated August 18, 1927 decreed the Title Suit filed by Rama Raja and dismissed the Rent Suit filed by Rani Chhatra Kumari Devi. There was an appeal to the High Court of Patna which dismissed the appeal. Against the judgment of the High Court appeals were taken to the Judicial Committee of the Privy Council. The appeal was decided in favour of Rani Chhatra Kumari Devi and the result was that the Title Suit filed by Rama Raja was dismissed and Rent Suit filed by Rani Chhatra Kumari Devi was decreed. In the course of judgment the Judicial Committee did not disturb the finding of the trial Court that Rama Raja was an adopted son of Shri Mohan Vikram Sah alias Mohan Raja and accepted that finding as correct; but the Judicial Committee held that Ramnagar estate was not the ancestral property of Mohan Raja, but he got that property by inheritance, he being the daughter's son of Prahlad Sen, the original proprietor of that estate. In view of this circumstance, the Judicial Committee held that though Rama Raja was the adopted son of Mohan Raja, Rama Raja was not entitled to the estate in view of the will executed by Mohan Raja in favour of Rani Chhatra Kumari Devi in the year 1904. It appears that in the year 1927 Rama Raja had taken possession of Ramnagar estate and got his name registered in Register D and remained in possession till the year 1931 when he lost the suit in Privy Council. After the decision of Privy Council, Rani Chhatra Kumari Devi again came into possession of Ramnagar estate and continued to remain in possession till she died in 1937. It is in evidence that after the death of Rani Chhatra Kumari Devi, Rama Raja obtained possession of Ramnagar estate and continued to remain in possession thereof from 1937 till 1947, the year of his death. There is evidence that Rama Raja died in Bombay and his dead-bodywas cremated in Banaras.

6. It is also in evidence that during the lifetime of Rama Raja there was a partition suit in the year 1942 - No. 40 of 1942 - for the partition of the properties of the Ramnagar estate among Rama Raja and his sons including the respondent. This suit was filed on September 29, 1942 in the Court of the Subordinate Judge at Motihari. A preliminary decree - Ex. 1(2) - was passed on April 16, 1943 on compromise and the final decree - Ex 1(1) in the suit was passed on May 22, 1944. From the two decrees it appears that Ramnagar estate was comprised of extensive properties including

zamindari interest in a large number of villages and the estate had an extensive area of Bakasht lands. By the said partition the estate was divided among the co-shares but certain properties including forests in the estate were left joint.

7. On behalf of the appellant Mr. Aggarwala put forward the argument that the High Court was not justified in holding that Narain Raja was born in Banaras in the year 1918. According to the case of the appellant Narain Raja was born at a place called Barewa in Nepal. In order to prove his case the appellant examined two witnesses - Sheonath Tewari (P.W. 18) and N. D. Pathak (P.W. 15). The High Court held that their evidence was acceptable. There was also a plaint (Ex. 8) produced on behalf of the appellant to show that Narain Raja was born at Barewa. This plaint was apparently filed in a suit brought by the respondent for the realisation of money advanced by the respondent's mother to one Babulal Sah. The place of birth of the respondent is mentioned in this plaint as Barewa Durbar. The High Court did not attach importance to Ex. 8 because it took the view that the description of the place of birth given in the document was only for the purpose of litigation. It further appears from Ex. 8 that it was not signed by the respondent but by one Subhan Mian Jolaha described as 'Agent'. On behalf of the respondent R.W. 9 - G. S. Prasad was examined to prove that Narain Raja was born at Banaras. The High Court accepted the evidence of this witness and also of the respondent himself on this point. It was submitted by Mr. Aggarwala that there were two circumstances which indicate that the respondent could not have been born at Banaras: In the first place, it was pointed out, the municipal registers of Banaras for the year 1918 - Ex. 2 series - did not mention the birth of the respondent. It was explained on behalf of the respondent that the house at Mamurganj in which the respondent was born was not included within the limits of the municipality in the year 1918, and that the omission of the birth of the respondent in the municipal registers was therefore, of no significance. It was contended on behalf of the appellant that there was litigation with regard to properties of Ramnagar estate between the respondent's father and Rani Chhatra Kumari Devi and therefore the evidence of P.W. 9, G. S. Prasad that Rama Raja was living with Rani Chhatra Kumari Devi at Ramnagar even during her lifetime cannot be accepted as true. It was, therefore, suggested that it was highly improbable that Narain Raja should have been born at Banaras in the year 1918, as alleged, in the house belonging to Ramnagar estate. We do not, however, think it necessary to express any concluded opinion on this question of fact but proceed to decide the case on the assumption that Narain Raja was not born in the territory of India, in the year 1918. The reason is that the place of birth of Narain Raja has lost its importance in this case in view of the concurrent findings of both the High Court and the Tribunal that for a period of 5 years preceding the commencement of the Constitution Narain Raja was ordinarily resident in the territory of India. Therefore the requirement of Art. 5(c) of the Constitution is fulfilled. Mr. Aggarwala on behalf of the appellant did not challenge this finding of the High Court. It is, therefore, manifest that the requirement of Art. 5(c) of the Constitution has been established and the only question remaining for consideration is the question whether Narain Raja had his domicile in the territory of India at the material time.

8. Upon this question it was argued before the High Court on behalf of the respondent that the domicile of origin of Mohan Raja may have been in Nepal but he had acquired a domicile of choice in India after inheriting Ramnagar Raj from his maternal grandfather Prahlad Sen. It was said that Mohan Raja had settled down in India and had married all his 4 Ranis in Ramnagar. It was argued, therefore, that at the time when Mohan Raja had adopted Rama Raja in 1903 Mohan Raja's domicile of choice was India. It was said that by adoption in 1903 Rama Raja became Mohan Raja's son and by fiction it must be taken that Rama Raja's domicile was India as if he was Mohan Raja's son. It was contended in the alternative that whatever may have been Rama Raja's domicile

before 1937 when Rani Chhatra Kumari Devi died, Rama Raja acquired a domicile of choice in India when he came to India on the death of Rani Chhatra Kumari Devi. It was also stated on behalf of the respondent that Rama Raja remained in possession of the Ramnagar estate until his death in 1947. The High Court, however, held, upon examination of the evidence, that there was no material on the record to decide the question of Mohan Raja's domicile. It was also held by the High Court that it was not possible to ascertain from the evidence whether there was any intention of Rama Raja to settle down in India and make it his permanent home. In any event, Narain Raja was born in the year 1918 and unless the domicile of Rama Raja in 1918 was ascertained the domicile of origin of Narain Raja will remain unknown. The High Court therefore, proceeded upon the assumption that Narain Raja had his domicile of origin in Nepal and examined the evidence to find out whether Narain Raja had deliberately chosen the domicile of choice in India in substitution for the domicile of origin.

9. The crucial question for determination in this case, therefore, is whether Narain Raja had acquired the domicile of choice in India.

10. The law on the topic is well-established but the difficulty is found in its application to varying combination of circumstances in each case. The law attributes to every person at birth a domicile which is called a domicile of origin. This domicile may be changed, and a new domicile, which is called a domicile of choice, acquired; but the two kinds of domicile differ in one respect. The domicile of origin is received by operation of law at birth; the domicile of choice is acquired later by the actual removal of an individual to another country accompanied by his *animus manendi*. The domicile of origin is determined by the domicile, at the time of the child's birth, of that person upon whom he is legally dependent. A legitimate child born in a wedlock to a living father receives the domicile of the father at the time of the birth; a posthumous legitimate child receives that of the mother at that time. As regards change of domicile, any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely. For this purpose residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material. The state of mind, or *animus manendi*, which is required demands that the person whose domicile is the object of the inquiry should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or, in effect, he should have formed a deliberate intention to settle there. It is also well-established that the onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown (see ***Winans* v. *Attorney-General*.** [1904] A.C.287 In ***Munro* v. *Munro***, 7 CI. 876 Lord Cottenham states the rule as follows:

"The domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile , and acquiring another as his sole domicile. To effect this abandonment of the domicile of origin, and substitute another in its place, it required *animo et facto*, that is, the choice of a place, actual residence in the place then chosen and that it should be the principal and permanent residence, the spot where he had placed *larem rerumque ac fortunarum suarum summam*. In fact, there must be both residence and intention. Residence alone has no effect, per se, though it may be most important as a ground from which to infer intention."

In ***Aikman* v. *Aikman,*** 3 Mac 854, Lord Campbell has discussed the question of the effect on domicile of an intention to return to the native country, where such intention is attributable to an undefined and remote contingency. He said:

"If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency, will not prevent such a residence in a foreign country from putting an end to his domicile of origin. But a residence in a foreign country for pleasure, lawful or illicit, which residence may be changed at any moment, without the violation of any contract or any duty, and is accompanied by an intention of going back to reside in the place of birth, or the happening of an event which in the course of nature must speedily happen, cannot be considered as indicating the purpose to live and die abroad."

11. On behalf of the appellant Mr. Aggarwala relied on the decision of the House of Lords in ***Moorhouse* v. *Lord***, 10 H.L. Cas 272 in which it was held that in order to lose a domicile of origin, and to acquire a new domicile, a man must intend *quatenus in illo exuere patriam* and there must be a change of nationality, that is natural allegiance. It is not enough for him to take a house in the new country, even with the probability and the belief that he may remain there all the days of his life. But the principal laid down in this case was discussed in ***Udny* v. *Udny***, L.R. 1 H.L. 441 which decision is the leading authority on what constitute a domicile of choice taking the place of a domicile of origin. It is there pointed out by Lord Westbury that the expressions used in ***Moorhouse* v. *Lord***, 10 H.L. Cas. 272 as to the intent *exuere patriam*[1], are calculated to mislead, and go beyond the question of domicile. At page 458 Lord Westbury states:

"Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time. This is description of the circumstances which create or constitute a domicile and not a definition of the term. There must be residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness, and it must be a residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary or intended for a limited period, may, afterwards become general and unlimited; and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established."

13. In the next case - ***Doucet* v. *Geoghegan***, 9 Ch. Div. 441 the Court of Appeal decided that the testator had acquired in English domicile; and one of the main facts relied on was that he had twice married in England in a manner not conforming to the formalities which are required by the French Law for the legalisation of marriages of Frenchmen in a foreign country. James L.J. stated as follows:

"Both his marriages were acts of unmitigated scoundrelism, if he was not a domiciled Englishman. He brought up his children in this country; he made his will in this country, professing to exercise testamentary rights which he would not have if he had not been an Englishman. Then with respect to his declarations, what do they amount to ? He is reported to have said that when he had made his fortune he would go back to France. A man who says that, is like a man who expects to reach the horizon and finds it at last no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life."

In our opinion, the decisions of the English Courts in ***Undy* v. *Undy*** L.R. 1 H.L.44 and ***Doucet* v. *Geoghegan*** represent the correct law with regard to change of domicile of origin. We are

[1] To throw off or renounce one's country or native allegiance (The lawdictionary.org)

of the view that the only intention required for a proof of a change of domicile is an intention of permanent residence. In other words, what is required to be established is that the person who is alleged to have changed his domicile of origin has voluntarily fixed the habitation of himself and his family in the new country, not for a mere special of temporarypurpose, but with a present intention of makingit his permanenthome.

13. Against this background of law we have to consider the facts in the present case for deciding whether Narain Raja had adopted India as his permanent residence with the intention of making a domicile of choice there. In other words, the test is whether Narain Raja had formed the fixed and settled purpose of making his home in India with the intention of establishing himself and his familyinIndia.

14. The following facts have been either admitted by the parties or found to be established in this case. Narain Raja was educated in Calcutta from 1934 to 1938. From the year 1938onwards Narain Raja lived in Ramnagar. After Rama Raja's death in 1947 Narain Raja continued to live in Ramnagar, being in possession of properties obtained by him under compromise in 1944. In the course of his statement Narain Raja deposed that his father had built a palace in Ramnagar between 1934 and 1941 and thereafter Narain Raja himself built a house at Ramnagar. Before he had built his house, Narain Raja lived in his father's palace. There is the partition suit between Narain Raja and his brothers in the year 1942. Exhibits 1(2) and 1(1) are the preliminary and final decrees granted in that suit. After the partition Narain Raja was looking after the properties which were left joint and was the manager thereof. The extensive forests of Ramnagar estate were not partitioned and they had been left joint. Narain Raja used to make settlement of the forests on behalf of the Raj and pattas used to be executed by him. After partition, he and his wife acquired properties in the district of Champaran, in Patna and in other places. Narain Raja and his wife and children possessed 500 or 600 acres of land in the district of Champaran. Narain Raja managed these properties from Ramnagar. He had also his houses in Bettiah, Chapra, Patna and Benaras. The forest settlements are supported by Exhibits X series, commencing from 1943, and by Ex. W of the year 1947. Then, there are registered pattas excluded by Narain Raja of the year 1945, which are Exs. W/3, W/4, and W/5. There are documents which prove acquisition of properties in the name of Narain Raja's wife - F(1), F(2), F(3), and F(5). Exhibit F(4) shows the purchase of 11 bighas and odd land at Patna by Narain Raja. It is also important to notice that Narain Raja had obtained Indian Passport dated March 23, 1949 from Lucknow issued by the Governor-General of India and he is described in that Passport as Indian by birth and nationality and his address is given as Ramnagar of Champaran district. In the course of his evidence Narain Raja said that he had been to Barewa for the first time with his father when was 10 or 12 years old. He also said that he had not gone to Barewa for ten years before1963.

15. The High Court considered that for the determination of the question of domicile of a person at a particular time, the course of his conduct and the facts and circumstances before and after that time are relevant. We consider that the view taken by the High Court on this point is correct and for considering the domicile of Narain Raja on the date of coming into force of the Constitution of India his conduct and facts and circumstances subsequent to the time should also be taken into account. This view is borne out by the decision of the Chancery Court in ***In re Grove Vaucher* v. *The Solicitor to the Treasury,*** (1889) 40 Ch. 216 in which the domicile of one Marc Thomegay in 1744 was at issue and various facts and circumstances after 1744 were considered to be relevant. At page 242 of the report Lopes, L.J. has stated:

"The domicile of an independent person is constituted by the *factum* of residence in a country and the *animus manendi*, that is, the intention to reside in that country for an indefinite period.

During the argument it was contended that the conduct and acts of Marc Thomegay subsequently to February, 1744, at the time of the birth of Sarah were inadmissible as evidence of Marc Thomegay's intention to permanently reside in this country at that time. It was said that we must not regard such conduct and acts in determining what the state of Marc Thomegay's mind was in February, 1744. For myself I do not hesitate to say I was surprised at such a contention; it is opposed to all the rules of evidence, and all the authorities with which I am acquainted. I have always understood the law to be, that in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at the time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight of cogency. The law, I thought, was so well-established on that subject that I should not have thought it necessary to allude to this contention, unless I had understood that the propriety of admitting this evidence was somewhat questioned by Lord Justice Fry, a view which I rather now gather from his judgment he has relinquished."

16. We are, therefore, of opinion that the conduct and activities of Narain Raja subsequent to the year 1949 are relevant but we shall decide the question of his domicile in this case mainly in the light of his conduct and activities prior to the year 1949.

17. Reverting to the history of Narain Raja's life from 1950 onwards, it appears that he had married his wife in 1950. His wife belonged to Darkoti in Himachal Pradesh near Patiala. The marriage had taken place at Banaras. Narain Raja had a son and a daughter by that marriage and according to his evidence the daughter was born in Banaras and the son was born in Bettiah. The daughter prosecutes her studies in Dehradun. In 1950 or 1951 Narain Raja had established a Sanskrit Vidalya in Ramnagar in the name of his mother, called Prem Janani Sanskrit Vidyalaya. The story of Narain Raja's political activities is as follows: There was a Union Board in Ramnagar before Gram Panchayats had come into existence, of which Narain Raja was the Chairman or President. After Gram Panchayats were established, the Union Board was abolished. Narain Raja was a voter in the Gram Panchayat and he was elected as the Vice-President of the Union called C.D.C.M. Union of Ramnagar. For the General Elections held in 1952 Narain Raja was a voter from Ramnagar Constituency. In the General Election of 1957 he stood as a candidate opposing Kedar Pandey. Thereafter, he became the President of the Bettiah Sub-divisional Swatantra Party and then Vice-President of Champaran District Swatantra Party.

18. Taking all the events and circumstances of Narain Raja's life into account we are satisfied that long before the end of 1949 which is the material time under Art. 5 of the Constitution, Narain Raja had acquired a domicile of choice in India. In other words, Narain Raja had formed the deliberate intention of making his home with the intention of permanently establishing himself and his family in India. In our opinion, the requisite *animus manendi* has been proved and the finding of the High Court is correct.

19. On behalf of the appellant Mr. Aggarwala suggested that there were two reasons to show that Narain Raja had no intention of making his domicile of choice in India. Reference was made, in this context, to Ex. 10(c) which is a Khatian prepared in 1960, showing certain properties standing in the name of Narain Raja and his brothers in Nepal. It was argued that Narain Raja had property in Nepal and so he could not have any intention of living in India permanently. It is said by the respondent that the total area of land mentioned in the Khatian was about 43 bighas. The case of Narain Raja is that the property had belonged to his natural grandmother named Kanchhi Maiya who had gifted the land to Rama Raja. The land was the exclusive property of Rama Raja, and after his death, the property devolved upon his sons. The case of Narain Raja on this point is proved by a Sanad (Ex. AA). In any event, we are not satisfied that the circumstance of Narain Raja owning the

property covered by Ex. 10(c) can outweigh the fact that Narain Raja alone had extensive properties in India after the partition decree of the year 1944.

20. It was also pointed out on behalf of the appellant that Narain Raja, and before him Rama Raja, had insisted upon designating themselves "Sri 5" indicating that they belonged to the royal family of Nepal. It was argued on behalf of the appellant that Narain Raja had clung tenaciously to the title of "Sri 5", thereby indicating the intention of not relinquishing the claim to the throne of Nepal if at any future date succession to the throne falls to a junior member of the family of the King of Nepal. We do not think there is any substance in this argument. It is likely that Narain Raja and his father Rama Raja had prefixed the title of "Sri 5" to their names owing to the pride of their ancestry and sentimental attachment to the traditional title and this circumstance has no bearing on the question of domicile. Succession to throne of Nepal is governed by the rule of primogeniture and it cannot be believed that as the second son of his father, Narain Raja could ever hope to ascend to the throne of Nepal, and we think it is unreasonable to suggest that he described himself as "Sri 5" with the intention of keeping alive his ties with Nepal. There was evidence in this case that Narain Raja's elder brother Shiv Bikram Sah has left male issues.

21. For the reasons expressed, we hold that Narain Raja had acquired domicile of choice in India when Art. 5 of the Constitution came into force. We have already referred to the finding of the High Court that Narain Raja was ordinarily resident in India for 5 year immediately preceding that time when Art. 5 of the Constitution came into force. It is manifest that the requirements of Art. 5(c) of the Constitution are satisfied in this case and the High Court rightly reached the conclusion that Narain Raja was a citizen of India at the relevant time.

22. We accordingly dismiss both these appeals with costs. One set.

23. Appeals dismissed.

D.P. Joshi v. State of Madhya Pradesh
AIR 1955 SC 334

Venkatarama Ayyar, J.

In place of the rule that "Madhya Bharat students are exempted from capitation fees" a new rule was substituted, which runs as follows:

"For all students who are 'bona fide residents' of Madhya Bharat no capitation fee should be charged. But for other non-Madhya Bharat students the capitation fee should be retained as at present at Rs. 1,300 for nominees and at Rs. 1,500 for others".

[Vide Exhibit 6/1 quoted in ***Rustam Mody* v. *State***: ***Sumitra Devi* v. *State,*** I.L.R. 1953 M P 87,.

'Bona fide resident' for the purpose of this rule was defined as:

"one who is -

(a) a citizen of Indian whose original domicile is in Madhya Bharat, provided he has not acquired a domicile elsewhere, or

(b) a citizen of India, whose original domicile is not in Madhya Bharat but who has acquired a domicile in Madhya Bharat and has resided there for not less than 5 years at the date, on which he applies for admission, or

(c) a person who migrated from Pakistan before September 30, 1948 and intends to reside in Madhya Bharat permanently, or

(d) a person or class of persons or citizens of an area or territory adjacent to Madhya Bharat or to India in respect of whom or which a Declaration of Eligibility has been made by the Madhya Bharat Government".

In brief, the change effected by the new rule was that whereas previously exemption from capitation fee was granted in favour of all Madhya Bharat students whatever that might mean, under the revised rule it was limited to bona fide residents of Madhya Bharat.

5. Now the contention of Mr. N. C. Chatterjee for the petitioner is that this rule is in contravention of articles 14 and 15(1), and must therefore be struck down as unconstitutional and void. Article 15(1) enacts:

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

The argument of the petitioner is that the rule under challenge in so far as it imposes a capitation fee on students who do not belong to Madhya Bharat while providing an exemption there from the students of Madhya Bharat, makes a discrimination based on the place of birth, and that it offends article 15(1).

Whatever force there might have been in this contention if the question had arisen with reference to the rule as it stood when the State took over the administration, the rule was modified in 1952, and that is what we are concerned with in this petition. The rule as modified is clearly not open to attack as infringing article 15(1). The ground for exemption from payment of capitation fee as laid down therein is bona fide residence in the State of Madhya Bharat. Residence and place of birth are two distinct conceptions with different connotations both in law and in fact, and when article 15(1) prohibits discrimination based on the place of birth, it cannot be read as prohibiting discrimination based on residence. This is not seriously disputed.

The argument that is pressed on us is that though the rule purports to grant exemption based on residence within the State, the definition of bona fide residence under the rule shows that the

exemption is really based on the place of birth. Considerable emphasis was laid on clauses (a) and (b) of the rule wherein 'residence' is defined in terms of domicile, and it was argued that the original domicile, as it is termed in the rules, could in substance mean only place of birth, and that therefore the exemption based on domicile was, in effect, an exemption based on place of birth under an alias. That, however, is not the true legal position.

Domicile of a person means his permanent home. "Domicile meant permanent home, and if that was not understood by itself no illustration could help to make it intelligible" observed Lord Cranworth in ***Whicker* v. *Hume*** [1859] 28 L.J. Ch. 396. Domicile of origin of a person means "the domicile received by him at his birth". (Vide Dicey on Conflict of Laws, 6th Edition, page 87). The learned author then proceeds to observe at page 88:

"The domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance, or the country of the infant's nationality".

In ***Somerville* v. *Somerville***, [1801] 5 Ves. 750, Arden, Master of Rolls, observed:

"I speak of the domicile of origin rather than of birth. I find no authority which gives for the purpose of succession any effect to the place of birth. If the son of an Englishman is born upon a journey, his domicile will follow that of his father".

6. Mr. N. C. Chatterjee argued that domicile of origin was often called domicile of birth, and invited our attention to certain observations of Lord Macnaghten in ***Winans* v. *Attorney-General,*** (1904 A.C. 287, 290. But then, the noble Lord went on to add that the use of the words "domicile of birth" was perhaps not accurate. But that apart, what has to be noted is that whether the expression used is "domicile of origin" or "domicile of birth", the concept involved in it is something different from what the words "place of birth" signify. And if "domicile of birth" and "place of birth" cannot be taken as synonymous, then the prohibition enacted in article 15(1) against discrimination based on place of birth cannot apply to a discrimination based on domicile.

7. It was argued that under the Constitution there can be only a single citizenship for the whole of India, and that it would run counter to that notion to hold that the State could make laws based on domicile within their territory. But citizenship and domicile represent two different conceptions. Citizenship has reference to the political status of a person, and domicile to his civil rights. A classic statement of the law on this subject is that of Lord Westbury in ***Udny* v. *Udny,*** [1869] L.R. 1 Sc. & Div. 441. He observes:

"The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal statuses or conditions: one by virtue of which he becomes the subject of some particular country binding him by the tie of national allegiance, and which may be called his political status, another by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status.

The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend".

Dealing with this question Dicey says at page 94:

"It was, indeed, at one time held by a confusion of the ideas of domicile and nationality that a man could not change his domicile, for example, from England to California, without doing at any

rate as much as he could to become an American citizen. He must, as it was said, *'intend quatenus in illo exuere patriam'*. But this doctrine has now been pronounced erroneous by the highest authority".

Vide also the observations of Lord Lindley in 1904 A.C. 287, 299 (D).

In Halsbury's Laws of England, Vol. VI the law is thus stated at page 198, para 242:

"English law determines all questions in which it admits the operation of a personal law by the test of domicile For this purpose it regards the organisation of the civilised world in civil societies, each of which consists of all those persons who live in any territorial are which is subject to one system of law, and not its organisation in political societies or States, each of which may either be co-extensive with a single legal system or mayunite several systems under its own sovereignty".

Under the Constitution, article 5, which defines citizenship, itself proceeds on the basis that it is different from domicile, because under that article, domicile is not by itself sufficient to confer on a person the status of a citizen of this country.

8, A more serious question is that as the law knows only of domicile of a country as a whole and not of any particular place therein, whether there can be such a thing as Madhya Bharat domicile apart from Indian domicile. To answer this question we must examine what the word "domicile" in law imports. When we speak of a person is having a domicile of a particular country, we mean that in certain matters such as succession, minority and marriage he is governed by the law of thatcountry.

Domicile has reference to the system of law by which a person is governed, and when we speak of the domicile of a country, we assume that the same system of law prevails all over that country. But it might well happen that laws relating to succession and marriage might not be the same all over the country, and that different areas in the State might have different laws in respect of those matters. In that case, each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile.

The position is thus stated by Dicey at page 83:

"The area contemplated throughout the Rules relating to domicile is a 'country' or 'territory subject to one system of law'. The reason for this is that the object of this treatise, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his legal home or domicile within a territory governed by one system of law, i.e. within a given country, rather than within another.

If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it would be essential to determine whether D was domiciled within such particular part, e.g. California in the United States; but in this case, such part would be *pro tanto* a separate country, in the sense in which that term is employed in theseRules".

The following statement of the law in Halsbury's Laws of England, Volume VI, page 246, para 249 may also be quoted:

" where that State comprises more than one system of law, a Domicile is acquired in that part of the State where the individual resides".

9. An instructive decision bearing on this point is ***Somerville* v. *Somerville,*** [1801] 31 E.R. 839. There, the dispute related to the personal estate of Lord Somerville, who had died intestate in London, his domicile of origin being Scotch. The contest was between those who were entitled to inherit if his domicile was Scotch, and those who were entitled to inherit if his domicile was English. It was urged in support of the claim of the latter that by reason of the death of Lord Somerville at London, succession was governed by English domicile. In discussing this question

the learned Master of the Rolls referred to the fact that the law of succession in the Province of York was different from that prevailing in other parts of England, and was akin to Scotch law, and posed the question whether if a Yorkshire man died intestate in London, succession to his personal estate would be governed by the Law of the Province of York or of England.

He observes:

"It is surprising that questions of this sort have not arisen in this country when we consider that till a very late period and even now for some purposes a deferent succession prevails in the Province of York. The custom is very analogous to the law of Scotland. Till a very late period the inhabitants of York were restrained from disposing of their property by testament And the question then would have been whether during the time the custom and the restraint of disposing by testament were in full force, a gentleman of the county of York coming to London for the winter and dying there intestate, the disposition of his personal estate should be according to the custom or the general law". The principle that was laid down was that "succession to the personal estate of an intestate is to be regulated by the law of the country, in which he was a domiciled inhabitant at the time of his death; without any regard whatsoever to the place either of the birth or the death or the situation of the property at that time".

On the facts, the decision was that the domicile of origin which was Scotch, governed the succession. What is of interest in this decision is that it recognizes that for purposes of succession there can be within one political unit, as many domiciles as there are systems of law, and that there can be a Scotch domicile, an English domicile and even a York domicile within Great Britain.

10. Under the Constitution, the power to legislate on succession, marriage and minority has been conferred under Entry 5 in the Concurrent List on both the Union and the State Legislatures, and it is therefore quite conceivable that until the centre intervenes and enacts a uniform code for the whole of India, each state might have its own laws on those subjects, and thus there could be different domiciles for different States. We do not, therefore, see any force in the contention that there cannot be a domicile of Madhya Bharat under the Constitution.

11. It was also urged on behalf of the respondent that the word "domicile" in the rule might be construed not in its technical legal sense, but in a popular sense as meaning "residence", and the following passage in Wharton's Law Lexicon, 14th Edition, page 344 was quoted supporting such a construction:

"By the term 'domicile', in its ordinary acceptation, is mean the place where a person lives or has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy, is some times called his domicile".

In ***Mcmullen* v. *Wadsworth,*** [1889] 14 A.C. 631, it was observed by the Judicial Committee that "the word domicile in article 63 (of the Civil Code of Lower Canada) was used in the sense of residence, and did not refer to international domicile". What has to be considered is whether in the present context "domicile" was used in the sense of residence. The rule requiring the payment of a capitation fee and providing for exemption there from refers only to bona fide residents within the State. There is no reference to domicile in the rule itself, but in the Explanation which follows, clauses (a) and (b) refer to domicile, and they occur as part of the definition of "bona fide resident".

In Corpus Juris Secundum, Volume 28, page 5, it is stated:

"The term 'bona fide residence' means the residence with domiciliary intent".

There is therefore considerable force in the contention of the respondent that when the rule-making authorities referred to domicile in clauses (a) and (b) they were thinking really of residence. In this view also, the contention that the rule is repugnant to article 15(1) must fail.

In the result, the petition fails and is dismissed; but in the circumstances there will be no order as to costs.

Rashid Hasan Roomi v. Union of India
AIR 1967 All 154

Tripathi, J.

1. By this petition under Section 491 of the Code of Criminal Procedure a challenge is raised to the validity of the petitioners' detention in the district jail, Fatehpur, in pursuance to an order purporting to be under Foreigners Internment Order, 1962, and it is prayed that he be set at liberty.

2. Having heard learned counsel for the parties at some length, we directed yesterday that the petitioner be set at liberty forthwith. We now propose to give our reasons for the order.

3. The undisputed facts which are relevant to the questions in controversy are of somewhat unusual nature and raise interesting questions of law.

4. The petitioner was born of Indian parents in the district of Fatehpur and has been living since his birth in this country. He was here on 26th January, 1950, when the Constitution of India came into force. The petitioner's father Syed Siddiq Hasan migrated to Pakistan in 1948 leaving behind the petitioner who was then a minor and his younger brothers and sisters in India. It is admitted that the petitioner has been living in Kasba Kara Jahanabad District Fatehpur since after the migration of his father to Pakistan and has been carrying on cultivation.

According to the petitioner his permanent home is at Jahanabad where he owns considerable cultivable land and practises as a registered Homoeopathic Doctor. The petitioner has filed certified copies of the extracts from the final Assembly electoral rolls for 1957 and 1962 for Kara Jahanabad Town Area which indicate that he is entered as a voter at serial Nos. 667 and 36 respectively of the aforesaid electoral rolls. The petitioner's allegation that he contested the election of the Town Area for the office of Chairman in 1958 has not been denied. His further allegation that he contested for the aforesaid office again in the year 1964 and was elected as the Chairman of the Town Area Committee and has been continuing in that office too has not been denied in the counter affidavit. The petitioner has annexed certified copies of the result sheets of the aforesaid two elections which indicate that in the election which was held in 1957 the votes polled by him were 1011 as against 1131 of the successful candidate while in the election which was held in 1964 he polled the highest number of votes and was declared elected as Chairman of the Town Area Committee. It is admitted that he at the time of his arrest also was occupying the office of the Chairman of the Town Area Committee of Kara Tahanabad. The petitioner has also obtained an India-Pakistan passport before 1961. It appears however that his application for obtaining another India-Pakistan passport in 1961 has not been granted by the State Government as is evident from annexure I to the counter affidavit.

The petitioner was arrested on 13th of October, 1965, in pursuance to an order of the civil authority, Fatehpur, purporting to be under para 5/8 of the Foreigners' Internment Order, 1962, and since then he is confined in the district jail, Fatehpur.

5. It is urged on behalf of the petitioner that he is an Indian citizen and his detention as a Pakistani national is not sustainable in law.

6. Mr. H. N. Seth, learned counsel for the opposite party has contended that as the petitioner's father had migrated to Pakistan in the year 1948 when the petitioner was still a minor his domicile is linked with that of his father and therefore he cannot be held to have domiciled in India on the 26th January, 1950, when the Constitution came into force and as such cannot be held to be a citizen of India. Reliance was placed by the learned counsel on the decisions reported in 1954 All LJ 156: AIR 1954 All 456): AIR 1955 Nag 6, AIR 1957 Punj 86 and AIR 1961 Orissa 150. Learned counsel also cited a passage from G. C. Cheshire 'Private International Law' in support of his

contention that the domicile of an infant automatically changes with any change that occurs in the domicile of the father.

7. The argument raised by the learned counsel though ingenious is based on a fallacy and the cases cited by him do not apply to the facts of the present case.

8. In the case of ***Smt. Allah Bandi* v. *Govt. of Union of India***, 1954 All LJ 156: AIR 1954 All 456) the two minor married girls who happened to be with their parents at the time of the disturbances of 1947 also went to Pakistan when their parents left for that country while their husbands who were citizens of India continued to reside in India. It was held that the girls being minors could not legally change their domicile of origin and shift to Pakistan with the intention of settling there in the absence of their husbands and therefore it could not be said that they migrated to Pakistan when they left India with their parents.

9. In the case of ***Karimunnisa* v. *State of Madhya Pradesh***, AIR 1955 Nag 6 it was held that in the case of a dependent his domicile is the same and changes with the domicile of the person on whom he is, as regards his domicile, legally dependant and the domicile of an infant is determined by that of his father. In this case the infant had migrated to Pakistan along with his father.

10. In ***State* v. *Abdul Hamid***, AIR 1957 Punj 86 also their Lordships were dealing with a case where a minor had migrated to Pakistan along with his father and in that setting of facts it was held that the minor also must be taken to have acquired the nationality of his father.

11. In the case of ***Mohammad Umar* v. *State***, AIR 1961 Orissa 150 the court was concerned with a case where the minor had migrated to Pakistan along with his father in the year 1949.

12. Thus it will be noticed that none of the aforesaid cases cited by the learned counsel deal with a case where the infant or the minor had been left at the place of his birth by his father who had deserted him and then had migrated to a foreign country. Here we are concerned with a case where the petitioner was deserted by his father who migrated to Pakistan leaving him to stand on his own in the land of his birth.

13. G. C. Cheshire in his 'Private International Law' says:--

"The primary rule is that the domicile of an infant automatically changes with any change that occurs in the domicile of the father. As between a living father and his infant child there is a necessary unity of domicile, even though they may reside in different countries. This unity is not destructible at the will of the father. It is not terminated if he purports to create a separate domicile for his son, for instance, by entrusting his future care and maintenance to a relative domiciled in another country or by setting him up in business abroad. This doctrine, that a change in the father's domicile is necessarily communicated to the child, is generally laid down in absolute terms, but it is to be hoped that should the occasion arise it will not be pressed to its logical conclusion.

Suppose, for instance, that, if father deserts his son, leaves him in his domicile of origin and himself acquires a fresh domicile elsewhere. Or suppose that he is divorced for adultery and the custody of the children is given to his wife. In such cases as these it is scarcely credible that a court would affirm the inevitability of a common domicile."

14. We are, therefore, of opinion that on the facts of the present case it will not be reasonable to hold that although the petitioner was domiciled in India on the date when Constitution came into force because he happened to be a minor of about 13 or 14 years on that date his domicile must be linked with that of his father who had migrated to Pakistan in the year 1948 after deserting him in India.

15. The petitioner was born of Indian parents in the territory of India. He had his domicile here and at the commencement of the Constitution had been ordinarily a resident in the territory of India

for more than five years immediately preceding such commencement. He has been enrolled as a voter in his country. He contested the election for the office of the Chairman of the Town Area Committee twice once in the year 1957 and then again in the year 1964. He has been occupying that office since November 1964. For instance of this application therefore it must be held that he is a citizen of India.

16. Mr. Seth contends that even if the applicant is held to be a citizen of India, as his father is admittedly a national of Pakistan the petitioner comes under the wide sweep of Section 3 of the Foreigner's Internment Order which provides that any person who, or either of whose parents, or any of whose grand parents was at any time a citizen or subject of any country at war with, or committing external aggression against India, can be arrested under paragraph 5 of the said order.

17. Para 3 of the order as it: originally stood reads as follows:

"3. Application of chapter--This chapter shall apply to and in relation to any foreigner who is, and any person not of Indian origin who was at birth, a citizen or subject of any country at war with, or committing external aggression against India.

18. It was amended by Foreigners (Internment) Amendment Order dated 26th November 1962 and the aforesaid paragraph was substituted by the following paragraph:--

"3. Application of chapter--This chapter shall apply to and in relation to any foreigner who is, and any person who, or either of whose parents, or any of whose grand parents was at any time a citizen or subject of any country at war with, or committing external aggression against India, ... Then there was another amendment being Foreigners' Internment Amendment Order 1965 which came into force on the 6th of September, 1965, which provided *inter alia* that "in the Foreigners Internment Order, 1962, in paragraph 3, for the words" in relation to any foreigner "the words" in relation to any national of Pakistan and to any other foreigner shall be substituted.

19. It will be observed that originally paragraph 3 pf the Order applied to any foreigner but by the amendment of 1965 the nationals of Pakistan were placed in a separate category for the application of chapter 2 of the Order, than other foreigners.

20. It is true that in view of the provisions of paragraph 3 of the Order as it stands today any person who, or either of whose parents, or any of whose grand parents was at any time a citizen or subject of any country at war with India can also be arrested and detained under the Foreigners' Internment Order, 1962. If is also true that as the petitioner's father is admittedly in Pakistan he falls in one of the categories mentioned in paragraph 3 of the Order. But the impugned order passed by the civil authority makes it clear that the petitioner has been detained on the supposition that he was a Pakistan national and not because his father happened to be in Pakistan. In order to appreciate the point it is necessary to quote the order:

"In exercise of the power conferred upon me as Civil Authority of district Fatehpur, I Sheo Pujan Singh do hereby order that Sri Rashid Hasan Roomi a Pakistan National son of Syed Siddiq Hasan Roomi r/o vill. Kora Tahanabad P. O. Jahanabad district Fatehpur holding Pakistani Passport No. Nil dated Nil and India Visa No. Nil dated Nil be arrested under para 5/8 of the Foreigners' (Internment) Order, 1962, as applicable to Pakistani Nationals in India vide Government of India Notification No. 1/ 61/65-F. III dated September 7, 1965 and further that he be confined in District Jail. Fatehpur as provided in para 6 of the said order.

Sd/- S. P.Singh
12. X.
Civil Authority
Foreigners' Registration Officer.

Dated October, 12, 1965.

21. It will be noticed that the impugned order describes the petitioner as a Pakistani national and says that he be arrested under para 5/8 of the Foreigners' Internment Order, 1962, as applicable to Pakistani nationals in India. It is, therefore, obvious that the impugned order was passed by the civil authority on the supposition that the petitioner was a national of Pakistan and not because he fell under the third category i.e. one of his parents was residing in Pakistani territory. As the supposition on which the order is based has proved to be illusory in law the order must be held to be invalid.

22. It was for these reasons that we had directed yesterday that the petitioner be set at liberty.

Prakash v. Mst. Shahni
AIR 1965 J&K 83

Bhat, J.

1. This second appeal came before us on 19th April 1963. There was a concurrent finding of fact that the Respondent, Mst. Shahni, was the real owner of the property in dispute and she had purchased it in the name of Bindu Ram Defendant 2 with whom she lived as his mistress on the date of the purchase. This concurrent finding of fact could not be disturbed in second/appeal. Mr. Sharma, learned Counsel for the appellant, however, raised a new point that notwithstanding the fact that the property in dispute had been purchased Benami in the name of Bindu Ramyior the Plaintiff, Shahni could not get the declaration sought for with respect, to this property because she was not a permanent resident of the State and as such could not acquire any immovable property in the State. We therefore remitted an issue to the trial Court to the following effect:

Whether Mst. Shahni is not a state subject (permanent-resident). OPD

We further directed the trial Court to permit the parties to lead such evidence as they chose about this issue and then give its finding. The trial Court had to submit its finding through the District Judge, Jammu.

2. The trial Court, after the case went back lo it allowed parties opportunity to lead evidence. The Defendant on whom the burden of proof lay produced two witnesses Desraj and Kanshi Ram and himself went into the witness box. The Plaintiff produced Dharu, Amrui, Gauri, Kirpa, Amar Nath. Kithu Ram and Sain Das witnesses and herself went into the witness box. The finding of the Courts below is unanimous on the point that Mst. Shahni Respondent is not a permanent resident of the State. This finding was accepted as correct by the Appellant but the respondent Mst. Shahni put in her objections with regard to this finding before us.

3. We have heard the learned Counsel for the parties. The learned counsel for the Respondent has tried to assail this finding on some legal grounds which shall be considered after the finding of fact arrived at by both the Courts in this behalf is recorded. The Courts below have found that the Plaintiff Mst. Shahni had married one Pohu Ram who was a resident of Put Bijoyan Tehsil Sialkot. The Plaintiff as her husband Pohu Ram came to the State during the disturbances of 1947 as refugees. The Plaintiff Respondent, Mst. Shahnii still describes herself as the widow of Pohu Ram. She had tried to obtain a state subject certificate, but the Deputy Commissioner of Jammu rejected her application. The learned Counsel for the Respondent says that the case has now been referred to the Revenue Minister for his opinion. But that fact can have no bearing on the disposal of this appeal. It is an established fact that Shahni has not been granted a certificate of being a state subject (permanent resident) by the revenue authorities and on evidence produced by either party in this case it has been held by both the Courts that she was married to a man who was a resident of Pul Bijoyan in Sialkot Tehsil. Shu continues to call herself the widow of that person, i.e., Pohu Ram..

4. The point raised by Mr. Sharma that the Respondent cannot acquire any immovable property in the State becomes important in this way that if Shahni could not directly in her own name, acquire immovable property in the State she cannot defeat the law by an indirect device by first getting the property purchased or acquired in the name of some one else, in this case Bindi Rim, and then getting a decree for declaration that she is the real owner of the property. This involves a principle of jurisprudence that what cannot be achieved legally cannot be permitted to be acquired by indirect methods. In our opinion, therefore, this point does not merit any discussion. If Shahni could not in her own name acquire immovable property in the State she cannot be permitted

to purchase it in the name of a Benamidar and then claim it as her own. No such declaration can be granted in her favour by any Court of law in the State.

5. The first question therefore to be determined is whether there is any restriction on acquisition of immovable property for persons who are not permanent residents of the State. In this behalf the law is very well settled. There is a Full Bench authority of this Court reported as ***Devi Das* v. *Fauna Lal***, A.I.R. 1959 J & K 62 wherein all to Irshads and Commands of His Highness have been mentioned by which transfer of immovable property in favour of non-state subjects is prohibited, We have also perused the original lrshads. In the Command of 9th Maghar 1957 (Bikrami) it is laid down by His Highness that no immovable property should be transferred in favour of non-residents of the State; it any such transfer has to take place it could be done only with the permission of His Highness after getting a proper Ryatnama from His Highness. Section 139 of the T.P. Act says that all Hidayals, resolutions, and Ailans restricting and regulating transfers of immovable property in any part of the State of Jammu and Kashmir preserve intact the rights of transfer expressly taken away or restricted by any such enactment. A whole list of circulars and Hidayals in particular has been mentioned in Sub-section (2) of this very section and the commands) one of winch has been referred to above in addition to Ors. to the same effect have also been mentioned. That means acquisition or transfer of any immovable property in favour of a person who is not a resident of this State is completely prohibited and banned under the Laws of the State. The legal validity of these commands of His Highness has been kept intact under the Constitution Act (XIV) of 1996 as well as Section 157 of the Jammu and Kashmir Constitution.

6. The second point that has been argued by Mr. Vidya Sagar is that the findings of the Courts below that the Respondent is not a permanent resident are not well founded. According to him Mst. Shahni was born in the State of Jammu and Kashmir and therefore she retains her domicile and must be consider a permanent resident of the State for all practical purposes. It was, however, not denied by him that she had married Pahu Ram who was a resident of village Pul Bijoyan in Tehsh Sialkot. Sialkot was not a part of the State of Jammu and Kashmir but formed part of British India before partition and is now a part of Pakistan. Mr. Vidya Sagar argued that the domicile of Mst. Shahni would be the domicile of her origin and on that account she would be deemed to be a permanent resident of this State, as her parents were permanent residents of this State. Domicile has been defined to be the country which is taken to be a man's permanent home for the purpose of determining his civil status (Vide Basu's Commentary on the Constitution of India 3rd Edn. page (61). Domicile may be required by birth, by choice and by operation of law. The place of birth is called the domicile of origin. Domicile by choice may be acquired by a person by the factum of his residence and his intention to settle '.permanently in a particular country. The third category of domicile is that which is acquired by operation of law. A married woman acquires the domicile of her husband, if she had not the same domicile before marriage. The wife's domicile follows that of her husband. See ***Harvey* v. *Farnie***, 8 (1882) A.C. C. 43 and ***R. E. Attaullah* v. *J. Attaullah,*** A. I. R. 1953 Cal 530 (S.B.). So long as the marriage subsists the wife is incapable of acquiring a separate domicile of her own, no matter her husband may have even deserted her: ***Lord Advocate* v. *Jalfrey***, 1 (1921) A.C.C. 146. Nothing short of a dissolution of marriage tie enables a married woman to acquire a separate domicile Even on the death of her husband, a widow retains her late husband's domicile until she changes it by her own act, e.g., by remarriage. ***Attorney-General for Alberta* v. *Cook***, 1926 A.C. C. 444.

7. Even in England by the Act of 1914, Section 10 a woman on marriage takes her husband's nationality, and during covertures the wife's nationality changes with that of her husband. On the death of her husband Under Section 11 of the same Act or on divorce a married woman retains her

married nationality. Therefore according to these well-settled principles of the Constitution and Private International Law a woman on her marriage gets the domicile of her husband which she retains during her widowhood also.

8. The term 'permanent resident' has now been defined in Section 6 of the Constitution of Jammu and Kashmir and it describes state subjects of class I and 11 as defined in Notification No. ' I-L/84 dated 20-4-1927 read with the State Notification No. 13L dated 27-6-1932. It has included Anr. class of persons Under Sub-section (1) (b) of Section 6 as those who having lawfully acquired immovable property in the State have been ordinary residents in the State for not less than ten years prior to 14th May 1954. We shall take up this clause first.

9. Shahni is not and cannot be a permanent resident of the State within the meaning of this Sub-section because it is her case that she came to the State during the disturbances of 1947 nor has she lawfully acquired immovable property in the State. About her being a state subject of class I or II she satisfies neither of the conditions, because her husband was not at all a state subject of the State of Jammu and Kashmir.

10. Mr. Vidyasagar has however laid stress on Note II appended to this Notification. This Note reads asunder:-

The descendants of the persons who have secured the status of any class of the state subjects will be entitled to become the State subjects of the same Class For example if A is declared a state subject of class II his sons and grandsons will ipso facto acquire the status of the same class (II) and not of Class I.

11. Mr. Vidya Sagar tried to argue that Mst. Shahni's father was a state subject. Her brother had secured a state subject certificate; as a descendant of her father Shahni claims the status of being a permanent resident. In view of what has been already stated that a female takes the domicile of her husband' on marriage, this explanation has no application to the case of the Respondent, Mst. Shahni. il she had not married a person who was a resident of Anr. place outside the State, she could have no doubt claimed the status of her father) but on her marriage she lost her status in the State and acquired a new status of being a resident of Sialkot.

12. Even in the case of the wife or the widow of a state subject, she can retain her status as a slate subject only so long as she does not leave the State for permanent residence outside. The purpose of the notification and this definition is very well made out from Note III appended to the notification. In other words His Highness or the legislature of the Stale have been very jealous not to allow anybody who has not lived in the State in terms of the definition to be a permanent resident. Regard being had to both the notes appended to the definition, it can never be imagined that a female would be granted the status of a permanent resident of the State if she married a non-state-subject.

13. In view of the foregoing we are clearly of the opinion that there is no force in the legal contention put forward by Mr. Vidya Sagar. Mst. Shahni has been rightly held to be not a state subject or a permanent resident of the State of Jammu and Kashmir. Further, in view of the Irshads of his Highness prohibiting acquisition of property by non-state-Subsections, the suit property cannot be held to be the property of Respondent 1, Mst. Shahni. She cannot claim the suit property as its real owner in the eye of law and therefore she cannot get a declaration to that effect from any Court in the State.

14. And this finding alone is sufficient to get the suit of the Respondent dismissed; the appeal is accepted and the suit of the Plaintiff is dismissed, Parties will bear their own costs throughout.

S Mortaza Fazl Ali – I agree

Appeal Allowed.

Delhi Cloth and General Mills Co. v. Harnam Singh
AIR 1955 SC 590

Bose, J.

1. The defendantappeals.

2. The plaintiffs were the partners of a firm known as Harnam Singh Jagat Singh. Before the partition of India they carried on the business of cotton cloth dealers at Lyallpur which is now in Pakistan.

3. The defendant is the Delhi Cloth and General Mills Co. Ltd. It is a registered company carrying on business at Delhi and other places and has its head office at Delhi. One of the places at which it carried on business before the partition was Lyallpur.

4. The plaintiffs' case is that they carried on business with the defendant company for some three or four years before 1947 and purchased cloth from the company from time to time. In the course of their business they used to make lump sum payments to the defendant against their purchases. Sometimes these were advance payments and at others the balance was against them. When there was an adverse balance the plaintiffs paid the defendant interest: see the plaintiff Sardari Lal asP.W. 3.

5. On 28-7-1947 the account stood in the plaintiffs' favour. There was a balance of Rs. 79-6-6 lying to their credit plus a deposit of Rs. 1,000 as security. On that day they deposited a further Rs. 55,000 bringing the balance in their favour up to Rs. 56,079-6-6.

6. The defendant company delivered cloth worth Rs. 43,583-0-0 to the plaintiffs against this amount at or about that time. That left a balance of Rs. 11,496-6-6. The suit is to recover this balance plusinterest.

7. The claim was decreed for Rs. 12,496-6-6 and this was upheld on appeal to the High Court. The defendantappealshere.

8. The defendant admits the facts set out above but defends the action on the following ground. It contends that when India was partitioned on 15-8-1947, Lyallpur, where these transactions took place and where the money is situate, was assigned to Pakistan. The plaintiffs fled to India at this time and thus became evacuees and the Pakistan Government froze all evacuee assets and later compelled the defendant to hand them over to the Custodian of Evacuee Property in Pakistan. The defendant is ready and willing to pay the money if the Pakistan Government will release it but until it does so the defendant contends that it is unable to pay and is not liable. The only question is, what are the rights and liabilities of the parties in those circumstances? The amount involved in this suit, though substantial, is not large when compared with the number of claims by and against persons in similar plight. The defendant itself is involved in many similar transactions. A list of them appears in Ex. D-11. Mohd. Bashir Khan, D.W. 1, says that the total comes to Rs. 1,46,209-1-9. The defendant has accordinglychosen to defend this action as a test case.

9. The further facts are as follows. At the relevant period, before the partition, cloth was rationed and its distribution controlled in, among other places, the Punjab where Lyallpur is situate. According to the scheme, quotas were allotted to different areas and the manufactures and supplies of cloth could only distribute their cloth their cloth to retailers in accordance with those quotas, and dealers in those areas could only import cloth up to and in accordance with the quotas allotted to them.

If the supplies themselves had a retail shop or business in a given area, then the quota for that area was divided between the supplier and a Government quota-holder or quota-holders called the

nominated importer or importers. The local agency of the suppliers was permitted to import up to the portion of the quota allotted to it in that area and the suppliers were obliged to give the balance of the quota to the Government quota-holder or holders.

The plaintiffs were the Government quota-holders for Lyallpur, and the defendant company also carried on business there through the General Manager of the Lyallpur Mills.

10. It is admitted that the defendant owns these mills but it is a matter of dispute before us whether the mills are a branch of the defendant company; but whatever the exact status of the Lyallpur mills may be, it is clear from the evidence and the documents that the General Manager of these mill conducted the defendant's cotton business at Lyallpur.

11. It seems that the details of the cloth distribution scheme for Punjab, in so far as it affected the defendant company, were contained in a letter of the 24th October, 1945 from the Secretary, Civil Supplies Department, Punjab. That letter has not been filed and so we do not know its exact contents but reference to it is found in a series of letters written by the defendant company from Delhi to the District Magistrate at Lyallpur. Those letters range in date from 3-1-1946 to 19-4-1947: (Exs. P-5 to P-12).

They are all in the same form, only the figures and dates differ. It will be enough to quote the first, Ex. P-5. It is dated 3-1-1946 and is from the Central Marketing Organisation of the defendant company, the Delhi Cloth and General Mills Co. Ltd. It is written from Delhi to the District Magistrate, Lyallpur, and is as follows:

"The District Magistrate,

Lyallpur.

Re: Cloth Distribution Scheme.

Dear Sir

Ref: Letter No. 15841-CL-(D)-45/8342 of 24th Oct. 1945 from Secretary, Civil Supplies Deptt., Punjab Govt., Lahore.

Kindly note that we have allotted 28 bales for your district for the month of January 1946. Out of this a quantity of 18 bales will be dispatched to our Retail stores in your district/State and the balance of 10 bales will be available for delivery to your nominated importer.

We shall be obliged if you kindly issue instructions to your nominated importer to collect these goods from us within 15 days of the two dates for delivery fixed, namely by the 20th of January and 5th of February 1946 respectively. It may be noted that the first half quota will lapse in case delivery is not taken by you by the former date and the second half will lapse if not taken by the latter date.

Yours faithfully,

D. C. &; Gen. Mills Co. Ltd."

In each case a copy was sent to the plaintiffs marked as follows:

"Copy to nominated importer:- Jagat Singh Harnam Singh, Cloth Merchants, Lyallpur".

12. The Indian Independence Act, 1947 was passed on 18-7-1947 and the district of Lyallpur was assigned to Pakistan subject to the award of the Boundary Commission. Then followed the partition on 15-8-1947 and at or about that time the plaintiffs fled to India. This made them evacuees according to a later Ordinance. But before that Ordinance was promulgated the Assistant Director of Civil Supplies, who was also an Under Secretary to the West Punjab Government, wrote to the defendant's General Manager at Lyallpur (the General Manager of the Lyallpur Cloth Mills) on 17-2-1948 and told him that -

"The amount deposited by the non-Muslim dealers should not be refunded to them till further orders". (Ex.D-1).

13. The defendant did all it could, short of litigation, to protest this order and to try and get it set aside. Its General Manager at Lyallpur wrote letters to the Assistant Director of Civil Supplies on 14-4-48, 9-8-48 (Exs. D-2 and D-4), 23-4-49 (Ex. D-7) and 6-6-49 (Ex. D-8), but the replies were unfavourable. On 30-4-48 the Assistant Director said that "in no case" should the sums be refunded (Ex. D-3) and on 1-11-48 directed that these amounts should be deposited with the Custodian of Evacuee Property (Ex. D-5). This was in accordance with an Ordinance which was then in force. Later, on 8-11-48, the General Manager received orders from the Deputy Custodian that the moneys should be deposited with the Deputy Custodian (Ex. D-6) and on 23-6-49 these orders were repeated by the Custodian (Ex. D-9).

14. Meanwhile, the plaintiffs, who by then had shifted to Delhi, made a series of demands on the defendant in Delhi for payment. These are dated 3-1-49 (Ex. P.W. 4/4), 27-1-49 (Ex. P.W. 4/1), 11-3-49 (Ex. P.W. 4/3) and 26-3-49 (Ex. P.W. 4/2). The defendant's attitude is summed up in its letter to the plaintiffs dated 12-2-49 (Ex. P-3). The defendant said that it had received orders from the West Punjab Government, through the Assistant Director of Civil Supplies, not to make any refunds without the orders of the West Punjab Government.

15. On 15-10-1949 the Ordinance of 1948 was replaced by Ordinance No. XV of 1949 (Ex. D-26) but that made no difference to the law about evacuee funds and properties.

16. On 4-7-1950 the plaintiffs served the defendant with a notice of suit (Ex. P-14). This notice was forwarded to the defendant's General Manager at Lyallpur by the defendant's Managing Director in Delhi urging the General Manager to try and obtain the sanction of the West Punjab Government for payment of the money to the plaintiffs; and on 27-7-1950 the defendant wrote to the plaintiffs saying-

"We confirm that the sum of Rs. 11,496-6-6 and Rs. 1,000 are due to you on account of your advance deposit and security deposit respectively with our Lyallpur Cotton Mills, Lyallpur, and the sum will be refunded to you by the said Mills as soon as the order of prohibition to refund such deposits issued by the West Punjab Government and served upon the said Mills is withdrawn or cancelled, and that your claim shall not be prejudiced by the usual time limit of three years having been exceeded". (Ex.P-4).

17. The defendant's reply did not satisfy the plaintiffs, so they instituted the present suit on 16-12-1950.

18. After the suit, the defendant's Managing Director wrote personally to the Joint Secretary to the Government of Pakistan on 2-4-1951 but was told on 21-4-1951 that the matter had been carefully examined and that the money must be deposited with the Custodian (Ex. D-25). A second attempt was made on 30-4-1951 (Ex. D-24) and the Joint Secretary was again approached. Soon after, an Extraordinary Ordinance was promulgated on 9-5-1951 (Ex. D-27) exempting "cash deposits of individuals in banks" from the operation of the main Ordinance. But the Joint Secretary wrote on 2-6-1951 that this did not apply to private debts and deposits and again asked the defendant to deposit the money with the Custodian (Ex. D-23). Finally, the Custodian issued an order on 6-11-1951 directing that the deposits be made by the 15th of the that month, "failing which legal action will have to be taken against you". (Ex. D-10). The money was deposited on 15-11-1951 on the last day of grace (Ex. D-12).

19. The first question that we must determine is the exact nature of the contract from which the obligation which the plaintiffs seek to enforce arises. The sum claimed in the suit, aside from the interest, is made up of three items:

(1) Rs. 79-6-6 outstanding from a previous account;

(2) Rs. 11,496-6-6 being the balance of a sum of Rs. 55,000 deposited on 28-7-1947; and

(3) Rs. 1,000assecurity.

20. The three items appear to be linked up but we will, for the moment, concentrate on the largest, the deposit of Rs. 55,000. Both sides have spoken of it as a "deposit" throughout but we will have to examine its exact nature because deposits are of various kinds and it will be necessary to know which sort this was before we can apply the law.

21. Unfortunately, the evidence is meagre and scrappy, so we have been obliged to piece much disjointed material together to form an intelligible pattern. It is admitted that the distribution of cloth in this area was controlled by the Government of Punjab (in undivided India) at all material times. It is also admitted that the plaintiffs were, what were called, "Government nominees" for Lyallpur. In the plaint the plaintiffs also called themselves the "reserve dealer". This term has not been explained but the use of these words and the words "nominated importer", indicates that the plaintiffs occupied a privileged position. The letters (Exs. P-5 to P-12), on which the plaintiffs relied very strongly, also point to that; Ex. P-5, for example, shows that the defendant was obliged to give 10 bales out of a quota of 28 for that area to the plaintiffs under the orders of the Punjab Government and could only keep 18 for its own retailstores in the month of January1946. In Aprilthe defendant was allowed to keep all 28 but in July the distribution was 35: 25 in the plaintiff's favour. In September, November (1946) and April 1947 it was half and half. In February and March 1947 it was 10: 26 and 29: 26 for the plaintiffs and the defendant's stores respectively.

22. Now, ordinarily, a privilege has to be paid for and it seems that the price of this privilege was (1) payment of a security deposit of Rs. 1,000 and (2) payment of a second deposit against which cloth was issued from time to time in much the same way as abanker hands out money to a customer against deposits of money in a current account, only here the payments were issues of cloth instead of sums of money. We draw this inference from what we have said above and from the followingfacts:

(1) Both sides have called the payment a "deposit" in their pleadings;

(2) The plaintiffs speak of receiving goods "against this deposit" (paragraph 3 of the plaint) and Mohd. Bashir Khan (D.W. 1) of delivery being made "against this advance";

(3) The plaintiff Sardari Lal (P.W. 3) says that the parties have been carrying on dealings for 3 or 4 years and that "advances used to be made to the mills from time to time. Sometimes our balance stoodatcredit";

(4) Sardari Lal says that when their balance was on the debit side, they paid the defendant's interest but the defendant paid no interest when the balance was in the plaintiffs' favour. (This is the position when there is an overdraft in a bank);

(5) There was a balance of Rs. 79-6-6 standing in the plaintiffs' favour when the deposit of Rs. 55,000 wasmade;

(6) The plaintiff said in their letter (Ex. P.W. 4/1) to the defendant that they had a "current account" with the defendant in which a sum of Rs. 11,496-6-6 was in "reserve account". This figure of Rs. 11,496-6-6 is made up by including the old balance Rs. 79-6-6 in this account;

(7) In their letter Ex. P-14 the plaintiffs said that they had "deposited" money in the plaintiffs' account at Lyallpur "as reserve dealers", against that they received goods leaving a balance of Rs. 11,496-6-6. Again, this figure includes Rs. 79-6-6.

(8) All this shows that the payment of Rs. 55,000 was not just an advance payment for a specified quantity of goods but was a running account very like a customer's current account in a bank. The only matter that can be said to indicated the contrary is the fact that the defendant has listed this money in Ex. D-11 under the head "Purchaser's advance". But the mere use of this term cannot alter the substance of the transactions any more than the mere use of the word "deposit". The

fact that the parties choose to call it this or that is, of course, relevant but is not conclusive, and in order to determine the true nature of a transaction it is necessary to view it as a whole and to consider other factors. But in this case we need not speculate because the plaintiffs have themselves explained the sense in which the term "Purchasers advance account" is used. In their statement of the case which they filed here, they say -

"The defendants maintained a "Purchasers advance account' in their books at Delhi. The plaintiffs used to pay the defendants advance amounts against which cloth was supplied and the balance had to be adjusted periodically".

24. But the banking analogy must not be pushed too far. The stress laid by the parties on the terms "Government nominees", "nominated importer" and "reserve dealer", both in the correspondence and in the pleadings and evidence, suggests that the defendant was dealing with the plaintiffs in their capacity of "Government nominees" and that, in its turn, imports the condition that the dealings would stop the moment the plaintiffs ceased to occupy that privileged position. As we have seen, the import of cloth was controlled by the Punjab Government at all relevant times with the result that the defendant could not sell to anybody it pleased. The sales had to be to the Government nominees. Therefore, if Government withdrew their recognition, the defendant would not have been able to sell to the plaintiffs any longer and it is fair to assume that the parties did not contemplate a continuance of their relationship in such an eventuality. But, as this was not a definite contract for the supply of a given quantify of goods which were to be delivered in instalments but as course of dealings with a running account, it is also reasonable to infer that the parties were at liberty to put an end to their business relationship at any time they pleased by giving due notice to the other side and in that event whichever side owed money to the other would have to pay. But, either way, the place of performance would, in these circumstances, be Lyallpur. We stay this because all the known factors were situate in Lyallpur. The plaintiffs were the Government nominees for Lyallpur and they were resident there. The defendant carried on business there and the goods had to be delivered at Lyallpur and could not be delivered elsewhere, and so performance was to be there. The accounts were kept at Lyallpur, and though copies appear to have been forwarded to Delhi from time to time, the books were situate there and the Lyallpur office would be the only place to know the up-to-the minute state of the accounts. In the circumstances, it is reasonable to assume, as in the case of banking and insurance (matters we shall deal with presently), that on the termination of the contract the balance was to be paid at Lyallpur and not elsewhere. That localises the place of Primary obligation.

25. This also, in our opinion, imports another factor. The defendant in Delhi would not necessarily know of any change of recognition by the Lyallpur authorities. The correspondence with the Collector indicates that the Government nominee cleared the goods from the defendant's Lyallpur godowns under the orders of the District Magistrate. If, therefore, the nominee was suddenly changed, intimation of this fact would have to be given to the defendant at Lyallpur and not at Delhi, otherwise there would be a time lag in which the defendant's Lyallpur office might easily deliver the goods to the plaintiff's as usual despite withdrawal of the recognition. Everything therefore points to the fact that the notice of termination would have to be given at Lyallpur and the obligation to return the balance would not arise until this notice of termination was received. That obligation would therefore necessarily arise at Lyallpur.

26. The plaintiff's learned counsel argued very strongly that the defendant's Lyallpur business was carried on from Delhi and that the accounts were kept there, that there was no branch office at Lyallpur and that Lyallpur had no independent local control of the business. He relied on the letters written by the defendant to the District Magistrate, Lyallpur, about the allotments of quotas (Exs. P-

5 to P-12) and also on Ex. D-7, a letter written by the defendant's General Manager at Lyallpur to the Deputy Custodian of Evacuee Property at Lyallpur in which he says that a

"complete list showing the list of all non-Muslims falling under item (3) with the amount to be paid has been asked for from our Head Office and will be submitted as soon as received".

Counsel contended that the Lyallpur people had so little to do with the accounts that they were not able to supply even a list of the persons who dealt with them. They had to find that out from Delhi.

27. These matters should have been put to the defendant's witnesses. Ex. D-7 was written in reply to a letter from the Deputy Custodian of Evacuee Property. That letter is Ex. D-6 and in it the Deputy Custodian refers to some earlier correspondence with the Under Secretary to the West Punjab Government, Lahore, which has not been filed. When we turn to the list that was eventually supplied from Delhi (Ex. D-11) we find that it relates to accounts from all over Pakistan such as, Multan, Peshawar, Lahore, Sialkot, Rawalpindi and even Karachi and Sukkar. Obviously a local office like the Lyallpur office would not be in a position to supply that sort of information. The defendant's accountant at Lyallpur, Sewa Ram (P.W. 4), says that -

"Purchasers' deposits at Lyallpur were not recorded in the books of the defendant at Delhi but statements used to be dispatched from there to Delhi. An account book was prepared from statements received from Lyallpur. That book is known as 'Reference Book'".

Presumably, that would also be the practice of the other branch offices, so the head office would be the only place from where a general overall picture (which appears to be what was asked for) could be obtained.

28. Now, the plaintiffs resided at Lyallpur at all relevant times and the defendant carried on business there though a local General Manager. We do not know where the contract was made but we do know that the plaintiffs contracted in a special capacity that was localized at Lyallpur, namely as the Government nominees for Lyallpur. We know that the goods were to be delivered at Lyallpur and could not be delivered any where else. We know that there was a running accountant and that that accountant was kept at Lyallpur, and we have held that the "debt" did not become due till the defendant was given notice at Lyallpur that the business relationship between the parties had terminated. The termination came about because of acts that arose at Lyallpur, namely the assignment of Lyallpur to the newly created State of Pakistan and the flight of the plaintiffs from Lyallpur which made further performance of the primary contract impossible. The only factors that do not concern Lyallpur are the defendant's residence in India and the demands for payment made in Delhi. The fact of demand is not material because the obligation to pay arose at the date of termination and arose at Lyallpur, but if a demand for payment is essential, then it would, along the lines of the banking and insurance cases to which we shall refer later, have to be made at Lyallpur and a demand made elsewhere would be ineffective. On these facts we hold that the elements of this contract, that is to say, the contract out of which the obligation to pay arose, were most densely grouped at Lyallpur and that that was its natural seat and the place with which the transaction had its closest and most real connection. It follows from this that the "proper law of the contract", in so far as that is material, was the Lyallpur law.

29. We have next to see when notice to close the account and a demand for return of the balance was made and where. The plaintiff Jagat Singh (P.W. 5) says that he made a written demand in October 1947. But the earliest demand we have on record is Ex. P.W. 4/4 dated 3-1-1949. It is understandable that the plaintiffs, who had to flee for their lives, would have no copies of their correspondence, but it is a matter for comment that the demand which is filed (Ex. P.W. 4/4) does not refer to an earlier demand or demands. The defendant was asked to produce all the

correspondence because the plaintiffs had lost their own files. The defendant produced all we have on record and no suggestion was made that anything had been suppressed. Consequently we are not prepared to accept the plaintiffs' statement and we hold that there was no demand before 3-1-1949.

30. Another point is that the earlier demand, even if made, could not have been made at Lyallpur. The plaintiff Jagat Singh says he made the demand to the defendant's Managing Director. He resides in Delhi and the plaintiffs had by then fled from Pakistan. Therefore, the demand could not been made at Lyallpur, and apart from those demands, there is no other notice of termination, so, technically, the defendant would have been justified in declining to pay on the strength of a demand made in Delhi. The same defect attaches to Ex. P.W. 4/4. However, we are fortunately absolved from the need to base on so technical a ground.

31. Now at the date of the demand the Pakistan Ordinance (Ex. D-26) was in force and under it the defendant was prohibited from paying the money to the plaintiffs who were evacuees according to Pakistan laws. The defendant was directed, instead, to deposit the money with the Deputy Custodian of Evacuee Property. This was done on 15-11-1951 (Ex. D-12) and the deposit was made along with other similar deposits.

32. We now have to determine the legal liabilities which arise out of these facts. This raises complex questions of private international law, and two distinct lines of thought emerge. One is that applied by the English Courts, namely, the *lex situs*; the other is the one favoured by Cheshire in his book on Private International Law, namely, the "proper law of the contract".

33. The English approach is to treat the debt as property and determine its *situs* and then, in general, to apply the law that obtains there at the date when payment is due. But the difficulty of the English view is that they have different sets of rules for ascertaining the *situs*, with the result that the *situs* shifts from place to place for different purposes, also that it is determined by intention.

Thus, it can be in one place for purposes of jurisdiction and in others for those of banking, insurance, death duties and probate. The *situs* also varies in the cases of simple contract debts and those of speciality.

34. That a debt is property is, we think, clear. It is a chose in action and is heritable and assignable and it is treated as property in India under the Transfer of Property Act which calls it an "actionable claim": sections 3 and 130. But to give it position in space is not easy because it is intangible and so cannot have location except notionally and in order to give it notional position rules have to be framed along arbitrary lines.

35. Cheshire points out in his book on Private International Law, 4th edition, pages 449 to 451 that the *situs* rule is not logical and leads to practical difficulties when there is a succession of assignments because it is not possible to fix the situation of a debt under the *situs* rule in one place and only one place. Speaking of that Cheshire, quoting Foote, where Foote says that the assignment of a chose in action arising out of a contract is governed by the "proper law of the contract" paraphrases Foote thus at page 450 -

"If we understand him correctly, the appropriate law is not the 'proper law' (using that expression in its contractual sense) of the assignment, but the proper law of the original transaction out of which the chose in action arose. It is reasonable and logical to refer most questions relating to a debt to the transaction in which it has its source and to the legal system which governs that transaction One undeniable merit of this is that, where there have been assignments in different countries, no confusion can arise from a conflict of laws, since all questions are referred to a single legal system".

36. The expression the "proper law of the contract" has been carefully analysed by Cheshire in Chapter VIII of his book. In ***Mount Albert Borough Council* v. *Australasian Temperance and***

General Mutual Life Assurance Society, 1938 A.C. 224 Lord Wright defined it at page 240 as "that law which the English or other Court is to apply in determining the obligations under the contract," that is to say, obligation as contrasted with performance.

Lord Wright drew the distinction between obligation and performance at page 240. In a later case, Lord Simonds described it as

"the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion". ***Bonython*** **v.** ***Commonwealth of Australia,***.1951 A.C. 201, 219)

37. Cheshire sets out the definition given by some American Courts at page 203 and adopts it:

"It is submitted that, at any rate with regard to the question of valid creation, the proper law is the law of the country in which the contract is localized. Its localization will be indicated by what may be called the grouping of its elements as reflected in its formation and in its terms. The country in which its elements are most densely grouped will represent its natural seat the country with which the contract is in fact most substantially associated and in which lies its natural seat or centre of gravity".

38. This involves two considerations. The first is whether the proper law is to be ascertained objectively or whether parties are free to fix it subjectively by ranging over the world and picking out whatever laws they like from any part of the globe and agreeing that those laws shall govern their contract. Cheshire points out at page 202 that the "the subjective theory may produce strangely unrealistic results". It is also obvious that difficulties will arise if the contract is illegal or against public policy according to the laws of the country in which it is sought to be enforced though lawful according to the laws of the country which the parties choose: see Lord Wright in ***Mount Albert Borough Council*** **v.** ***Australasian Temperance, etc. Society,*** 1938 A.C. 224 at page 240. Cheshire prefers the view of an American Judge which he quotes at page 203 -

"Some law must impose the obligation, and the parties have nothing whatsoever to do with that, no more than with whether their acts are torts or crimes".

39. The contract we are considering is silent about these matters. There is no express provision either about the law that is to obtain or about the *situs*. We have therefore to examine the rules that obtain when that is the case.

40. The most usual way of expressing the law in that class of case is to say that an intention must be implied or imputed. In the ***Bank of Travancore*** **v.** ***Dhrit Ram,*** 69 I.A. 1, Lord Atkin said that when no intention is expressed in the contract the Courts are left to infer one by reference to considerations where the contract was made and how and where it was to be performed and by the nature of the business or transaction to which it refers. In the Mount Albert Borough Council case 1938 A.C. 224, Lord Wright put it this way at page 240 -

"The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract".

41. But, to us, it seems unnecessarily artificial to impute an intention when we know there was none, especially in a type of case where the parties would never have contracted at all if they had contemplated the possibility of events turning out as they did. In our opinion, what the Courts really do, when there is no express provision, is to apply an objective test, though they appear to regard the intention subjectively, and that is also Cheshire's conclusion at page 201 where, after reviewing the English decisions, he says-

"In other words, the truth maybe that the judges, though emphasizing in unrestricted terms the omnipotence of intention, in fact do nothing more than impute to the parties an intention to submit their contract to the law of the country with which factually it is most closely connected".

45. If driven to a choice, we would prefer this way of stating the law but we need not decide this because, so far as the present case is concerned, the result is the same whether we apply the proper law of the contract or the English rules about the *lex situs*. It may be that in some future case this Court will have to choose between these two views but the question bristles with difficulties and it is not necessary for us to make the choice here. All we wish to do here is to indicate that we have considered both and have envisaged cases where perhaps a choice will have to be made.

42. We gather that English judges fall back on the *lex situs* and make rules for determining the position of a debt for historical reasons. Atkin, L. J. said in ***New York Life Insurance Company* v. *Public Trustee,*** ((1924) 2 Ch. 101, 119) that the rules laid down in England are derived from the practice of ecclesiastical authorities in granting administration because their jurisdiction was limited territorially.

"The ordinary had only a jurisdiction within a particular territory, and the question whether he should issue letters of administration depended upon whether or not assets were to be found within his jurisdiction, and the test in respect of simple contracts was: Where was the debtor residing? ..... the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt".

(See also Dicey's Conflict of Laws, 6th edition, page 303). The rules, therefore, appear to have been arbitrarily selected for practical purposes and because they were found to be convenient.

43. But despite that the English Courts have never treated them as rigid. They have only regarded them as prima facie presumptions in the absence of anything express in the contract itself: see Lord Wright's speech in Mount Albert Borough Council case 1938 A.C. 224 at page 240. Also, many exceptions have been engrafted to meet modern conditions. Atkin, L.J. draws attention to one in ***New York Life Insurance Company* v. *Public Trustee,*** (1924) 2 Ch. 101, 119) at page 120 where he says-

"therefore, cases do arise where a debt may be enforced in one jurisdiction, and the debtor, being an ordinary living person, resides elsewhere".

So also Lord Wright in Mount Albert Borough Council case 1938 A.C. 224 at page 240 -

"It is true that, when stating this general rule, there are qualifications to be borne in mind, as for instance, that the law of the place of performance will prima facie govern the incidents or mode of performance, that is, performance as contrasted with obligation".

and at page 241 he says -

"Again, different consideration may arise in particular cases, as, for instance, where the stipulated performance is illegal by the law of the place of performance".

And so also Lord Robson in ***Rex* v. *Lovitt,*** 1912 A.C. 212 at page 220 -

"It cannot mean that for all purposes the actual situation of the property of a deceased owner is to be ignored and regard had only to the testator's domicile for executors find themselves obliged in order to get the property at all to take out ancillary probate according to the locality where such property is properly recoverable, and no legal fiction as to its 'following the owner' so as to be theoretically situate elsewhere will avail them".

And he says at page 221 that these rules are only "for certain limited purposes".

In banking transactions the following rules are now settled: (1) the obligation of a bank to pay the cheques of a customer rests primarily on the branch at which he keeps his account and the bank was

rightly refuse to cash a cheque at any other branch: ***Rex* v. *Lovitt,*** (1912) A.C. 212 at 219, ***Bank of Travancore* v. *Dhrit Ram,*** 69 I.A. 1, 8 and 9) and ***New York Life Insurance Company* v. *Public Trustee,*** (1924) 2 Ch. 101, 119) at page 117; (2) a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank: ***Joachimson* v. *Swiss Bank Corporation,*** (1921) 3 K.B. 110quoted with approval by Lord Reid in ***Arab Bank Ltd.* v. *Barclays Bank,*** 1954 A.C. 495, 531). The rule is the same whether the account is a current account or whether it is a case of deposit. The last two cases refer to a current account; the Privy Council case (Bank of ***Travancore* v. *Dhrit Ram,*** (69 I.A. 1, 8 and 9)) was a case of deposit. Either way, there must be a demand by the customer at the branch where the current account is kept, or where the deposit is made and kept, before the bank need pay, and for these reasons the English Courts hold that the *situs* of the debt is at the place where the current account is kept and where the demand must be made.

44. This class of case forms an exception to the rule that a debtor must seek his creditor because, though that is the general rule, there is nothing to prevent the parties from agreeing, if they wish, that that shall not be the duty of the debtor and, as Lord Reid explains in the Arab Bank case (1954 A.C. 495, 531) at page 531, a contract of current account necessarily implies an agreement that that shall not be the bank's duty, otherwise the whole object of the contract would be frustrated.

45. We have stressed the word "primarily" because the rules we have set out relate to the primary obligation. If the bank wrongly refuses to pay when a demand is made at the proper place and time, then it could be sued at its head office as well as at its branch office and, possibly, wherever it could be found, though we do not decide that. But the reason is that the action is then, not on the debt, but on the breach of the contract to pay at the place specified in the agreement: see Warrington, L.J. at page 116 and Atkin, L.J. at page 121 of ***New York Life Insurance Co.* v. *Public Trustee,*** ((1924) 2Ch. 101).

46. Now the rules set out above are not confined to the business of banking. They are of wider application and have also been applied in insurance cases: ***Fouad Bishara Jabbour* v. *State of Israel,*** (1954) 1 A.E.R. 145 and ***New York Life Insurance Co.* v. *Public Trustee,*** (1924) 2 Ch. 101.

47. Similar considerations obtain in England when an involuntary assignment of a debt is effected by garnishment. Cheshire has collected a list of English cases at pages 460 to 463 of his Private International Law from which we have quoted above. He sums up the position at page 461 thus-

"It is difficult to state the rule with exactitude, but it is probably true to say that a debt is properly garnishable in the country where, according to the ordinary usages of business, it would normally be regarded as payable".

48. But when all is said and done, we find that in every one of these cases the proper law of the contract was applied, that is to say, the law of the country in which its elements were most densely grouped and with which factually the contract was most closely connected. It is true the judges purport to apply the *lex situs* but in determining the *situs* they apply rules (and modify them where necessary to suit changing modern conditions) which in fact are the very rules which in practice would be used to determine the proper law of the contract. The English Judges say that when the intention is not express one must be inferred and the rules they have made come to this: that as reasonable men they must be taken to have intended that the proper law of the contract should obtain. The other view is that the intention does not govern even when express and that the proper law must be applied objectively. But either way, the result is the same when there is no express term. The "proper law" is in fact applied and for present purposes it does not matter whether that is

done for the reasons given by Cheshire or because the fluid English rules that centre round the *lex situs* lead to the same conclusion in this class of case.

49. That, however, raises a further question. Which is the proper law? The law that obtains when the contract was made and the obligation fashioned or the law in force at the time when performance is due ? Here again, we think the answer is correctly given by Cheshire at page 210, quoting Wolff's Private International Law, page 424, and Re. Chesterman's Trusts (1923) 2 Ch. 466, 478):

"A proper law intended as a whole to govern a contract is administered as 'a living and changing body of law' and effect is given to any changes occurring in it before performance falls due".

This is what the English Courts did in ***New York Insurance Co.* v. *Public Trustee,*** (1924) 2 Ch. 101, ***Re. Banque Des Marchands De Moscou,*** (1954) 2 A.E.R. 746, ***Fouad Bishara Jabbour* v. *State of Israel,*** (1954) 1 A.E.R. 145, and ***Arab Bank Ltd.* v. *Barclays Bank,*** 1954 A.C. 495, 529). They were all cases in which the law changed because of the outbreak of war and where performance became impossible because of local legislation. In the last two cases, the debts vested in the Custodian because of local legislation and payment by the debtor to the Custodian was regarded as a good discharge of the debt. The position in those two cases was just what it is here.

50. Counsel argued that as Lyallpur was part of India, when the contract was made, the Indian law must be applied and that no different intention can be imputed to the parties. But that is not the law, as we understand it, whether we apply the "proper law" or the *situs* rules. The proper law will be the law at Lyallpur applied as a living and changing whole, and this would have been the case even if India had not been divided, because each State had the right to make different local laws even in undivided India, as witness the different money lending laws and the cloth and grain control orders: indeed this very case is an illustration of that, for the controls which gave rise to this very contract were not uniform throughout India.

But even apart from the "proper law" the decision of the privy Council in ***Arab Bank Ltd.* v. *Barclays Bank***, 1954 A.C. 495, 529) and of the Queens Bench Division in ***Fouad Bishara Jabbour* v. *State of Israel,*** (1954) 1 A.E.R. 145 negatives this contention when an intention has to be imputed or a clause in the contract implied.

51. It is necessary, however, to bear in mind that, under modern conditions, chose in action arising out of contract have two aspects: (1) as property and (2) as involving a contractual obligation for performance. The property aspect is relevant for purposes of assignment, administration, taxation and the like; the contractual aspect for performance.

In the present case, we are primarily concerned with the property aspect because the Pakistan Ordinance regards debts as property and vests all evacuee property in the Custodian and requires every person holding such property to surrender it to the Custodian on payment of penalties prescribed by the Ordinance, and section 11(2) states that -

"Any person who makes a payment under sub-section (1) shall be discharged from further liability to pay to the extent of the payment made".

The payment was made and that, in our opinion, exonerated the defendant from further liability. Such payment would operate as a good discharge even under the English rules: see ***Fouad Bishara Jabbour* v. *State of Israel,*** (1954) 1 A.E.R. 145 at page 154 where a number of English authorities are cited, including a decision of the Privy Council in ***Odwin* v. *Forbes,*** (1817 Buck. 57).

That was also the result of the decisions in the following English cases, which are similar to this, though the basis of the decisions was the *situs* of the debt and the multiple residence of

corporations: ***Fouad Bishara Jabbour* v. *State of Israel,*** ((1954) 1 A.E.R. 145), Re Banque Des Marchands De Moscou (1954) 2 A.E.R. 746 and ***Arab Bank Ltd.* v. *Barclays Bank,*** (1954) A.C. 495, 529).

52. The same result follows from the decision of the Judicial Committee in the ***Bank of Travancore Ltd.* v. *Dhrit Ram,*** 69 I.A. 1, 9) where Lord Atkin said -

"When consideration is being given to the question, what law did the parties intend to govern the contract ? it seems proper to bear in mind that the promisor is a bank incorporated under Travancore law with, apparently, some connection with the State of Travancore, and governed as to its business by any law of Travancore that may affect banking "

The only difference between that case and this is that at the date of the deposit in this case there was no difference between the laws of Punjab and Delhi on the present point. But they could have differed even if India had not been divided, as we have just pointed out. The English cases are, however, in point and we can see little in principle to distinguish them from this case.

53. The learned counsel for the plaintiffs-respondents argued that even if the law is what we have said, the Pakistan Ordinance does not apply to this case because "a cash deposit in a bank" is excluded. The argument was based on the definition of "property" in section 2(5) of the Ordinance. But this is not a cash deposit in a bank as between the plaintiffs and the defendant. It is a debt which the defendant owes, or owed, to the plaintiffs, and the same definition states that "property" means, among other things, "any debt or actionable claim". The portion of the definition which speaks of a "cash deposit in a bank" means that such a deposit is not to be treated as "property" for purposes of the Ordinance as between the bank and the customer who owns or controls the deposit. We hold, therefore, that whether the proper law of the contract applies or the English law of situs in a case of this kind, the defendant is exonerated because, the debt being "property", the Ordinance divested the plaintiffs of ownership in it and vested the debt in the Custodian and at the same time interfered with the obligation for performance by providing that payment to the Custodian shall operate as a discharge of the obligation.

54. But we wish to emphasize that we decide this because payment was in fact made to the Custodian and that we express no opinion about what would happen in a case where there is no payment and the defendant has no garnishable assets in Pakistan out of which the West Punjab Government could realise the debt by attachment of the defendant's property. Different conclusions might possibly arise in such a case.

55. Lastly, it was urged that the Pakistan Ordinance is a Penal law and is confiscatory in character, therefore, no domestic tribunal will recognise it or give effect to it. That proposition is, in any event, too widely stated, but we are unable to condemn this law as opposed to the public policy of this country because we have exactly the same kind of laws here, as do other civilised countries which find themselves in similar predicament or at the outbreak of war; see ***Arab Bank Ltd.* v. *Barclays Bank,*** 1954 A.C. 495 and also ***Fouad Bishara Jabbour* v. *State of Israel,*** (1954) 1 A.E.R. 145, 157) and ***Re. Munster*** , (1920) 1 Ch. 268) where a like argument was repelled. We hold that this legislation is not confiscatory.

56. The same rules apply to the item of Rs. 79-6-6 and to the deposit of Rs. 1,000 as security.

57. The appeal succeeds. The decrees of the lower Courts are set aside. A decree will now be passed dismissing the plaintiffs' claim, but in the special circumstances of this case the parties will bear their own costs throughout.

Appeal Allowed.

British India Steam navigation Co. Ltd. v. Shanmugha Vilas Cashew Industries (1990) 3 SCC 481

Two cases *British India Steam navigation Co. Ltd*. v. *Shanmugha Vilas Cashew Iindustries* and *British Steam Navigation Co. ltd* v. *Hindustan Cashew Products Ltd* identical on facts involved questions concerning the choice of proper law of contract and have important bearing upon the jurisdictional clauses in the bills of lading.

Respondents in both the cases had purchased a specified quantity of cashew nuts which were shipped by the applicant company through chartered vessels in pursuance of contract of affreightment evidenced by bills of lading. The applicant company is incorporated in England. The respondents have send the appellant in both the cases for short-landing of bags containing cashew nut. The court below having decreed the suits, the appellants had approached the Kerala high Court which dismissed the appeals. Accordingly the appellant company has preferred these appeals before the Supreme Court. The appellant contended firstly, that it was a mere charterer of the vessel and not the owner. Secondly, as per the clause of the bill of lading, the court at Cochin had no jurisdiction. Finally the remedy would only lie against the owner of the vessel. The concerned clauses of bill of lading read;

3. JURISDICTION: The contract evidenced by this bill of lading shall be governed by English law and disputes determined in England or, at the option of the Carrier, at the port of destination according to English law to the exclusion of the jurisdiction of the Courts of any other country.

Clause 29 - FINALLY IN ACCEPTING THIS BILL OF LADING. The Shipper, Consignee, and Owner of the goods, and the Holders of this Bill of Lading, expressly accept and agree to all its stipulations, exceptions, and conditions whether written, printed stamped or incorporated, as fully as if they were all signed by such Shipper, Consignee, Owner or Holder.

The first respondent is the consignee and holder of the bills of lading and ex fade should be bound by this clause. The question in the instant case was one of initial jurisdiction on the basis of the clause mentioned in the bill of lading. Referring to the bill of lading generally, the court pointed out:

> "It is a settled principle of Private International Law governing bills of lading that the consignee or an endorsee thereof derives the same rights and title in respect of the goods covered by the bill of lading as the shipper thereof had."

The court proceeded on the premise that for the purpose of jurisdiction the action of the first respondent is an action *in personam* in Private International Law. An action *in personam* is an action brought against a person to compel him to do a particular thing.

The court took into consideration certain significant issues in the context of international trade and commerce. These related to the proper law of contract chosen by the parties themselves, the extent to which an applicable law to a contract be inferred from the jurisdictional clauses in the bills of lading and finally the role and function of the bills of lading themselves as distinguished from negotiable instruments and other related instruments such as charterparty.

Referring to bills of lading the court observed

> "The bill of lading is the symbol of the goods, and the right to possess those passes to the transferee of the bill of lading. In other words, its transfer is symbolic of the transfer of the goods themselves and until the goods have been delivered, the delivery of the duly indorsed bill of lading operates as between the transferor or transferee, and all who claim through them, as a physical delivery of the goods would do. The bill of lading is a negotiable instrument in the sense of carrying with it the right to demand and have possession of the goods described in it. It

also carries with it the rights and liabilities under the contract, where the property in the goods also is transferred. However, a bill of lading is not a negotiable instrument in the strict sense of the transferee deriving better title than the transferor. The transferee of a bill of lading gets no better title than the transferor himself had. Mere possession of the bill of lading docs not enable the holder to sue a person at a place where the transferor himself could not have done".

The court also clearly stated that the negotiations of a bill of lading is by the person who has the right to sue on it. He cannot sue at a place not intended by the parties when intention has been expressed. Considering the question as to the appellant's liability for the suit claim, the court referred first to Halsbury's Laws of England where it has been mentioned. "A contract for the carriage of goods in a ship is called in law a contract of affreightment. In practice these contracts are usually written and most frequently are expressed in one or other of two types of documents called respectivelya charterpartyand a bill of lading. [A] contract by charterpartyis a contract by which an entire ship or some principal part of her is let to a merchant, called 'the charterer', for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specified period."

The court thereafter observed:

"Thus for the purposes of ascertaining the responsibility of a charterer in respect of the cargo shipped and landed, it would be necessaryto know not onlythe stipulations between the shipper i.e. the owner of the cargo ad the charterer, evidenced by the bill of lading and also those between the charterer, evidenced by the bill of lading and also those between the charterer and the owner of the ship. If the charter is by way of demise the problem would be simple inasmuch as the bill of lading will be purely between the shipper and the charterer. In cases of a 'voyage charter' or a 'time charter' one has to find out the actual terms of the charter to ascertain whether they operated as charter by demise or made the charterer only as an agent of the shipowner ad if so to what extent so as to ascertain the extent of privity established between the shipper and the ship owner as stipulated in the bill of lading."

The court found on bills of lading prominently printed "SEE CONDITIONS OF CARRIAGE AND OTHER CONDITIONS ON REVERSE". Accordingly the court observed that the shipper, whose knowledge will be attributed to the first respondent did not know of the conditions of carriage printed on the reverse there being no other conditions printed elsewhere in the bills of lading. On these facts it is clear that the parties have chosen English law as the governing law for their contract. The court having identified the respondents' action as one *in personam* in private international law for purposes of jurisdiction, based its analysis on the leading authorities in private international law (on general principles as to jurisdiction in actions *in personam* as well as governing for the contract between the parties) such as Dicey. Morris and Cheshire. The court pointed out:-

> "According to the authors the parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them. The chosen forum may be a court in the country of one or both the panties or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a particular country or to a court identified by formula in a printed standard form, such as a bill of lading referring disputes to the courts of the carrier's principal place of business. It is a question of interpretation, governed by the proper law of the contract, whether jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject matter of the action falls within its terms. If there is no express Choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably

be the proper law. The jurisdiction of the court may be decided upon by the parties themselves on basis of various connecting factors".

The court observed that clause 3 of the bills of lading referred not only to the initial jurisdiction but also contained the selection of law made by the parties. The contract was thus governed by English law and disputes were to be determined according to English law, the court said., quoting in support Cheshire and North's Private International Law for parties' autonomy to not only to choose the applicable law but the forum as well.

As the law had been chosen, the proper law would be the domestic law of England and the proper law must be the law at the time when the contract was made and throughout the life of the contract and there could not be a "floating proper law".

Proceeding further. the court discussed the limitation on the party's autonomy to choose the applicable law and stated:

"It is true that in English law there are certain limitations on freedom to choose the governing law. The choice must be bona fide and legal and not against public policy. It may not be permissible to choose a wholly unconnected law which is not otherwise a proper law of contract. English Courts, it has been said. should, and do, have a residual power to strike down for good reasons. choice of law clause, totally unconnected with the contract. Where there is no express choice of the proper law, it is open to court to determine whether there is an implied or inferred choice of law in the pantiescontract".

The court also looked into the questions of submission to the jurisdiction to the Indian courts by the appellant while the chosen forum being English courts and English law as applicable law. The court said that litigating, in India would constitute submission to the jurisdiction. Quoting Cheshire and North's Private the court observed:

"An appearance merely to protest that the Court does not have jurisdiction will not constitute submission, even if the defendant also seeks a stay of proceedings pending the outcome of proceedings abroad.. In the instant case the appellant submits that as defendant it appeared before the Indian court to protest its jurisdiction and put forth its defences subject to that protest.. However, we find that in the memo of appeal before the lower appellants court no specific ground as to jurisdiction was taken though there were grounds on non-maintainability of the suit. Even in the special leave petition before this court no ground of lack of .jurisdiction of the courts below has been taken. We are therefore, of the view that the appellant has to be held to have either waived the objection as to jurisdiction or to have submitted to the jurisdiction in the facts and circumstances of the case... The submission as to lack of jurisdiction is therefore rejected".

The court also considered the application of Indian law to the present case. In this context the court opined that under the jurisdictional clause of the bill of lading only the English court has jurisdiction and the Indian courts would not have jurisdiction and Indian law would not be applicable. In the facts and circumstances of the case, the Court observed that the Indian Carriage of Goods Act, 1923 which is an Act to amend the law with respect to the carriage of goods by "sea was passed after the International Conference on Maritime law held at Brussels in October, 1922 and Brussels meeting in October 1923. Section 2 provides:

Subject to the provisions of this Act, the rules set out in the Schedule.. shall have the effect in relation to and in connection with the carriage of goods by sea in ships earning goods from any port in India to anyother port whether in or outside India.

To apply the rules to a case, the port of origin has to be an Indian port.. Unless the starting point or the port of loading is a part in India the rules are inapplicable. As in the instant case the goods

were shipped in Africa and carried to Cochin. This Act obviously was not applicable. Accordingly, the court allowed the appeal and remanded the case to the trial court for disposal according to law.

Similar was the ruling in the *Hindustan Products Ltd*. case.

NTPC v. SingerCompany
(1992) 3 SCC 551.

The Supreme Court in *National Thermal Power Corporation* v. *Singer Company* has traced the legal position with regard to the proper law of contract in all its perspective generallyas well as in the Indian context. It has thus laid down in clear terms the Indian law in the area of international contracts. The modern theories relate to the doctrine of proper law in the field of contracts where parties have expressly chosen the applicable law, where the law is inferred and where there is no such express choice by the parties. The Supreme Court has also clarified other important legal complications of pragmatic importance in internationalcommercialarbitration.
In *NTPC* v. *Singer Company*, an Indian Company, National Thermal Power Corporation (NTPC) entered into two contracts with foreign company, Singer Company, for the supply of equipment, erection and commissioning of certain works in India. The general terms and conditions of contract incorporated in the agreements state:

"The laws applicable to this contract shall be the laws in force in India. The courts of Delhi shall have exclusive jurisdiction in all matters arising artier this contract".

The terms of the contracts include also a clause for submission of disputes for arbitration wherein the place of arbitration was left to the choice of the arbitrators. The parties had contractually chosenrules of the InternationalChambers of commerce (ICC) for conduct of arbitration.

In compliance with their agreed terms the parties submitted themselves for arbitration conducted by ICC in London, having been chosen by the ICC arbitrators as the venue. The award was made in London as an interim award in respect of contracts entered into between NTPC and Singer Company. The contract was governed by Indian Law, entered into in India for its performance solely in India. The only meaningful foreign element present in the facts is the venue of arbitration.

NTPC had filed an application under the provisions of the Arbitration Act., 1940 before the Delhi High Court to set aside the interim award made in London by a tribunal constituted by ICC.

The same was dismissed by riding that:

"The award was not governed by the Arbitration Act. 1940. The arbitration agreementon which the award was made was not governed by the law of India, the award fell within the ambit of the Foreign Awards (Recognition and Enforcement) Act., 196l. London being the seat of arbitration, English Courts alone had jurisdiction to set aside the award, and the Delhi High Court had no jurisdiction to entertain the application filed under the Arbitration Act".

As against this ruling NTPC appealed to the Supreme Court.

The point for consideration was whether the award in question was governed by the provisions of the Arbitration Act, and as such became relevant for the courts in India only for the purposes of recognition and enforcement as the statute indicated.

The court discussed the whole concept of proper law of contract. This court also considered at length the proper law of arbitration. After a thorough analysis of the doctrine of proper law of contract on the basis of the leading case law and juristic writing. the court summarised thecurrent legal position thus:-

"Proper law is thus the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most intimate connection with the contract It must, however. be clarified that the expression 'proper law' refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. The law of contract is not affected by the doctrine of *renvoi*."

According to the court, in the present cast the parties have satisfied the above stated rule in as much as they have clearly and categorically stipulated that their contract, made in India to be performed in India, was to be governed by the laws in force in India and the courts in India were to have exclusive jurisdiction in all matters arising under their contract.

The Supreme Court thereafter, examined the law of arbitration in two aspects namely, (i) the law governing the arbitration agreement i.e. its proper law and (ii) the court has clearly distinguished the law of arbitration in term of substantive and procedural aspects. For the purpose of the present case such an approach was essential since the parties had never expressed their intention to choose London as the arbitral tribunal: but at the time they had stipulated that the arbitration would be conducted in accordance with ICC rules and accordingly London was chosen by the arbitral tribunal constituted by the International Court of Arbitration of ICC as the place of arbitration.

The court pointed out that the parties were free under ICC rules to determine the law which the arbitrator shall apply to the merits of the dispute and in the absence of any stipulation by the parties to the applicable law; the arbitrators may apply the law designated as the proper law by the rules of conflict. However, the court expressed the view, that these self contained and self regulating ICC rules are subject to the over riding powers of the appropriate national courts.

In the context of the two propositions pertaining to arbitration, stated earlier, the court observed that the proper law of arbitration agreement is normally the same as the proper law of the contract.... The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration the arbitration proceedings are conducted, in the absence of any agreement to the contrary in accordance with the law of country in which the arbitration is held.

In the opinion of the court an award is foreign not merely because it is made in the territory of a foreign state, but because it is made in such territory on an arbitration agreement not governed by the law of India. Accordingly it said that an award made in pursuance of an arbitration agreement governed by the law of India though rendered outside India, was not treated in India as a foreign award.

In the final analysis, the Supreme Court agreed with the tribunals ruling that the substantive law of the contract is Indian law and the laws of England governed procedural matters in the arbitration. On the facts of the case the apex court ruled that the award in question is an Indian award or a domestic award under the Indian Arbitration Act, although the dispute as with a foreigner and the arbitration itself was conducted and the award was made in a foreign state.

The other relevant factors that the court took into consideration were parties had expressly chosen the Indian law as the applicable law to the contract, courts of Delhi to have exclusive jurisdiction "in all matters arising under this contract", agreement was executed in Delhi. the contract to be performed in India, the form of agreement closely related to the system of law in India, various Indian enactments were specifically mentioned in the agreement as applicable and the arbitration agreement was contained in one of the clauses of the contract and not in a separate agreement. The governing rule of the contract being Indian law, arbitration agreement also would necessarily be governed by Indian law excepting the procedural aspects of the arbitration which, due to the fact of being conducted in a foreign country would be governed by the law of that country i.e. the law of England in the instant case.

In the result, the Supreme Court set aside the impugned judgement of the Delhi High Court and allowed the present appeal.

Smt. Mira Devi v. Smt. Aman Kumari
AIR 1962 Madhya Pradesh 212

Shrivastava, J.

1. The suit out of which this first appeal arises was filed by the respondent Smt. Aman Kumari for possession of home farm lands lying in several villages and for possession of movables. The respondent has also filed an appeal (First Appeal No. 120 of 1958) against the judgment in that case. This judgment governs the disposal of both the appeals.

2. In the erstwhile State of Korea which merged within Madhya Pradesh in 1948, there was a zamindari called 'Patna Zamindari'. It was held by one Jagdish Prasad Singh till his death in 1942. The respondent Smt. Aman Kumari is the widow of the said Jagdish Prasad Singh. He bad also left behind a son Gopal Saran Singh who died in 1948. The appellant Smt. Mira Devi claims to be his widow, having married him on 4-7-1941 under the Special Marriage Act, 1872 (III of 1872)--hereinafter referred to as the Act of,1872. Appellants Vijay Prasad Singh and Lalit Prasad, Singh are sons of Smt. Mira Devi from the deceased Gopal Saran Singh. After the death of Jagdish Prasad Singh, the Zamindari was resumed by the Korea Darbar in 1945, but the home-farm lands in several villages were allowed to be retained by the heirs of the zemindar. The present dispute relates to these homefarm lands and the agricultural houses and other property in those villages.

3. The plaintiffs case was that she and Gopal. Saran Singh, jointly inherited the property left by Jagdish Prasad Singh and after the death of Gopal Saran Singh, she became the sole owner of the property. She pleads that the home farm lands were cultivated by her till 1949 when after the death of Gopal Saran Singh the defendants came to Patna and ousted her From her house taking possession of all the properties. The plaintiff stated that her husband was a Raj Gond governed by Hindu Law in the matter of succession. She denied that defendant No. 1 Smt. Mira Devi ever married Gopal Saran Singh or that the marriage was valid in law. Accordingly, she claims that the defendants have no right in the property left by Gopal Saran Singh. The validity of the marriage was attacked on the ground that Gopal Saran Singh was below 18 years of age on the date when the alleged marriage is said to have taken place and because such a marriage is not recognized.

4. The defendants pleaded that Jagdish Prasad Singh and Gopal Saran Singh were not Raj Gonds but were Gonds of aboriginal origin. They were not hence governed by Hindu Law but by custom in the matter of succession. Defendant No. 1 claimed that she was legally married to Gopal Saran Singh who was over 21 years on the date of marriage and the other two defendants are his sons. The defendants asserted that after the death of Jagdish Prasad Singh, the whole estate passed to his son Gopal Saran Singh and after Gopal Saran Singh to the defendants. They admitted that the lands were managed by the plaintiff till 1949; but it was explained that this was on behalf of Gopal Saran Singh. After Gopal Saran Singh's death, the defendants took possession of the lands as desired by the Plaintiff herself who voluntarily surrendered possession of all land to them. Thereafter, the defendants continued in possession of the lands and a patta for the lands in suit was granted by the Madhya Pradesh Government in their favour.

5. The trial Court held that the zemindar was a Raj Gond governed by the Hindu Law of succession. The defendants' case that Smt. Mira Devi had married Gopal Saran Singh under the provisions of the Special Marriage Act was accepted and it was held that the marriage was valid. The marriage effected a severance of Gopal Saran Singh from the family and he thus got a third share in the property. The other two-third continued with Jagdish Prasad Singh and his wife

(plaintiff) and passed to the plaintiff after the death of Jagdish Prasad Singh. The Court thus decreed the claim for two-third share allowing the defendants one-third share. Both the parties have filed appeals against the decision claiming that the whole share should be given to them.

6. During the course of arguments before us, the defendants did not contest that the parties are Raj Gonds and are governed by the Hindu Law in matters of succession.

7. Before we consider the question of the shares of the parties in the properties, it is necessary to decide whether Smt. Mira Devi married Gopal Saran Singh as alleged and whether the marriage is valid. So far as the performance of the marriage ceremony is concerned, we have on record the marriage certificate (Ex. D-10) issued by the Marriage Registrar under the Special Marriage Act, 1872. The statements of Smt. Mira Devi and the attesting witnesses L.S. Sherlekar and S.N. Trivedi along with the certificate prove the solemnization of the marriage beyond doubt.

8. The respondent Smt. Aman Kumari objects to the validity of the marriage on the ground that Gopal Saran Singh was below 21 years of age and as the consent of his father to the marriage was not obtained, it was contrary the condition No. 3 in Section 2 of the Special Marriage Act, 1872. We have, therefore, to decide whether Gopal Saran Singh was under 21 years of age on 4-7-1941, the date on which the marriage was celebrated. (After discussing the evidence in Paras 9-13, the judgment proceeded;)

14. From the material on, record, we find it amply proved that Gopal Saran Singh was born in 1919. He was thus more than 21 years old when his marriage under the Special Marriage Act was celebrated on 4-7-1941. Consent of the father to the marriage was not, therefore, necessary. The marriage cannot be attacked as invalid on this ground.

15 The second ground on which the marriage is challenged is that Gopal Saran Singh was not a Hindu but a Gond belonging to the aboriginal tribe and Smt. Mira Devi was a Hindu and therefore the marriage could not be solemnized under Section 2 of the Special Marriage Act, 1872, as amended in 1923. That section permits a marriage between two persons both of whom do not profess any of the seven faiths specified therein or between two persons both of whom profess any of the four specified, faiths. It was contended that a marriage between a person professing one of those faiths and a person not professing any of those faiths is not permissible under that section and is therefore absolutely void. This contention is supported by the decision in ***Ratan Behari* v. *Maruaretha Hey***, AIR 1959 Cal 544 .

16. In the instant case, Smt. Mira Devi was undisputedly a Hindu Brahmin. As regards Gopal Saran Singh, the recitals in the plaint show that he was a Raj Gond Hindu. To this, the reply of the defendants was that they were Gonds of the Adivasi tribe following tribal customs and not rules of the Mitakshara School. The pleadings of the parties are thus the exact opposite of what they should have said to support their case on this point. However, the finding is that the parties belonged to Raj Gond class, who had according to the plaintiff adopted Hindu Law of succession,

17. The position of Raj Gonds has been considered by this High Court in ***Chattar Singh* v. *Roshan Singh,*** ILR (1946) Nag 159: (AIR 1946 Nag 277). The Court observed:

"The distinction between a Hindu and a person who is subject to Hindu Law is at times apt to be blurred but the distinction is there. The Gonds have, as is well-known, adopted in the course of time whether for reasons of propinquity or snobbery several Hindu usages and customs, but) this does not make them Hindus either in the ethnological or complete theological sense."

The Court then concluded that Gonds are not Hindus and proceeded to consider the contention that Raj Gonds which are a branch of the Gonds had become Hindus. On a review of the authorities, their Lordships repelled, the contention holding that Raj Gonds were not Hindus. In ***Dashrath Prasad* v. *Lalloo Singh,*** 1951 Nag LJ 616: (AIR 1951 Nag 343), Bose, J, (as he then

was) laid down that "Raj Gonds are not Hindus but the presumption is that they are governed by Hindu Law unless contrary is shown". It is clear from these decisions that although Raj Gonds have adopted the Hindu Law for some purposes, they have not thereby become Hindus. The adoption of a particular law is different from changing faith.

18. Strictly speaking, therefore, the marriage between Gopal Saran Singh and Smt. Mira Devi could not be celebrated under Section 2 of the Special Marriage Act. That brings us to the question whether a marriage contrary to the conditions specified in Section 2 is *void ab initio,* or whether it is valid until set aside by Court under Section 17 of the Act of 1872.

19. This question was considered by a Special Bench of three Judges of this Court in ***Ganeshprasad* v. *Damayanti,*** ILR (1946) Nag 1: (AIR 1946 Nag 60) (SB) and it was held that Section 2 docs not lay down the conditions of the validity, of the marriage but merely prescribes the forms which have to be filled in by the parties. It was held that Section 17 only gave a discretionary power to Court to declare the marriage "null or dissolved". It was finally concluded that such a marriage was not *void ab initio.*

20. The view taken by the other High Courts is contrary. In ***Basanta Sen* v. *Aghore Nath Sen,*** AIR 1929 Cal 631 (SB) jt was held that want of consent of the guardian when it was necessary under Section 2 rendered the marriage absolutely void. In ***Arvindam* v. *M. Vendernian,*** AIR 1939 Hyd 205 the provisions contained in Section 2 were considered mandatory and a marriage contrary to those provisions was held absolutely void. Their Lordships followed the Calcutta view in Basanta Son's case, AIR 1929 Cal 631 (SB) (supra), in preference to the view of the Nagpur High Court. A similar view has been taken in ***Jayalakshmi* v. *Soundararajan,*** AIR 1949 Mad 808 and ***Parbati Mukerjee* v. *Samrendra Nath,*** AIR 1951 Punj 88 (SB).

21. We consider ourselves bound by the view of the Special Bench of three Judges of this Court in ***Ganesh prasad's case***, ILR (1946) Nag 1: (AIR 1946 Nag 60) (SB) (supra). We do not agree that that view requires reconsideration. The word "may" used in Section 17 clearly gives discretion to the Court to declare the marriage null or to dissolve it. A matrimonial court may not consider it fit to exercise its discretion against granting such a declaration in suitable cases. We may add that Section 17 of the Act of 1872 did not contain any general declaration about such marriage being void as is now found in the corresponding Section 24 of the Act of 1954 which open with the words: "Any marriage solemnized under this Act shall be null and void and may be so declared by a decree.....etc." It is clear from this language that the marriage is void independent of any declaration by Court at all. This was not the position under the Act of 1872 where the power of the Court had to be invoked to produce such an effect.

22. At any rate, so far as the condition regarding "faiths" of the parties is concerned, the matter does not involve difficulty in view of the following observations in ***Ganesh prasad's case,*** ILR (1946) Nag 1: (AIR 1946 Nag 60) (SB) (supra):

"We are agreed that the Act does not require formal admittance to any of the faiths specified in Section 2, nor does it require that any of them should be outwardly embraced. All it lays down is that the declarant should make a formal profession of one or other of those faiths before the Marriage Registrar. In our opinion, any person can profess the faiths mentioned whether or not he or she has actually been admitted to any of them, and even if he or she is not recognised by others as belonging to one or other of them."

The Calcutta High Court which took a different view of the implications of Section 2 on other conditions observed in ***Dr. Niranjan Das* v. *Mrs. Ena Mohan***, AIR 1943 Cal 146 that all that the Act requires is a declaration of the faith at the time of the marriage. Thus, it appears that it would be sufficient if the party professes Hindu faith at the time of marriage, and this the deceased Gopal

Saran Singh, in the instant case, declared at the time of marriage (vide Ex. D-10). We bold that the attack on the validity of the marriage on this ground must fail.

23. The last ground against the validity of the marriage urged by Shri Dharmadhikari for the respondent is that the Special Marriage Act was never in force in Korea State and therefore the marriage was invalid as amongst Raj Gonds of that State, a marriage outside the community of Raj Gonds is not permitted. We may in this connection refer to Conflict of Laws by R.H. Graveson (1955, Third Edition), page 131 where after reviewing the case law, the learned author formulates the modern rule as follows:

"The essentials of a marriage are governed by the law of the domicile of each party at the time of marriage while the formalities are governed exclusively by the law of the place of celebration applicable to the particular type of marriage celebrated."

"Essential requirements of marriage" in this passage refers to the provisions of law prohibiting marriage on various grounds. In paragraph 21 of the judgment, the trial Court has observed than the evidence adduced by the plaintiff is insufficient to prove a custom that Gonds or Raj Gonds cannot marry outside their tribe. The witnesses for the plaintiff do not positively depose to such a prohibition. All that they say is that Raj Gonds generally marry within their caste or tribe. That is true about every caste or tribe. Something more is needed to prove a positive prohibition, e.g., the person who contracted such a marriage was treated by the tribe as having ceased to belong to the tribe etc. We agree that the evidence does not establish any positive prohibition. Thus, there was no contravention of any essential requirements of marriage in the law or custom governing the parties. So far as the form of the marriage is concerned, it was valid according to the place of celebration which took place in Wardha where the Special Marriage Act was in force. The marriage was thus valid as the form was according to the *lex loci celebrationis* and there was no prohibition in the *lex domicilii* against the marriage.

24. The contention that the marriage must be treated as invalid for the purpose of the succession of lands in Korea State is without any substance. It is true that succession to immovable property is governed by the law of the place where the property is situate. This only means that the persons who have a right in the property and their shares will be determined by such law. However, the question whether the claimant is a wife or a husband of the deceased would be determined by the law relating to the status of marriage. The personal status of a man accompanies him everywhere as also the status of domestic relations on the principle of universality of status recognized in all countries. As Graveson observes in The Conflict of Laws on page 114:

"This principle of universal recognition has led English Courts, for example, Jo accept the status of a child legitimated under the law of a foreign domicile, for many years before the principle of legitimation by subsequent marriage of the child's parents was introduced into English law by the Legitimacy Act, 1926; to recognise the status of husband and wife between parties who could dissolve their marriage by consent and registration "

In this connection, distinction between status and incidents of status should not be lost sight of. The relationship between spouses is a question of status. It is only the latter which would be governed by the law of the *situs* of the immovable property; but in administering such law, the relationship would have to be taken as valid according to the law of the place of the celebration of marriage.

25. In view of the discussion above, we hold that the marriage between Gopal Saran Singh and Smt. Mira Devi (defendant No. 1) was valid and the other two defendants born of this marriage are legitimate sons of Gopal Saran Singh. We shall now consider the question of inheritance.

26. Sections 22 and 23 of the Special Marriage Act, 1872, were as follows:

"22. The marriage under" this Act of any member of an undivided family who professes, the Hindu, Budhist Sikh or Jaina religion shall be deemed to effect his severance from such family.

A person professing the Hindu, Budhist, Sikh or Jaina religion who marries under this Act shall have the same rights and be subject to the same disabilities in regard to any right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 applies."

27. The effect of these sections is that such a person, on performance of the marriage, ceases to be a member of the joint family. His share in the family properties becomes defined at once and vests in him separately. He cannot later claim any right of survivorship in the family properties. However, it follows from Section 23 that he is not debarred from asserting his rights as an heir to any one to whom he could inherit but for the marriage under the Act. The saving of his rights under Section 23 is personal to him and does not extend to his children.

28. That being the position, it is clear that Gopal Saran Singh became separated from the family in 1941 as soon as the marriage under the Special Marriage Act was celebrated. At that time, the family consisted of Jagdish Prasad Singh, his wife (plaintiff) and his son Gopal Saran Singh. It is settled law that when a partition, takes place between a father and his son the mother is entitled to a share equal to that of the son. "Partition" here does not mean partition "by metes and bounds" but denotes the severance of the jointness of the family. All that is necessary to constitute a partition of a Hindu family is a definite and unequivocal indication of his intention by a member of the joint family to separate himself from the family and separately enjoy his share in the joint family property.

It such a declaration is made, the shares of the individual members become defined and vest in them separately. In the instant case, the declaration is not made by the individual member; but performance of the marriage leads to the severance of the family by a statutory provision. Essentially, the situation does not differ from the case of the declaration of an intention by a coparcener to separate. The coparcener who marries under the Special Marriage Act knows that severance will follow on such marriage.

By his act of contracting the marriage, he can be deemed to have made the necessary declaration to separate. We hold that there was a partition between Gopal Saran Singh and his father when the former married and therefore the plaintiff was entitled to one-third share of the family properties as her separate share; Jagdish Prasad Singh and Gopal Saran Singh each got a third share.

29. When Jagdish Prasad Singh died in 1942, inheritance opened, to the one-third share held by him. It has been conceded before us by both the parties that the Hindu Women's Right to Property Act, 1937, was not in force in Korea State at the material time. The inheritance would thus be governed by the provisions of Hindu Law as they stood without that Act A separated son excludes the widow from inheritance under Hindu Law and therefore Gopal Saran Singh would inherit to Jagdish Prasad Singh's share in preference to the plaintiff.

30. The learned Judge of the trial Court decided the case on the assumption that the Hindu Women's Right to Property Act, 1937, Applied to Korea State; but as we have already said, this was not the position. The mere fact that administration in Korea was carried on on the same principles as prevailing in the neighbouring districts of British India is not enough to make every statute of British India applicable to Korea. The learned Judge relied on the decisions in ***Girdharilal* v. *Fatehchand***, (S) AIR 1956 MP 145 and ***Manorama Bai* v. *Ramabai,*** AIR 1957 Mad 289; but these decisions consider the special effect of the Act of 1937 and are not helpful. as Gopal Saran Singh's right of inheritance was preserved by Section 23 of the Special Marriage Act, 1872, he inherited the share of Jagdish Prasad Singh.

31. After the death of Gopal Saran Singh, his estate would devolve on the defendants according to the provisions of the Indian Succession Act as provided in Section 24 of the Special Marriage Act. Under the Indian Succession Act, the widow and lineal descendants of the deceased exclude the mother and therefore the property left by Gopal Saran Singh would pass to the defendants in preference to the plaintiff.

32. That disposes of the main contentions of the parties. We may here briefly refer to one or two points which were raised in arguments. On behalf of the plaintiff, Shri Dharmadhikari argued that the jagir was resumed by the Korea Darbar in 1945 (vide Ex. D-12) and the home farm lands continued in the plaintiff's possession by sufferance. The defendants have no rights in them. On the same hypothesis, the defendants contend that after the resumption of the jagir, neither party had a right to the lands which vested in the Government and as Government granted a patta of the lands to the defendants, they should be considered to be fully entitled to the lands. We do not agree that either of these contentions is correct. The home farm lands appertained to the jagir and were family properties. If the Korea Darbar resumed the jagir but left the lands with the family, the parties would continue to have the same rights in them as they had in the jagir. They thus held the lands jointly--the plaintiff having one-third share and the defendants having the remaining two-third.

34. In view of the findings above, the appeal filed by the plaintiff (First Appeal No. 120 of (1958) is dismissed and the appeal filed by the defendants (First Appeal No. 39 of 1958) is partly allowed. The decree of the trial Court is modified by substituting "one-third share" for the words "two-third share" wherever they occur in the decree. As regards costs, considering that both the parties had claimed a whole share in the suit and appeal and the success is divided, we direct that the defendants shall pay one-third of the costs of the lower Court to the plaintiff and the costs of the appeals shall be borne as incurred.

Parwatawwa v. Channawwa
AIR 1966 Mysore 100

Somnath Iyer, J.

1. This second appeal concerns the succession to the properties of a certain Siddalingiah who died in the year 1954. His wife Siddavva who survived him died in the year 1956 and the defendant is theirdaughter.

2. The source of this appeal is a suit brought by Channavva the plaintiff, claiming to be he second wife of Siddalingiah. That she was married in the year 1951 to Siddalingiah in the State of Bombay was her case, and, she claimed Siddalingiah's properties as his widow to the exclusion of the defendant. She sought a decree for possession of those properties from the defendant.

3. The defendant did not in the courts below admit that the plaintiff was the wife of Siddalingiah, and pleaded that she was only his concubine. But, both the courts below pronounced that there was a marriage between the plaintiff and Siddalingiah. But while the Munsiff who thought that that marriage was invalid dismissed the suit, the District Judge to whom the plaintiff appealed, found that marriage to be a good marriage and gave the plaintiff the decree she wanted.

4. The defendant appeals to this Court and her appellant which involves a question of some importance has been referred to us under the provisions of Section 6 of the Mysore High Court Act.

5. It is not controverted that Siddalingiah was a permanent resident of the erstwhile State of Hyderabad and that when he went through a form of marriage with the plaintiff at Nilgond in the then State of Bombay, his first wife was living. The courts below have both found that there was the celebration of a marriage with all the necessary solemnity between Siddalingiah and the plaintiff in the year 1951, and that after her marriage, the plaintiff lived with her husband in the State of Hyderabad until he died. These findings were not discussed in this court.

6. It should be observed that the plaintiff instituted her suit in the Court of the Munsiff of Yelberga which was a Hyderabad Court before the reorganisation of the States but became a Court of the new Mysore State thereafter. The property claimed by her was originally in the State of Hyderabad and is now in the State. When that marriage ceremony was performed, there was a law instituted the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, operating in the State of Bombay forbidding bigamous marriages among Hindus. This law will be referred to as the Bombay Act. Section 4 of that Act declared that notwithstanding any law, custom or usage to the contrary, a bigamous marriage was void if it was contracted in the State of Bombay after the Act came into force.

7. That section reads:

Bigamour marriages to be void.--

"4. Notwithstanding any law, custom or usage to the contrary, a bigamous marriage shall be void,--

(a) if it is contracted in this Province after the coming into force of this Act,

(b) if it is contracted beyond the limits of this Province after the coming into force of the Act and either or both the contracting parties to such marriage are domiciled in this province."

8. What, therefore, induced the finding of the Munsiff that the marriage between Siddalingiah and the plaintiff though performed with required ceremony was void, was the celebration of that marriage in the State of Bombay which was prohibited by the aforesaid law. But the District Judge dissented from that view principally on the ground that section 4 of the Bombay Act did not

invalidate a marriage between spouses one of whom was not domiciled in the State of Bombay. Siddalingiah, according to the District Judge, had no Bombay domicile but was a person with a Hyderabad domicile, and, since there was no Hyderabad law prohibiting polygamy, the marriage, it was said, was not void although the plaintiff was domiciled in the State of Bombay.

9. Which of these two views should commend itself to us is the question, the answer to which must depend upon the provisions of section 4 of the Bombay Act, and their scope.

10. That both the plaintiff and Siddalingiah are Hindus governed by the Mitakshara school of Hindu Law is not in dispute. That when there was a marriage between the plaintiff and Siddalingiah there was no law operating in the State of Hyderabad as in the State of Bombay prohibiting a polygamous marriage is also not in controversy. So, it follows that under the personal law of Siddalingiah by which his marriage was governed, he had the capacity to contract a polygamous marriage, which under the Hindu Law is polygamous. But the plaintiff who was a permanent resident of the State of Bombay was governed by the Bombay Act which prohibited a marriage between persons one of whom had a living spouse. It is in this situation that the challenge to the validity of the marriage between them present itself for discussion.

11. It would be convenient to first discuss the correctness of the postulate that the Bombay Act did not operate on Siddalingiah who, it was asserted, had a Hyderabad domicile. The first submission to be considered in that context is the proposition that after the commencement of the Constitution there was a fusion of the then existing multitude of domiciles and so it became impossible for a citizen of India to have any other domicile than the Indian domicile. It was said that Art. 5 of the Constitution which recognizes only the domicile in the territories of India which creates citizenship excludes the concept of a domicile in the various States comprising the Union Territory. Article 5 of the Constitution reads:

Citizenship at the commencement of the Constitution--

"5. At the commencement of the Constitution, every person who has his domicile in the territory of India and--

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a citizen of India.

12. This article of course makes it clear that after the emergence of the Union under the Constitution every person who has a domicile in the territory of India and who falls within one or more of the three clauses to that article acquires the citizenship of India.

13. It is clear that this article mainly concerns itself with citizenship for the acquisition of which a domicile in the territory of India is by itself insufficient. But the question is whether the allusion in Art. 5 to a "domicile" the territory of India" obliterates all distinctions between a citizen of India who is a permanent resident in one State and another who is a permanent resident of another. While it is true that a citizen of India has an Indian domicile, it should not be forgotten that the Union of India is a union of the States, and that, under the Constitution the legislature of a State has the competence to make laws for the whole or any part of that State. Those are the laws which could be made under Art. 245 of the Constitution which declares the extent of laws made by Parliament and those of the legislatures of States. It reads:

Extent of laws made by Parliament and by the Legislatures of States.

"245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra--territorialoperation."

14. This article makes it clear that a law made by the Legislature of the State operates only within that part of the State for which it is made, and, that being so, if a law by one State conflicts with a law operating in another, there may be many occasions on which that conflict has to be solved by the application of well known principles and rules.

That the Constitution recognises only one domicile and that that domicile is the domicile within the "territory of India" can be no solution an Indian domicile for every citizen of the Union, a cash of State laws as in the present case arises. An inevitable distinction must, therefore, be made between a resident of one State and the resident of another for this limited purpose although, both of them have an Indian domicile, since the question whether in a given case a matter relating for instance to minority, succession or marriage, is governed by a law made by one State or by that made by another does not depend upon the fact that both of them are persons of Indian domicile, but, upon the more relevant factor that each has his legal home or domicile' in his own State.

15. The true position, therefore, is that every person belonging to a State forming part of the Union under the Constitution has a status distinct from although subsidiary to that flowing form his Indian domicile or his political status as an Indian citizen, that status having relevance only for certain purposes. For that purpose, it may be possible to say that while a person has the primary Indian domicile which contributes to the acquisition of citizenship he may have secondary domicile which is the domicile of the State to which he belongs, although the importance of such secondary domicile has relevance only in some spheres. The recognition of such domicile may become imperative where the higher Indian domicile does not and cannot regulate a matter governed by a Statelaw.

16. That that is the true position was what was elucidated by the Supreme Court in ***D.P.Joshi*** **v.** ***Madhya Bharat,*** (S) AIR 1955 SC 334. What was explained in that case was that the concept of an Indian domicile does not do away with the concept of subsidiary domiciles such as the domicile of the States and that there may be a domicile of a State for certain purposes notwithstanding there being the larger and the more comprehensive Indian domicile. In that context, Venkatarama Iyyar J. saidthis:

"A more serious question is that as the law known only of domicile of a country asa whole and not of any particular place therein, whether there can be such a thing as Madhya Bharat domicile apart from Indian domicile. To answer this question, we must examine what the word "domicile" in law imports. When we speak of a person as having a domicile of a particular country, we mean that in certain matters such as succession, minority and marriage he is governed by the law of thatcountry.

"Domicile has reference to the system of law by which a person is governed, and when we speak of the domicile of a country, we assume that the same system of law prevails all over that country. But it might well happen that laws relating to succession and marriages might not be the same all over the country, and that different areas in the State might have different laws in respect of those matters. In that case, each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile.

"The position is thus stated by Dicey at page 83:

The area contemplated throughout the Rules relating to domicile is a 'country' or 'territory subject to one system of law'. The reason for this is that the object of this treatise, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his legal

home or domicile within a territory governed by one system of law, i.e., within a given country, rather than within another.

If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it would be essential to determine whether D was domiciled within such particular part, e.g., California in the United State: but in this case, such part would be 'pro tanto' a separate country, in the sense in which that term is employed in these 'Rules'."(P.338).

* * * * *

"Under the Constitution, the power to legislate on succession, marriage and minority has been conferred under Entry 5 in the Concurrent List on both the Union and the State Legislatures, and it is therefore quite conceivable that until the Centre intervenes and enacts a uniform Code for the whole of India, each State might have its own laws on those subjects, and thus there could be different domiciles for different States. We do not, therefore, see any force in the contention that there cannot be a domicile of Madhya Bharat under the Constitution." (P. 339).

17. This discussion is relevant for the selection of the principles by which a conflict between one State law and another can be resolved. If it is clear that such State within the Union is a separate country for certain purposes and has a law of its own which its legislature can make for the whole or a part of that State, and, if there is a conflict between those two laws on matters like minority, succession or marriage the principles by the application of which that conflict may be resolved are the principles of private international law. There can be no other basis for the determination of a question which may arise in that way.

18. In this case, the plaintiff was a permanent resident of the State of Bombay and was therefore governed by the Bombay Act which forbade a bigamous marriage in the State of Bombay, Siddalingiah to whom she was married and who was admittedly a permanent resident of the Hyderabad State and whose domicile for the determination of his capacity to contract a polygamous marriage was the Hyderabad domicile, did not suffer from this disability since the Mitakshara School of Hindu Law by which he was governed permitted him to contract a polygamous marriage.

The marriage with which we are concerned was thus a marriage between the plaintiff who could not marry a person who had already an un divorced wife who was still living, and, Siddalingiah whose personal law bestowed on him the capacity to have a plurality of wives. Since Siddalingiah could marry more than one wife, if he had taken a second wife of a State where there was no law forbidding a polygamous marriage, that marriage would have been a good marriage. So, if the marriage between him and the plaintiff had been celebrated inside his own State which was the State of Hyderabad and the plaintiff was not domiciled in the State of Bombay, no one could have denounced that marriage as an invalid marriage. But what complicates the matter is the fact that Siddalingiah proceeded to the State of Bombay where the plaintiff resided and contracted the marriage within that State.

The submission for the defendant rested on section 4 which declares void every 'bigamous' marriage contracted within the State of Bombay after the Act came into force, and the argument advanced is that the law on marriage is the law operating in the place of its celebration, whatever may be the personal law of the spouses. The other submission was that the personal law of Siddalingiah had no relevance to his marriage with the plaintiff who had her domicile in the State of Bombay and that so long as the personal law of one of the spouses forbade a polygamous marriage, a polygamous marriage was impossible.

19. Section 4 of the Bombay Act which declares every bigamous marriage within the State of Bombay void, takes within its sweep bigamous marriages celebrated within the State. But that section was enacted by the Legislature of the State of Bombay which could make a law only for the whole or part of its own State, and, if that is the limited extent of the law by it for its State, whether it has the consequence of invalidating every marriage celebrated within the State of Bombay is disregard of the personal law of the spouse which may be at variance with the provisions of the Bombay Act is the question, of importance.

The conflict in the case before us which stands accentuated by the State of Bombay being the place of celebration is between the Bombay law which prohibited polygamy and the personal law of Siddalingiah which permitted it. If it is impossible to eliminate altogether the law of Siddalingiah's domicile and if the matter depended entirely on the place of celebration. Section 4 of the Bombay Act would constitute a complete defence to the plaintiff's suit.

20. So it was for the appellant that the impugned marriage celebrated in the State of Bombay, depended entirely upon the law of the place of celebration and that since that law was the Bombay Act which prohibited a plurality of wives or a marriage with a man during the continuance of his first marriage, the marriage was void.

21. If this is a correct statement of the law and an adjudication on the validity of the marriage could rest exclusively on the provisions of the Bombay Act, there would be little difficulty in pronouncing it as void, since, section 4 of that Act declares a marriage between two persons one of whom has a living spouse to be void.

22. That the validity of a marriage was completely governed by the law of the place of celebration, or the lex loci celebrations, was once the dictum of the Courts in England. But a study of judicial precedents in that country reveals striking contrarieties between the enunciations made from time to time. An analysis of those pronouncements manifests at least three different views which have been suggested at various stages. The law of the place of celebration the law of the country in which each of the parties was domiciled at the time of the marriage and the law of the husband's domicile which should be presumed to be the intended matrimonial home are, it is suggested, the three different legal systems one or the other of which decides the validity of the marriage.

23. Until the decision of the House of Lords in ***Brook* v. *Brook,*** (1861) 9 HLC 193, earlier cases proceeded on the unreserved assumption that the answer to the question whether a marriage was or was not valid should be found in the law of the pace of celebration. The general rule that a foreign marriage according to the law of the country where it is celebrated is good anywhere and that one which was not according to that law, was not, was the rule to which a successful appeal was made in those decisions.

24. In ***Simonin* v. *Mallac,*** (1860) 2 SW&TR 67: 164 ER 917, it was explained that a marriage good by the law of the country where solemnized should be held good in all other countries and that the converse was equally strongly maintained as a general rule by nearly all writers on International Law although it was not overlooked that those writers recognised also marriages involving polygamy and incest positively prohibited by a public law of a country for reasons of policy, as falling outside the rule.

25. Support for this enunciation was derived from ***Scrimshire* v. *Scrimshire,*** (1752) 2 H.C.395, which was a case in which the parties were British subjects domiciled in England. The respondent pleaded that the marriage celebrated in France was by the laws of France null and void.

Sir E. Simpson before whom that plea succeeded observed:

"The only question before me is, whether this is a good or bad marriage by the laws of England, and I am inclined to think that it is not good. On this point I apprehend that it is the law of this country to take notice of the laws of France, or of any foreign country, in determining upon marriages of this kind. The question being in substance this whether, by the law of the country, marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed by that law."

After a further discussion of the question, he summed up:

"These authority fully show that all contracts of arbitration to be considered according to the laws of the country where they are made, and the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received."

26. For the first time of distinction between forms and essential which are two distinct matters to be considered when pronouncing upon the validity of a marriage was thrown into prominence in (1861) 9 HLC 193. The Lord Chancellor emphasised the importance of the distinction between the forms of entering into the contract of marriage which are to be regulated by the *lex loci contractus* or the law of the country in which it is celebrated and the essentials of the contract which depended upon the *lex domicillii*, 'the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.'

27. The testator in that case married his first wife in England, and, after her death, her sister in Denmark. That marriage was valid by Danish law but void for consanguinity by English law. The contention of the Attorney General that the son by the second wife was a bastard and that his share of the testator's property passed to the Crown succeeded on the principle that if a contract of marriage is such in essentials as to be contrary to the law of domicile and it is declared void by that law, it is to be regarded as void in the country of domicile though not contrary to the law of the country in which it was celebrated. The Lord Chancellor observed:

"That the Parliament of England in framing the prohibited decrees within which marriages were forbidden, believed and intimated the opinion, that all such marriages were incestuous and contrary to God's word I cannot doubt."

28. The rule stated in (1861) 9 HLC 193, that the rule that the law of the place of celebration does not always decide the validity of a marriage and that, as to essentials, as distinguished from forms, the law of domicile is what operates, is what now holds that field.

29. In ***Berthiaume* v. *Dastous,*** 1930 Act 79, Viscount Dunedin reiterated the rule in the following way:

"If there is one question better settled than any other in international law, it is that as regards "marriage--putting aside the question of capacity--*locus regit actum*."

The maxim "*locus regit actum*" (the place governs the act) means that the validity of an act depends on the law of the place where it is done. The noble Lord thus made it clear that capacity did not depend upon the law of the place where the marriage was celebrated. This rule which has for its source the pronouncement in (1861) 9 HLC 193 has received recognition from writers on Private International Law to two of whom it would be sufficient to refer.

29A. Rule 31 as formulated by Dicey in his book on Conflict of Laws (Seventh edition) reads:

"Rule 31--Subject to the Exceptions hereinafter mentioned, a marriage is valid as regards capacity when each of the parties, "has, according to the law of his or her respective domicile, the capacity to marry the other."

30. Dr. Cheshire who stated this rule in a slightly different form did not doubt in his book on Private International Law that an essential matter such as the capacity to marry is not governed by the law of the place of celebration but was manifestly governed by the law of the domicile of the

parties although in his opinion the dual domicile doctrine insisting on capacity in both the parties accordingly to their own law of domicile, had relevance only to a purely domestic case not involving a 'foreign element'. In his view.

'The doctrine would be comparatively innocuous if the expression 'the law of the domicileof each party' were construed to mean, not the rule that would be applied in that domicile 'to a purely domestic case, but the rule applicable to the particular marriage in question, i.e. to one containing a foreign element." (Page 305 fifth edition).

31. Now, there is no question that as to the form of the impugned marriage, there was no transgression of the law of the place of celebration. The Bombay Act to which an appeal was made for the appellant did not prescribe any special form of marriage since its aim was no more than to invalidate a polygamous marriage. But the question before us touches and essential matter and not a mere form and the Bombay Act in the sense that it is the law of the place of celebration, cannot assist the challenge to the legality of the marriage.

32. But it was maintained that even if what governs the validity of a marriage is the law ofthe domicile of the parties as explained in (1861) 9 HLC 193 and by the books on international Law, the impugned marriage was not a good marriage since this was not a case in which each of the two parties to the marriage had the capacity for a polygamous marriage.

It was said that even if Siddalingiah who had a Hyderabad domicile and who was governed by the Mitakshara School of Hindu Law in force in that State which did not prohibit polygamy, possessed that capacity, the plaintiff whose law of domicile was the Bombay Act which forbade a polygamous marriage could not marry Siddalingiah whose first wife was then living. That it was not enough for Siddalingiah who was only one of the parties to the marriage to possess the capacity for a polygamous marriage if the plaintiff who was the other party to the marriage did not have it, and, that the requirement of Rule 31 in Dicey's Conflict of Laws was the existence of capacityin "each of the parties," was the assertion made before us.

33. It is however clear that the postulate that the capacity of each of spouses according to the law of his or her domicile is a condition precedent to the validity of the marriage, does not take notice of the law of the place of celebration, which may not be the place of domicile of either of the spouses. The question is whether the impugned polygamous marriage between the plaintiff and Siddalingiah can be denounced as an invalid marriage on the ground that the capacity for that marriage was inexistent in the plaintiff although Siddalingiah's personal law which was the law of his domicile bestowed on him that capacity.

34. The insistence on the capacity in each of the parties to the marriage to marry the other according to his or her respective law of domicile which finds recognition in some of the English cases, rests on the principle that a marriage is a contractual relationship. So it was explained in ***Mette* v. *Mette***, (1859)1 SW&TR 416: 164 ER 792; that there could be no valid marriage "unless each was competent to contract with the other" and that the question rested upon the effect of domicile andnaturalisation.

35. In ***Sottomayor* v. *De Barros,*** (1877) 3 P.D. 1, the Court of Appealobserved:

"But it is a well recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have

been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile..... "

36. That was a case in which the petitioner and the respondent who were first cousins came to reside in England in 1858. In 1866, they went through a form of marriage before a registrar's office in London. In 1873, they returned in Portugal and continued to reside there. By the law of Portugal, a marriage of Portuguese subject between first cousins without dispensation wheresoever contracted was invalid.

37. In that situation, the petitioner applied to the Court in England for a declaration that her marriage with the respondent was null and void. In ***Sottomayor* v. *Defence Barros,*** (1877) 2 PD 81, Sir R. Phillimore who heard the petition declined to make the declaration observing that although the decided cases established the doctrine that the Court of domicile recognises certain incapacities affixed by the law of domicile and could declare invalid, a marriage between the parties belonging to that domicile in a foreign state in which such marriage is lawful, they did not establish the converse view that the Court of the place of the contract of marriage is bound to recognise the incapacities affixed by the law of the domicile on the parties to the contract.

38. The wife's appeal to the Court of Appeal was allowed in (1877) 3 PD 1. Cotton L.J. in the course of his judgment said this:

"It is proved that the Courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnised between parties incapable of marrying, and incestuous. How can the Courts of this country hold the contrary, and if appealed to, say the marriage is valid?"

39. But there was a further consideration of this matter when the case was remitted to the Divorce Division when it appeared that the husband's domicile at the date of the marriage was not Portuguese but English. In ***Sottomayer* v. *De Barros,***.(1879) 5 PD 94, Sir James Hannen P. pronounced the marriage valid. The pronouncement in favour of the marriage rested on the husband's domicile being English, which the declaration to the contrary made by the Court of Appeal was founded on the assumption that both the husband and the wife had a Portuguese domicile.

What persuaded the view of Sir James Hannen P. was the observation extracted below made by the Court of Appeal that its decision was restricted to the case before it where the law of domicile of both the spouses prohibited the marriage:

"Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage."

40. But, when it turned out during the further investigations that the husband had and English domicile which did not prohibit the marriage. Sir James Hannen P. pronounced the marriage valid. That pronouncement weakened the decision in (1859) 1 SW&TR 416: 164 ER 792, in which the husband was a domicile Englishman who married his deceased wife's sister who was domiciled in Frankfurt. The marriage was celebrated in Frankfurt and while by the law of Frankfurt it was a valid marriage, it was void for consanguinity by the English law. Sir Cresswell Cresswell declared the marriage void on the ground that "there could be no valid contract unless each was competent to contract with the other."

41. It is clear that the reasoning of Sir James Hannen P. in the third Sottomayer's case (1879) 5 PD 94, cannot be reconciled with that of Sir Cresswell Cresswell in (1859) 1 Sw&TR 416: 164 ER 792. In the third Sottomayer's case (1879) 5 PD 94, the President of the Court did not consider the incapacity of the wife impressed by the law of her own domicile as a relevant factor which could

have the effect of invalidating marriage which according to the law of the husband's domicile was a good marriage.

42. In regarded: Paine 1910 Ch 46 the husband who was a domiciled German married his first wife's sister at Frankfurt. That marriage was valid by German law but was void by the English law. Bennett J. was of the view that the marriage was invalid since the English law did not bestow upon the lady the capacity to contract. The dictum which influenced that view was that stated by Sir Cresswell Cresswell in (1859) 1 Sw&TR 416: 164 ER 792, that there could be no valid contract unless each was competent to contract with the other.

Sustenance for this view was also derived from the rule formulated by Dicey in his book on Conflict of Laws and the statement of the law found in Westlake's Private International Law and Halsbury's Laws of English (second edition volume VI, page 286). Bennett J. in his brief judgment did not notice the dissonance between the reasoning in Mette's case. (1859) 1 SW&TR 416: 164 ER 792, and that employed by Sir James Hannen P. in the third Sottomayer's case(1879) 5 PD 94.

43. The discussion so far made yields the following tow rules:

(a) Where the parties at the time of their marriage are domiciled in a country the laws of which prohibit their marriage, the marriage is void whether they are domiciled in the same country or in different countries.

(b) Where the laws of the country in which they are domiciled bestow on both the parties capacity for the marriage, the marriage is a good marriage.

44. But the difficulty presented is by a case in which the law of the country in which one party is domiciled bestows the capacity and the law of the other does not. In such a case, the pronouncement should be in favour of the validity of the marriage if the law of the husband's domicile bestows capacity on the husband for the marriage as Sir James Hannen P. did in the third Sottomayer's case. (1879) 5 PD 94 but adverse to its validity according to the decision in Mette's case. (1859) 1 SW&TR 416: 164 ER 792, and the case of in 1940 Act 46. The marriage in the third Sottomayer's case (1879) 5 PD 94, was, it is true, celebrated in England which was also the country of the husband's domicile, but the decision did not it appears respondent on that factor which had no relevance.

45. The doctrine against incapacity in either of the two parties to the marriage is influenced by the theory that a marriage is a contract and so both parties to it must have the capacity to marry one another. I doubt even if the insistence on capacity in both the parties to the marriage rests upon a sound principle of private international law, whether such insistence is possible in the case of a marriage between Hindus which is an institution not sharing all its attributes with a marriage under other laws or in other countries. A marriage among Hindus which is a holy union for the performance of religious duties was described by Sir Gooroodass Banerjee in the Hindu Law of Marriage and Stridhana (Lahore Law Lectures) thus:

Marriage in Hindu Law a sacrament.

"The important of the institution of marriage is too well recognised to require any comment. It is the source of every domestic comfort from infancy to old age; it is necessary for the preservation and the well being of our species; it awakes and develops the best feelings of our nature; it is the source of important legal rights and obligations; and, in its higher forms, it has tended to raise the weaker half of the human race from a stage of humiliating servitude. To the Hindu, the importance of marriage is heightened by the sanctions of religion. 'By no people', says Sir T. Strange. 'is greater importance attached to marriage than by the Hindus.' In Hindu Law it is regarded as one of the ten sanskars, or sacraments, necessary for regeneration of men of the twice-born classes, and the only sacrament for women and Sudras. It being a settled doctrine of the Hindu religion that one must

have a son to save him from a place of torment called 'put', marriage, as the primary means to that end, becomes a religious necessity." (Page 31).

46. Opinions have differed on the question whether a Hindu marriage is only a sacrament and not a contract. Sir Gooroodass Banerjee explained it as both a sacrament and a contract (page 3) while the decided cases reveal divergence of authority, some taking the view that it is a sacrament and not a contract and some that it is both. But if the sacramental aspect of a Hindu marriage is its principal feature and unlike the husband, the wife could not marry again during his lifetime, a rule which emanates from the concept that a marriage is essentially a contract, when applied to a Hindu marriage, may produce results of doubtful accuracy.

47. Now, the Hindu Law by which Siddalingiah was governed did not prohibit a polygamous marriage although the ancient texts required a just cause for a second marriage. He therefore possessed the capacity to marry the plaintiff in whom there was no incapacity to marry a person who had another living wife until the Bombay Act came into force declaring such marriage void and in effect prohibited it.

Assuming that the Bombay Act when it came into force divested the plaintiff of that capacity to marry a person who had his first wife living and, in consequence, there was incapacity in the plaintiff to marry Siddalingiah and, on that question, I do not express any opinion in this case the question is whether the plaintiff who married Siddalingiah in whom there was no incapacity, with the intention of following him to the place of his domicile, where the spouses desired to establish their matrimonial home--and of the existence of such intention which is fully established by their subsequent conduct there can scarcely be any doubt--did not there by acquire the status of a wife by reason of her own incapacity.

48. If the basis for the requirement of capacity in both the parties is the contractual character of the marriage and that basis is no safe foundation in the case of a marriage between Hindus, the incapacity, of the plaintiff if any should not in my opinion, affect the validity of the marriage.

49. Dr. Cheshire alluding obviously to the rule formulated by Dicey prescribing capacity in each of the parties to the marriage, doubted the correctness of that rule as one of universal application. He did not doubt about its applicability to a 'domestic' case as he calls it, between two spouses of the same domicile, but did not concede its operation on a case involving a 'foreign element'. Dr. Cheshire did not restrict his theory to a marriage like a Hindu marriage with its own peculiar attributes involving the performance of religious duties. He was discussing the applicability of the rule to a case where each of the parties to the marriage had his or her own domicile, the law of one of which bestowed capacity and the other did not, and deduced what he termed as the law of the intended matrimonial home which he enunciated thus:

"It is submitted that the correct doctrine is that which submits the question of capacity to what may briefly be termed the law of the intended matrimonial home. More fully stated, the doctrine is this. The basic presumption is that capacity to marry is governed by the law of the husband's domicile at the time of the marriage, for normally it is in the country of that domicile that the parties intend to establish their permanent home. This presumption, however, is rebutted if it is found beyond reasonable doubt that the parties intended to establish their home in a certain country and that they did in fact establish it there. Rival view based on matrimonial home.

At first sight, it may seem paradoxical that the governing law should depend upon a subsequent event the place where the conjugal home is set up. It must be stressed, however, that the question whether a marriage is void for incapacity arises, after, generally long after, its solemnization, so that it will be known whether the pre-marriage intention of the parties will regard

to their future domicile has in fact been fulfilled." (Dr. Cheshire on Private International Law Page 307, 5th edition). *Lex loci celebrationis* cannot be disregarded.

50. This statement of the law is more than opposite to a Hindu wife whose place is the home of her husband by whom, as pointed out by Mukerjea J., as he then was, in Ratneshwari ***Nandan Singh* v. *Bhagwati Saran Singh,*** AIR 1950 FC 142, at p. 178, the acceptance of the bride is a necessary and indispensable part of a Hindu marriage ceremony even considering the Hindu marriage to be entirely a sacrament.

51. So, in the case of a marriage between Hindus the basic presumption which according to Dr. Cheshire is that it is the country of the husband's domicile at the time of the marriage that the parties intended to establish their permanent home, has the strongest foundation,. The structure of that foundation is best explained by Sir Goroodass Banerjee thus:

"Marriage according to the Vedas is a union of flesh with flesh and bone with bone. Accordingly Brihaspati says: "In scripture and in the Code of law, as well as in population practice a wife is declared sharing the fruit of pure and impure acts." (Page 150).

52. The law of the intended matrimonial home stated by Dr. Cheshire has its origin in one of the earlier English cases. In ***Warrender* v. *Warrender***, (1835) 2 C&F 488: 6 ER 1239. Sir George Warrender, born and domiciled in Scotland married an English woman in England according to the rites and ceremonies of the Church of England. He did not charges his domicile but intended that his matrimonial residence should be in Scotland. After the husband and wife lived together for a short time in Scotland, they separated. Sir George continuing his domicile in Scotland instituted a suit for dissolution of the marriage on the grounds of adultery.

This suit was resisted on the ground that the Scotch Court had no jurisdiction to dissolve a marriage celebrated in England according to whose laws the marriage was indissoluble. The unanimous opinion of the House of Lords was that as Sir George Warrender at the time of his marriage was a domiciled Scotchman and Scotland was to be the residence of the marriage couple, although the ceremonials of entering into the contract of marriage were restricted by the law of England where the marriage was celebrated, the essentials of the contract was regulated by the law of Scotland in which the husband was domiciled. The Court of Session in Scotland it was held, had therefore, the authority to dissolve the marriage.

53. The elucidation that the essentials of the contract were to be regulated by the law of Scotland in which the husband was domicile is an elucidation of considerable importance since it was made in a case where the wife has an English domicile. The capacity for marriage being one concerning an essential matter is therefore, according to this statement of the principle, to be regulated by the law of the husband's domicile. That is precisely Dr. Cheshire's law of the intended matrimonial home.

54. An affirmation of this principle is again to be found in (1861) 9 H.L.C. 193. The husband in that case married the sister of his deceased wife in Denmark. Both of them were domiciled British subjects and their marriage was valid by the laws of Denmark but void according to the laws of England. The Lord Chancellor said that the question to be considered was whether the marriage between two British subjects whose domicile was in England and who contemplated England as the place of their matrimonial residence was valid in England though permitted by the law of Denmark.

The Lord Chancellor proceeded to observe:

"The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are

domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined." (Page 212).

55. In ***Ogden* v. *Ogden,*** 1908 P&H 46, Sir Gorell Barnes P, after referring to the second Sottomayor's case (1877) 2 P.D. 81 and to what the Court of Appeal stated therein, made certain observations which reinforce the view resting on the law of the intended matrimonial home.

He said this:

"..... and it may, perhaps, not be unreasonable for one country to refuse to recognise a marriage contracted in it between two persons by the laws of whose domicile a marriage between them is illegal, and yet it may be quite proper and reasonable for a country, in which a marriage takes place between persons domiciled in another country, to recognise it as a valid marriage when it would be legal in such other country if contracted after compliance with all formalities required in such other country, and, further, to protect its citizens in all cases of marriage where one of the contracting, parties is domiciled in the country first referred to that is to say, where the marriage takes place and the other is domiciled in a foreign country, and there is a conflict between the laws of the two countries as o the validity of the marriage." (p. 74).

56. If this principle is sound, in the case before us in which the Court in which the suit was instituted was the Court exercising jurisdiction in the area of the husband's domicile, the plaintiff could, it seems, appeal to the protection to which Sir Gorell Barnes, P., refers.

57. There is more modern recognition of the law of the intended matrimonial home. In ***Defence Reneville* v. *Defence Reneville***, 1948 P. 100, the marriage was celebrated in Paris between a domiciled English woman and a domiciled Frenchman who was the respondent. They lived together at various places in France and French possessions. After some years, the wife left her husband and returned to England and presented a petition for nullity on the ground of incapacity or wilful refusal of the respondent. The Court of Appeal came to the conclusion that the law applicable to the marriage was French law being that of the 'matrimonial domicile.'

In the course of his judgment, Lord Greene, M.R. observed:

"In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. What law is that to be decided? In my opinion by the law of French, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage. In (1861) 9 HLC 193 a case in which the marriage in Denmark (by the law of which country, assuming it applied, it was valid) of two persons domiciled in England was held to be void on the ground that although the *lex loci* governed the forms of marriage its essential validity depended on the *lex domicilii* of the parties. Lord Campbell L.C. said this: 'But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated." In the case of a void marriage, the matrimonial domicile contemplated will clearly be the same as that conveyable marriage, since the parties presumably intend to live together. In the present case, the matrimonial domicile was clearly French, and it is, in my opinion, to French law that the question whether the marriage was void or violable on the grounds alleged must be referred." (Page 114).

58. That the case before us in which the marriage was celebrated in the State of Bombay does not fall outside the principle propounded by the Master of Rolls in De Reneville's case, 1948 P. 100,

is what emerges from the fact that the plaintiff and Siddalingiah intended to live and did not live together in the husband's home in the Hyderabad State, which was the countryof their matrimonial domicile.

59. Again, in ***Ponticelli* v. *Ponticelli,*** (1958) 2 WLR 439, the marriage was a marriage by proxy between a husband of an Italian domicile but resident in England and a girl who was then resident and domiciled in Itlay. The marriage was celebrated in accordance with the Italian law and the country of the intended matrimonial home was England. The husband presented a petition for nullity of marriage on the ground that the wife had wifely refused to consummate it. Sachs J. pronounced in favour of validity proceeded to consider what the law was by the application of which the plea of nullitycould be decided and had no hesitation in concluding that the law was not the *lex loci celebrationis* but the English law which was the lex domicile and also the law of the intended matrimonialhome.

It is true that the case before Sachs J. presented the question in a form slightly different from that in which it arises in the case before us since the ground on which the petition was presented for nullity was wilful refusal on the part of the wife to consummate the marriage. Although it may be said that a post-nuptial fact was the foundation of the application, it is manifest that the decision did not rest on any such ground. Sachs J. was clearly of the view that the principle of De Reneville's case, 1948 P.100, that the validityof a marriage depends upon the law of the husband's domicile at the date of the marriage which was the law of the matrimonial domicile had the suffrage of reason. He said that it was a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony (to which a uniform general rule already applies), be consistentlydecided according to the law of one countryalone, a point of view which, be pointed out, was supported by the judgment of Bucknill L.J., in De Reneville's case, 1948 P. 100, and that consistencycould not be attained if anyother test was accepted.

Discussing the submission made before him that there was a third alternative as to the law to be applied in a case like the one before him, namely, the law of the intended matrimonial domicile, Sachs J. observed that no difference would be involved since both the spouses intended to live and settle in England after the marriage.

60. Those observations of Bucknill L.J., who concurred in the opinion of the Master of Rolls in Defence Reneville's case, 1948 P.100, read:

"True, the wife's domicile before marriage was English, but on the other hand, her husband's domicile was French; and, the two parties to the marriage having different domiciles, it seems to me that the law of France should prevail. To hold that the law of the country where each spouse is domiciled before marriage must decide as to the validity of the marriage in this case might led to the deplorable result, if the laws happened to differ, that the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason Ithink it essential that the law of one country should prevail and that it is reasonable that the law of the countrywhere the ceremony a of marriage took place and where the parties intended to live together and where in fact lived together, should be regarded as the law which controls the validityof their marriage."(page 122).

It is clear that in the opinion of the Lord justice while the law of the place of celebration controlled the form of the marriage, the law of the intended matrimonial home regulated essentials.

61. This principle acquired prominence again in ***Casey* v. *Casey,*** 1949 P.D.420, in which a woman domiciled and ordinarily resident in England married in England a man domiciled and ordinarily resident in Canada. When the wife mad an application for a decree of nullity, the point was whether the England law or the Canadian law decided the validity of the marriage. Becknill

L.J. pointed out that the passage in Lord Greene's judgment in De Reneville's case, 1948 P. 100, which I have already extracted, indicated that the law applicable was the law of Canada because the husband was domiciled in Canada and because at the date of the marriage, it was the intended matrimonial domicile in reference to which the parties were supposed to have entered into the bonds ofmarriage.

The Lord Justice repelled the contention that the fact that the marriage took place in England while the husband was in active service raised an inference that the parties intended to make England their permanent matrimonial domicile.

62. As long as in the third Sottomayer's case (1879) 5 P.D. 94, Sir James Hannen P. refused to accept the view pressed on him that a marriage forbidden by the law of domicile of one of the parties was an invalid marriage. He cited numerous examples which could suggest the injustice which might be caused to the spouses of his own country if a marriage was declared invalid on that ground. In the view of the President, there was no principle on which a Court should refuse recognition of a marriage on the basis of its own laws and that it was unreasonable for a judge to indulge in his own feelings as to what prohibitions of foreign countries on the capacity to contract a marriage were reasonable.

63. What emerges from this discussion in that on the question was to what law should govern capacity for marriage, there are at least three streams of thought. One view is that it is the law of the place of celebration which overlooks the distinction between formality and capacity. The second is that it is the law of the domicile of each party before the marriage which is demonstrated by the later pronouncements to be a conservative and orthodox view. The third is that the law of the intended matrimonial home is what governs capacity which has been explained as the best.

64. I am not unaware of the denunciation of this third view commended by Dr. Cheshire. It is said that it has little practical foundation and it is argued by its detractors that by allowing everything to hinge on intention, it open the door to the evasion of the law. That the validity of the marriage cannot remain in suspense until the parties implemented their intention, that the assumption that the woman domicile becomes that of the man on marriage rests on no conceivable principle and that the incapacities emanating from the law of her antenuptial domicile could not be disregarded is what is said against the theory.

65. The criticism that the doctrine depends entirely upon expressed intention is unconvincing since it overlooks the requirement of the implementation and the basic factor that nearly always the parties to the marriage would have planned every detail about their matrimonial home including its location. It is also clear that the acceptance of the theory that the law of domicile of each party before the marriage govern capacity produces difficulties of such great enormity that it may not be sound. The view accepted in many cases that only one law should govern capacity and not the laws of both the spouses when they are in conflict with one another accords with reason and justice. Its chief virtue is that it eliminates uncertainty and to think that the law should be the law of the husband's domicile which has the support of the 'basic presumption' that normally it is in the country of that domicile that the parties intend to establish their permanent home.

Although on some occasions a doubt has been expressed whether Lord Campbell's dictum in (1861) 9 HLC 193 enunciates the principle in that way, there can be little doubt that he did. Lord Campbell's reference to the "law of the country in which the parties are domiciled and mean to reside" cannot be mistaken for any other law then the law of the intended matrimonial home as understood in more than one case in recent time.

66. The discussion made so far is about the law which governs capacity and, in my opinion, that law is the law of the husband's domicile if not the law of the intended matrimonial home which

was in the case before us the Mitakshara School of Hindu Law in force in the erstwhile State of Hyderabad which bestowed capacity on both the spouses to marry one another. That it is so would be the end of the defendant's contention that the plaintiff was not the wife of Siddalingiah. The marriage between the plaintiff and Siddalingiah was a good and legal marriage since the law of Siddalingiah's domicile which was also the law of the intended matrimonial home did not prohibit polygamy, and, so, Siddalingiah could take a second wife and the plaintiff could be that wife.

67. The endeavour so far has been focussed on the identification of the law by which the capacity of the parties to marry one another should be determined. That identification becomes necessary since the existence or otherwise of such capacity at the time of marriage is what determines its validity. It is in other words, the capacity antecedent to the solemnization of the marriage which becomes a relevant factor in that way.

68. But there appears to be another principle by the application of which the validity of a marriage between a husband whose personal law does not prohibit polygamy and a woman whose personal law does, can be judged. It is an accepted principle that a person domiciled in one country carries with him sufficient personal law of his own when he is temporarily in another country and that it is that personal law which has to be referred to on many questions such as minority, marriage and succession. If that personal law so accompanies a person temporarily present in another country, it should be possible to say that that personal law enables him to contract a marriage in the manner recognised by it. An illustration of this principle was made by Lord Brougham in (1835) 2 C&F. 488: 6 ER 1239, which reads:

"An Englishman, marrying in Turkey, contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman and only residing in Turkey and under the Mahomedan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the Appellant's argument) must be ascertained by the English, and not by the Turkish law." (P. 535)

69. This principle was applied by Chitty J., in In re: Ullee (1885) 53 LT (N.S.) 711. To arrive at the result that the issues of a Mohammedan marriage celebrated in England between a Mahomedan of English domicile and an English woman are not illegitimate. In an erudite article by Mr. Beckett published in (1932) 48 LQR 341 on the recognition of Polygamous Marriages under English Law, he observed:

"Such authority as there is upon this point (and there appears certainly to be very little) points to the conclusion that persons, whose personal law which sanctions polygamy, should be deemed, when temporarily in a country whose marriage law is based upon the Christian conception of marriage, to carry with them sufficient of their personal law to regulate and govern their marriages and family relations, subject always of course to the limitation that their matrimonial rights and duties cannot be enforced in the local Courts, even though their existence may be recognized. If this view is accepted, the following further rules might be formulated.

Where a polygamous marriage is celebrated in a country where the lex loci provides no form of polygamous marriage which it is possible for the parties to use, such a marriage should be deemed to be valid under the *lex loci contractus* provided that it is valid by the personal law of the husband. (Page367).

70. It seems to me that if the personal law for the purposes for which it is relevant travels with a person who makes a transient sojourn in another country, it is logical to say that a polygamous

marriage permitted by the personal law of the husband would be a valid marriage even if celebrated in a country where the law of that country does not permit it.

71. Mr. Beckett expressed predilection in favour of the availability of another principle. He depended upon a Scottish decision in ***Lendrum* v. *Chakrvati,*** (1929) Scottish LT 96, to deduce the principle that there may be in a given case acquisition of a polygamous personal law by a woman by the act of going through the ceremony of marriage and living with her husband which renders her capable of contract the law of her new domicile.

Mr. Beckett pointed out that Lord Morison's judgment in Lendrum's case 1929 Scottish LT 96 supported that possibility. The principle according to Mr. Beckett could be worded thus:

"A woman who enters into a polygamous marriage and resides with the spouse of such marriage, is deemed to acquire his domicile and his personal law and to possess the capacity to contract such a marriage (whatever her personal law before the marriage) provided that her husband possesses such capacity under his personal law." (Page 361).

72. Although about the correctness of this principle it may be unnecessary for us to express any opinion, I feel disposed to say that the principle stated by Mr. Beckett is in substance not different from that which the law of the intended matrimonial home incorporates. If the law of the intended matrimonial home which is sometimes referred to as the law of the matrimonial home incorporates. If the law of the intended matrimonial home which is sometimes referred to as the law of the matrimonial domicile incorporates a sound principle, pronouncement in Lendrum's case 1929 Scottish LT 96 should be equally sound.

73. There is another unexceptional rule which has consistently elicited recognition. That rule is that where a ceremony of marriage is proved and is followed up by cohabitation as man and wife, the presumption in case of doubt or in the absence of evidence to the contrary is always in favour of validity and legitimacy. The most recent enunciation of that principle by Sir Jocelyn Simon, P., is to be found in ***Mahadervan* v. *Mahadervan,*** (1962) 2 All E.R. 1108.

74. It is on the foundation of this principle that Mr. Beckett considered it possible to say that that principle applies as much to polygamous marriages and their children as it does to other marriages and their issues, and I would say that the extension of the rule in this way may not be illegitimate.

75. In my opinion, we should not dissent from the finding of the District Judge that the marriage between the plaintiff and Siddalingiah was a valid marriage. The affirmance of that finding, it is not disputed, must result in the dismissal of this appeal. This appellant should therefore be dismissed. No costs.

Gopalvallabh Iyegar J. - I agree.

Appeal dismissed.

Rosetta Evelyn Attaullah v. Justin Attaullah
AIR 1953 Calcutta 530

R.P. Mookerjee, J.

1. The petitioner wife filed an' application under Section 10, Divorce Article for dissolution of her marriage with the respondent. Neither the respondent nor the co-respondent appeared before the lower Court. The decree nisi was passed ex parte by the Additional District Judge, Alipore. When the proceeding came up before this Court for confirmation appearance was entered on behalf of the husband respondent. On his behalf it was contended that the Alipore Court had no jurisdiction to entertain the application.

2. In the petition for dissolution of marriages it was stated that the parties were domiciled in India at the time of their marriage in 1948. Evidence was led to this effect on behalf of the petitioner and the learned Judge came to a finding that it was so. Under Section 2, Divorce Act, it is necessary that there should, be a definite finding that the parties were domiciled in India at the time when the petition for dissolution was presented. During the *ex parte* hearing no evidence was adduced in support of such a case and no finding was recorded by the Judge. The attention, of this Court having been drawn to this matter by the respondent the following issue was sent down for decision by the trial Court:

"Were the parties domiciled in India at the time when the petition was presented".

3. After this issue had been sent down evidence was led by the parties and on a consideration of such evidence the Additional District Judge has recorded the finding that at the time when the application for dissolution of marriage was presented on 2-5-1950, the parties were domiciled in the dominion of Pakistan and not in the Republic of India.

4. At the final hearing before us it had been strenuously argued on behalf of the petitioner wife that since 15-8-1947 the domicile of the parties was the Indian domicile. In the alternative it is contended that even if the domicile of the respondent husband had not since 15-8-1947 been the Indian domicile he had adopted thereafter the domicile of India and both the parties had acquired the domicile of India before the date of the presentation of the application by the wife for dissolution of marriage.

5. For a proper appreciation of the questions raised before us it is necessary to refer to the facts as elicited from the evidence adduced by the parties.

6. Both the parties admittedly professed the Christian faith. The petitioner and both her parents were residents of Calcutta or near about from long before 15-8-1947 and continued thereafter. The place where the petitioner's parents stayed have since 15-8-1947 been included in the Indian Dominion. The petitioner was of Indian domicile from after 15-8-1947. Whether after her marriage the same domical continued would depend on the question whether her husband was of Indian domicile.

7. The respondent husband was born in 1912 at Mardan, in area which then within the North-West Frontier Province was situate within the then British India. Since 15-8-1947 this area has been within the Dominion of Pakistan. The respondent's father lived at Peshawar and died there in 1940. The respondent was baptized at Mardan and was educated at different places in the North-West Frontier Province. In 1933 he entered Government service at Peshawar in the office of the local Secretariat. In 1946 his services were lent by the British Indian Government to the British Embassy at Kabul within Afghanistan. He has ever since been working at Kabul and has also been residing there. It also appears that since 1946 the respondent husband had not resided for any length of time in the North-West Frontier Province or in any other part of Pakis-tan.

8. The respondent had never even visited any other part of British India before 1948. He came to what has become Western-Bengal for the first time in December 1948. He came from Kabul to marry the petitioner. The respondent's in-other had from before been staying at Konnagar in the District of Hooghly in West Bengal, and it was he who had arranged for this marriage. The petitioner and the respondent were married at St. John's Church, Calcutta, on 15-12-1948. Within a week thereafter the respondent husband left for Kabul with his newly married wife.

9. The petitioner wife returned to West Bengal alone in April 1949. The respondent came from Kabul on 7-7-1949, and stayed with his wife in the house of the father of the latter in West Bengal and both left for Kabul on 27th July following. Within two months thereafter the petitioner wife again returned in September 1949 to her father's place after having obtained a temporary permit from the authorities for staying in India temporarily on the ground that her brother was seriously ill. The petitioner-wife has ever since stayed in India after obtaining extensions of the temporary permit.

10. On or about 6-4-1950 the respondent husband came to West Bengal and stayed for some time either with his father-in-law or his brother until he returned to Kabul the next month. He has since then been staying at Kabul except for the temporary period when he had come to Calcutta to depose in the present proceedings after the order of remand by this Court.

11. It was first contended on behalf of the petitioner wife that before 15-8-1947 the respondent was domiciled in British India as it then was. As he had left the North-West Frontier Province for Kabul before 15-8-1947, and he had ever since been employed in the British Embassy at Kabul without returning to the North-West Frontier Province the respondent continued to have the domicile of British India even after the Dominion of India and Pakistan had been brought into existence under the Indian Independence Act.

12. The patent fallacy in this line of argument is that it is overlooked that on and from 15-8-1947 "British India" had ceased to exist.

13. Under Section 1 (1), Indian Independence Act, 1947 (10 & 11 Geo. VI C. 30)

"(1) As from the 15th day of August Nineteen hundred and forty seven, two independent Dominions shall be set up in India, to be known respectively as "India" and "Pakistan".

(2) The said dominions are hereafter in this Act referred to as the "new Dominions" and the said 15th day of August is hereafter in this Act referred to as the appointed day".

14. Section 2, Indian Independence Act, further made it clear that:

"the territories of India shall be the territories under the sovereignty of His Majesty's which, immediately before the appointed date, were included in British India except the territories which under Sub-section (2) of this Section are to be the territories of Pakistan".

15. Sub-section (2) of Section 2, Indian Independence Act, further provided subject to the provisions of sub-sections (3) and (4) of this section, which are not relevant for the purpose of the question now before us, that:

"The territories of Pakistan shall be

(a) The territories which, on the appointed day are included in the Province of East Bengal and West Punjab as constituted under the two following sections:

(b) The territories which, at the date of the passing of this Act, are included in the Province of Sind and the Chief Commissioners Province of British Baluchistan; and.

(c) If, whether before or after the passing of this Act but before the appointed day, the Governor-General declares that majority of the valid votes cast in the referendum which, at the date of the passing of this Act, is being or has reasonably been held in that behalf under his authority in North Western Frontier Province are in favour of representatives of that Province taking part in the

Constituent Assembly of Pakistan the territories which, at the date of the passing of this Act are included in that Province".

16. The Referendum taken in the North-West Frontier Province resulted in favour of its joining Pakistan.

17. Under the provisions of the Indian Independence Act, 1947, all rights, authority and jurisdiction exercisable by the King of England over the territories constituting British India under Section 2, read with Section 311(1), Government of India Act, 1935 (25 and 28 Geo. V. c. 42) came to an end. This will become abundantly clear if we refer to the provisions of Section 19 (1) Indian Independence Act, read with Sub-section (4) of that section. Under the latter Sub-section the term "India" when we refer to a state of affairs existing before the appointed day or whichwould have been existing but for the passing of this Act has the meaning assigned to it by Section 311, Government of India Act, 1935. This is further clarified when in Section 7, Indian Independence Act, the consequences of the setting up of the two new Dominions are set out. The British Parliament in England will have no responsibility as from the appointed date so far as the Government of any of the territories which immediately before that day were included in British India. The Parliament of the United Kingdom also gave the assent to the omission from the Royal style and title of the King of England the words "Emperor of India".

18. The territories which had previously been known as British India were divided under the then sovereign authority of the British Parliament into two new sovereign Dominions viz: India and Pakistan. We are not concerned here as to the legal status under the provisions contained in the Indian Independence Act, so far as the States under the Indian rulers are concerned.

19. It is contended that although British India has ceased to exist, a person who had originally a domicile of British India will continue to have the same. This is not possible. As a result of the provisions contained in the Indian Independence Act a person who had originally the domicile of British India, unless he had subsequently acquired the domicile of some other country outside the ambit of the territories which were originally British India, he would automatically acquire the domicile either of India or of Pakistan.

20. The limited question for our decision is whether on 2-5-1950, the parties were domiciled in the Republic of India If they were" so domiciled the conditions imposed under Section 2, Divorce Act, (as adapted by the Adaptation Orders of 1948 and 1950) would be satisfied If on the other hand we reach the conclusion that the parties were not domiciled in the Republic of India on the date when the application for dissolution of marriage was filed it will not be necessary to enter into a discussion far less to find specifically, of what domicile the parties were on the relevant date.

21. On behalf of the petitioner it was contended that the territorial sovereignty will not affect the question of domicile in the present case. As observed by Oppenheim in "International Law" -- Volume 1 -- Peace 6th Edition, at page 408, that the importance of "State territory" lies in the fact that it is the space within which the State exercises its supreme authority. it must however "be emphasised that the territory of a State is totally independent of the racial character of the inhabitants of the State."The State community may consist of different nations.

22. Nations lay down in their respective municipal law as to how nationality can be acquired as also for determining the grounds on which individuals obtain their nationality. Two of the different modes of acquisition of nationality are by subjugation after conquest or by cession of territory. The inhabitants of the subjugated and the ceded territory acquire ipso facto by such subjugation or cession the nationality of the State which acquires the territory.

23. The circumstances under which Britain withdrew from India though of a unique character are not altogether without precedent. From the territory which was under the sovereignty of the

British King and Parliament viz. British India, the latter withdrew such sovereign authority and after division of the territory into two different parts ceded such territory to two new independent States which were brought into existence under a Parliamentary Statute viz. the Indian Independence Act. Oppenheim in Section 219 at page 563 observes -

"As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become 'ipso facto' by the cession subjects of the acquiring State."

24. If the old State does not disappear altogether it is possible to mitigate the hardship of the inhabitants being handed over to a new sovereign State against their will by a stipulation in the treaty of cession, if any, which bind the acquiring State, to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration.

25. Reference is made in Vol. 38 of the American Journal of International Law (1944) pages 363-374 to options which were allowed in treaties concluded by Germany between 1939 and 1942 about the evacuation of German minorities from Soviet Russia, Italy and some other countries. It has been pointed out by Oppenheim s B Section 219 (a) page 504-505 that -

"failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens and endanger the safety of the acquiring State."

26. In some cases therefore an option is stipulated in favour of the inhabitants of the ceded territory and thus avert the charge that inhabitants are handed over to a new sovereign against their will. The terms of option may vary from case to case but the general principle applied has been that a person habitually resident in a ceded territory acquires 'ipso facto' the nationality of the State to which the territory has been transferred, and lose the nationality of the ceding State, (page 506 -- Oppenheim.)

27. From the principles referred to above it will be significant that a person habitually respondent within a particular ceded territory acquires 'ipso facto' as a result of the cession the nationality of the State to which the territory is transferred.

28. On an examination of the provisions contained in the Indian Independence Act it ban already been pointed out that British India bad ceased to exist after two new independent States having sovereign authority over particular portions of the original territory which constituted British India had been brought into existence. in this case therefore there was no possibility of a British Indian subject retaining his nationality after 15-8-1947. Even if it were possible for a British Indian subject to retain (after 15-8-1947) the British Indian nationality the respondent husband was not one habitually resident within that proportion of British India which became the Indian Dominion and was subsequently declared to be the Indian Republic. He cannot, therefore, been on the principles applied to cession of territories acquire after 15-8-1947 the nationality of the Dominion of India or the Republic of India that is Bharat.

29. Whether the respondent husband was a person habitually resident of the North-West Proatier Province i.e. within Pakistan from after 15-3-1947 and also whether he had acquired 'ipso facto' the Pakistan nationality does not require consideration by us as we have already indicated; we do not express any opinion on this point.

30. No doubt domicile and nationality are two quite different conceptions as had been pointed out by Lord Westbury in -- ***'Udny v. Udny'***, (1889) LR 1 Sc and Div 441 at p. 457 (A)-

The law of England, and of almost all civilised countries ascribes to each individual at his birth two distinct legal states or conditions: one by virtue of which he becomes the sub- ject of some

particular country binding him by the tie of national allegiance, and which may be called his political status; another by virtue of' which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. This political status may depend on different laws in different countries, whereas the civil status is governed universally by one single principle, namely that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines Ms majority or minority, his marriage, succession, testacy or intestacy, must depend."

A man may change his domicile without divesting himself of his nationality -- ***'Boldrini* v. *Boldrini'***, (1962) Probate 9 (B). Similarly there may be a change of nationality without a change of domicile.

"A change of domicile is not a condition of naturalisation and naturalisation does not necessarily involve a change of domicile. (--***'Wahl* v. *Att.-Gen'*** , (1932) 147 LT 382) (C)."

31. But in the present case where the State known as British India disappears, from after a particular date, from the map of the world, it is impossible for a person to retain either the nationality or the domicile of British India. In the case of a complete merger or cession of a State is not open to a person, who was a citizen of that State, which is now non-existent, or was domiciled therein, to continue to arrogate, even after its disappearance, either a citizenship or a 'domicile with reference to that quondam State.

32. On the conclusion reached by us that the respondent's husband had not 'ipso facto' acquired either the nationality or the domicile of the Indian Duration after 15-8-1947, it remains to be considered whether the respondent had adopted the domicile of India subsequently and before the date of the presentation of the application for dissolution of marriage. The law as to the acquisition of a new domicile is now well settled. It is open to a person to "acquire a domicile of choice, by the combination of residence ('factum') and intention of permanent or indefinite residence ('animus manendi'), but not otherwise" (Dicey's Conflict of Laws, 6th Edition, page 89).

33. So far as the factum of residence is concerned to constitute residence it need not be long in point of time.

"If the intention of permanently residing in a place exists, a residence in pursuance to that intention, however short, will establish a domicile" -- ***'Bell* v. *Kennedy',*** (1868) LR 1 Sc. & Div 307 at p. 319(D).

34. In determining the nature of domicile of choice therefore the 'animus' or the character of the necessary intention requires careful scrutiny. Dicey refers to the four following essential conditions for determining the character of necessary intention-

(1) The intention must amount to a purpose or choice. There is some divergence of judicial opinion as to how far this intention or choice must be definite or conscious. According to some it is not necessary in order to establish a domicile, that a person should have absolutely made up his mind which of the two countries is the place where he intends to make his permanent home -- ***'Attorney General* v. *Pottinger',*** (1861) 30 LJ Ex. 284 (E). The other view is that somewhat more distinct intention must be proved specifically:

"it must be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question of change of domicile had arisen in a form requiring a deliberate or solemn determination." -- ***'Douglas* v. *Douglas',*** (1871 LR 12 Eq 617 (P). See also -- 'Ramsay v. Liverpool Royal infirmary1 (1930) AC 588 (G). This latter view seems to have been stressed in the more recent cases.

(2) The intention must be an intention to reside permanently or for an indefinite period. If a person goes to a foreign country with the intention to finish a piece of business or even with the intention of staying there until he has made a fortune he still retains his domicile of origin and is not proved to have adopted the domicile of choice -- ***'Jopp* v. *Wood',*** (1865) 4 De GJ & Sm. 616 (H). The intention to reside temporarily may afterwards be shown to have become unlimited. As soon as there is such a change of purpose or 'animus' the fact of domicile will be taken to have been established, taut not until then '(1869) LB 1 Sc & Div 441 (A)'.

(3) The intention must be an intention of abandoning i.e. of ceasing to reside permanently in the country of the former domicile. Difficulty arises when the intention to leave the country of former domicile is dependent on some purpose which may subsequently be frustrated. The intention to abandon must be a real one and not a make-believe one. Reference may be made to the observations of the Court of Appeal in --***'Fasbender* v. *Attorney General',*** (1922) 1 Ch 232 (I); -- ***Fasbender* v. *Att. Gen*.**, (1922) 2 Ch 850 (J).

(4) It is not necessary that the intention of the person should be an intention to change allegiance. This view has, however, been shaken by the more recent decision in --***Winans* v. *Attorney General,*** (1904) AC 287 (K).

35. It is to be borne in mind that in determining the domicile of the parties in a proceeding for dissolution of marriage it is the domicile of the husband alone which is to be considered inasmuch as a wife takes the domicile of her husband upon her marriage. It has been repeatedly pointed out that in the submission by the parties to the jurisdiction of a Court their former domicile are relevant. In view of the clear provisions of Section 2, Divorce Act no other consideration can influence the decision. The difficulties in which one or other party finds himself or herself are not relevant for the decision. The problem of the deserted wife after the husband has acquired a new domicile and the tendency of earlier decisions in English Courts to remedy the peculiar position by relaxing the general principles has no relevancy in the face of the clear statutory provisions in the Indian Divorce Act. As in the more recent cases in England the Courts have been rigorously applying the test of domicile even in hard cases special statutory provisions have been made in England as Matrimonial Clauses Act of 1937 and 1944. In India, however, the Court has to rigidly apply the test of domicile as on the date when the application for the dissolution of a marriage is filed. It is not open to the Courts to import considerations of personal difficulties or problems which may arise on applying the statutory provisions. That is a matter of policy which is the province of other competent authorities.

36. We shall now proceed to examine the evidence as adduced by the parties to prove the 'animus' of residence as indicated by the husband.

37. It appears that the husband respondent had on 14-4-1948 applied through the British Embassy at Kabul to the Government of India in the Ministry of External Affairs and Commonwealth Relations regarding "adoption of Indian domicile 'and the possibility of his employment under the Government of India". It is with reference to that application that the Deputy Secretary in the Ministry of External Affairs, New Delhi, intimated on 27-5-1948 the Secretary, British Embassy at Kabul (Ex. 2 (b) and Ex, A) to the following effect:

"Mr. J. Ataullah is free to come to India and settle down here if he so desires. His citizenship of the Dominion of India will, however, be determined according to the provisions of the Draft Constitution of India, recently published which are yet to be adopted by the Constituent Assembly of India with or without any modifications. As regards employment under the Government of India, there is none which could be offered to him and he will have to revert to the Government of the North West Frontier Province after the expiry of his deputation to the British Embassy, Kabul."

The respondent husband in course of his deposition in the present proceedings states with reference to his application dated 14-4-1948 referred to above and the reply from the Ministry of External Affairs (Ex. 2(b) and Ex. A):

"Originally I had the intention of settling in India permanently, but I changed my mind as the Government of India could not promise any job under them. I finally changed my mind on 16-6-1948 when I received that letter" (Ex. A).

He states at another place that

"Permission had been granted to me by the Government of India by their letter dated 27-5-1948 to reside in India permanently. But I never resided in India permanently."

We have not before us any copy of the application made by Attaullah on 14-4-1948 but it is quite clear that his intention to reside permanently in India was dependent on his obtaining a job in India. The condition was not satisfied and he frankly admits his earlier intention was abandoned on receipt of the letter Ex. A.

38. The evidence as furnished by Ex. A is not under the circumstances sufficient to prove the adoption of a domicile of choice by Attaullah. The intention to reside permanently in India and also to leave permanently the then domicile, whatever it might have been, were contingent on his obtaining a job in India. This was frustrated. The original intention to abandon the then domicile cannot be deemed to be a real one but a conditional one.

39. On behalf of the petitioner's wife it was contended that the intention expressed in April 1948 continued in November 1950 and reliance is placed on Ex. 2 a letter written by Attaullah to his father-in-law on 18-11-1950. If this letter is to be treated as an admission by the respondent husband it has to be taken in its entirety. It is to be noticed that the wife petitioner has been residing in India on the strength of a temporary Permit from September 1949. The husband respondent came to Bengal on or about 6-4-1950 and the husband and wife lived together for a few days till 11-4-1950 when they again fell out. The husband left for Kabul a few days later. The application for dissolution Of marriage was filed on 2-5-1950, and a decree nisi was passed *ex parte* on 28-9-1950. The husband respondent came to Bengal between October and November 1950. The case for the husband is that during that visit certain terms for the settlement of the differences between them were accepted. The letter (Ex. 2) which was written by the husband is the outcome of such terms of settlement.

40. In his letter dated 17-11-1950 addressed to the Secretary Embassy of India in Kabul (with a copy sent to the Assistant Secretary to the Government of West Bengal, Home (Political) Department Calcutta (Ex. 2(a)) he had no doubt declared that he intended

" To go to India and settling down there eventual permission for which has already been given by the Government of India vide Memorandum No. D. 3309-EI/48 dated 27-5-1948 from the Deputy Secretary to the Government of India in the Ministry of External Affairs and Commonwealth Relations to the Secretary, British Embassy, Kabul I shall be grateful if It please be recommended to the Government of India to allow my wife to stay in India permanently with her parents who are Indian nationals being bona fide residents of Calcutta. My wife has been born and brought up in Calcutta.

My wife will not be a burden to the Govt., of India in anyway as she will stay with her parents and I will support her.

I shall be highly obliged if an earlier action is taken on this application as Government of India have extended the period and validity of the temporary permit of my wife up to 31-12-1950."

If this declaration of intention be taken as valid and a bona fide one as of abandoning the idea or desire to reside permanently in the country of the then domicile and to reside permanently in

India he would as from 17-11-1950 be deemed to have adopted a domicile of choice -- the Indian domicile.

41. As pointed out already this expression of intention on 17-11-1950 was long after the date of the application by the wife for dissolution of marriage. A change in domicile subsequent to the date when the application for dissolution was presented will not validate the proceedings as the provisions contained in Section 2, Divorce Act, are clear and specific. Taking into account this difficulty in the way of the petitioner wife it was attempted to be argued that the intention to adopt the Indian domicile was expressed on 14-4-1948 and this intention was continued till 17-11-1950 as evidenced by Ex. A and Ex. 2 (a). As I have pointed out already that the expression of intention or animus as disclosed in the correspondence in 1948 cannot be regarded as having expressed the final intention to reside in India permanently and adopt the Indian domicile unconditionally and without any reservation.

42. Further Ex, 2(a) has to be read along with Ex. 2 viz., the letter which Attaullah wrote to his father-in-law on 1-11-1950 enclosing what is now marked as Ex. 2 (a). An attempt was being made at that stage to settle the differences between the husband and the wife by taking such steps as would make it possible for the wife to stay with her parents by expressing a make believe intention of coming over to India by the husband. Exhibits 2 and 2(a), therefore, cannot be regarded as expressing a real and bona fide intention by the husband to reside permanently in India or of ceasing to reside permanently in the country of his the then domicile. The tests indicated by Dicey in the 2nd and 3rd conditions referred to above are not satisfied.

43. The evidence as adduced in this case, therefore, leads to the irresistible conclusion that the husband had not acquired ipso facto the Indian domicile on 15-8-1947 and had not thereafter adopted the domicile of India as the domicile of his choice before the wife petitioner presented her petition for dissolution of marriage on 2-5-1950. The condition laid down in Section 2, Divorce Act, not having been satisfied the application for dissolution must be dismissed as not maintainable in the Court of the District Judge. 24-Parganas. The decree nisi passed by the Additional District Judge, Second Court Alipore on 28-9-1950 is accordingly set aside.

44. As had been noticed in the order passed by this Court on 30-S-1951 the husband respondent raised for the first time in. this Court an objection based upon Section 2, Divorce Act, questioning the Jurisdiction of the Court to entertain the application. The question of costs was to be determined at the final hearing. In view of the fact that the objection had not been raised at the initial stage the proper order in the circumstances of this case will, therefore, be to direct each party will bear the respective costs of both the Courts.

Chunder, J.

45. I agree.

Lahiri, J.

46. I agree.

Joao Gloria Pires v. Mrs. Ana Joaquina Rodrigues e Pires
AIR 1967 Goa, Daman and Diu 113

R.S. Bindra, A.J.C.

1. This petition has been made by Joao Gloria Pires now residing at Kampala in Uganda, against Ana Joaquina Rodrigues who is putting up at Faraday of Salcette Taluka, Goa and the prayer made is that the decree of divorce secured by the former against the latter on 10th April 1963 from the High Court of Uganda should be confirmed in terms of Sec. 1100 of the Portuguese Civil Procedure Code (hereinafter referred to as the Code).

2. The parties are agreed on the points that they are Roman Catholics, that Piers also was originally a resident of Goa and that they were married in the Church at Old Goa on 23rd of April 1957. Pires has confirmed that he is now a British citizen and a resident of Uganda. These two facts have not been disputed by Joaquina, the respondent. There is also no dispute on the point that Joaquina has been living in Goa ever since the date of her marriage with Pires.

3. A copy of the Judgment given by the High Court of Uganda has been placed on the record and it shows that the divorce was sought and secured on the ground that Joaquina had been living in adultery.

4. Joaquina opposed the prayer for confirmation of the decree, which is obviously based on foreign Judgment, on two grounds. Firstly she pleaded that she had not been given proper notice of the proceedings instituted against her in the High Court at Kampala, and he second objection was that she and Pires being Roman Catholics and their marriage having been solemnized in a church in the territory of Goa where the prevalent law was and it that such marriages are indissoluble, the decree of High Court at Kampala cannot be recognised here Pires controverted the validity of these two objections by contending that the respondent had not only been duly served by the High Court at Kampala hut she had admittedly submitted her written statement to that Court under registered cover as is mentioned in para six of her objections at pages 39 to 42 of the file, and that since the date of liberation of the Goa territory by the Indian forces the treaty dated 7-5-1940 between the Portuguese Government and the Holy See, according to which alone the Roman Catholic marriages were declared to be indissoluble is no longer in operation and as such the respondent cannot avail of the same.

In this connection Pires also made a reference to a Decree dated 3rd of November 1910 bearing on the law of divorce which was in force in the territory of Goa before the aforementioned treaty dated 7-5-1940 came into being. It was emphasized that the Decree dated 3rd of November 1910 permitted divorce between Roman Catholic couples and that with effect from the date of liberation that Decree was revived and the treaty dated 7th of May 1940 lapsed because India was not a party to that treaty and the Portuguese rule had ceased to operate in the liberated territory.

5. Shri S. Tamba, the Government Pleader, put in appearance on behalf of the Government of Goa, Daman and Diu. He adopted the stand that the terms of the Treaty dated 7-5-1940 between Portuguese Government and the Holy See were actually incorporated in another Decree No. 35461 dated 22-1 1946, that this Decree is still the law in Goa territory despite the liberation and that since this Decree enjoins that Roman Catholic marriages cannot be dissolved by a divorce decree the judgment given by the High Court at Kampala cannot be confirmed here.

6. Although very elaborate arguments were addressed by the learned counsel for the petitioner and for the respondent, as also by the Government Pleader, but we were not fully satisfied on certain points arising out of Private International Law. We therefore, suggested to the three counsel that they should get an adjournment, study the matter and then address the Court again. However, they exhibited some reluctance to adopt that suggestion and unanimously requested the Court that the Private International Law bearing on the matters in controversy may be looked into by the Court itself and a decision given. It is in this background that the principles of Private International Law were looked into by us unaided by the help of the learned counsel.

7. Mr. Shinkre, the counsel for the respondent, and Shri Tamba the Government Pleader, relied upon clause 6 of Sec. 1102 of the Code in support of the contention that the prayer made by Pires for confirmation of the Decree of the High Court at Kampala cannot be granted by this Court. Clause 6 of Sec. 1102 is to the effect that the foreign judgment can not be confirmed if it is in conflict with any principles of Portuguese Public order. It was not contended by Shri Amandeu Prazeres da Costa, the learned counsel for the petitioner, that the provisions of Sec. 1102 of the Code have ceased to be operative in the Union Territory of Goa. Daman and Diu (hereinafter referred to as the Union Territory).

We may appropriately point out that by Sec 4 of the Goa. Daman and Diu (Administration) Ordinance No. 2 of 1962 it was provided that all laws in force immediately before the 20th of December 1961 in Goa, Daman and Diu or in any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority. It is common knowledge, and this fact was not disputed by Shri Parsers, that the Code has neither been amended nor repealed except, of course, in some minor matters by the rules formulated by the Judicial Commissioner's Court in terms of Sec. 20 of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation No. 10 of 1963. The latter amendments have no bearing on the matter in controversy. Therefore, what is stated in clause 6 of Sec. 1102 of the Code is a rule of law which applies with full force in the Union Territory.

8. Before proceeding to determine the exact import of Clause 6 we would like to give a finding on the contention raised by Shri Prazeres whether the Decree No. 35461 dated 22-1-1946 (hereinafter referred to as the Decree) is still operative in the Union Territory. After bestowing our best thought on the matter we have reached the conclusion that the Decree is very much valid and operative in the Union Territory. It is correct that before the Treaty had been concluded and its terms incorporated in the Decree, the law of divorce prevalent in the Union Territory was that contained in the Decree dated 3rd of November 1910. It is also correct that this Decree did visualize dissolution of Roman Catholic marriages.

It is equally clear that the Decree of 1946 definitely set its face against dissolution of Roman Catholic marriages. Such marriages were declared to be sacrosanct and inviolable. It is too apparent that when the Decree of 1946 became operative, the previous Decree of 1910 ceased to have the force of law in the Union Territory. It is consequently difficult to accept the argument that with the liberation of the Union Territory with effect from 20th of December 1961 not only the Decree of 1946 lapsed because it was founded on the treaty and India was not a party to that treaty, but at the same time the Decree of 1910 which had been abrogated in 1946 had been revived without there being any legislative enactment to that effect. It will follow that the argument raised by Mr. Prazeres lacks even the merit of plausibility. The result which we are thus led to is that the Decree of 1946 is still the law in the Union Territory and so the respondent can take advantage of the same if she is legally entitled to do so.

9. This brings us to the consideration of the main question as to what is the exact scope of clause 6 of Sec. 1102 of the Code. Before giving a finding on this all important point in controversy we would like to make some preliminary observations. All the countries in the World, it appears, have enacted statutory provisions bearing on how and under what circumstances can the foreign judgments be implemented. In India the relevant law is to be found in Sections 13 and 44A of the Civil Procedure Code of 1908. Broadly speaking these provisions lay down two methods of implementing foreign judgments. One method is of filing a suit on the basis of foreign judgment and then carrying out the decree made by the Indian Court.

The second method visualizes the execution of the decree of the foreign Court straightaway by a District Court in India if there is any reciprocal arrangement between India and the country in which the foreign judgment sought to be executed was given. Sec. 13 says that a foreign judgment shall be conclusive as to any matters thereby directly adjudicated upon between the parties except in the six cases mentioned therein. The last of these six cases is whether the foreign judgment sustains a claim founded on a breach of any law in force in India. This case almost corresponds with clause 6 of Sec. 1102 of the Code which enjoins that the foreign judgment shall be confirmed only if it does not contain any finding prejudicial to the principles of the Portuguese Public Order.

The sixth case mentioned in Sec. 13 of the Indian Civil Procedure Code of 1908, it is well established, covers within its ambit Sec. 23 of the Indian Contract Act which lays down that an agreement which is opposed to public policy shall not be enforceable. Though the exact significance of the expression 'public order' mentioned in clause 6 of Section 1102 of the Code was not very meticulously discussed during the course of arguments but it was conceded by all the three lawyers that it almost approximates with the connotation of the expression 'public policy' used in Sec. 23 of the Indian Contract Act. Therefore, in a way the provisions of Sec. 1102 of the Code and Section 13 of the Indian Civil Procedure Code of 1908 are identical to the extent indicated.

10. On page 144 of the Commentary by Malik and Singhal on the Civil Procedure Code of 1908, third edition, it is mentioned that in matters of foreign judgments the Courts in India are guided by much the same principles as those adopted by the Courts in England. In support of this view the authors have placed reliance on the Madras case ***Nalla* v. *Mahomed*** reported in (1897) ILR 20 Mad 112. On page 667 etc. of the Private International Law, sixth edition, by G.C. Cheshire it is mentioned that despite the fact that the foreign judgment upon which the defendant is sued is final..... and conclusive it is still open to him to escape liability by pleading any one of the following three defenses:

(i) that the judgment had been obtained by fraud;

(ii) that it is contrary to natural justice; and

(iii) that it is repugnant to public policy as understood in England.

This third clause, it is to be emphasized, cones ponds with the law enshrined in clause 6 of the Sec. 1102 of the Code as well as in Sec. 13 of the Indian Civil Procedure Code of 1908. Therefore, it can be safely assumed that the foreign judgment secured by Pires will be confirmed by this Court only if it is not opposed to principles of the Portuguese "public order", the expression used in clause 6 of the Sec. 1102 of the Code.

11. We have held above that in terms of the decree of 1946 a Roman Catholic marriage cannot be dissolved by a decree of divorce. We also know the background in which that decree was promulgated. It can bear repetition to state that that Decree had been placed on statute book as a result of treaty, which is known as 'Concordata' in Portuguese language, entered into between the Portuguese Govern and the Holy See of Vatican city in the year 1940. Prior to this treaty, it is commonly conceded by the contending counsel, the Roman Catholic marriages in Portuguese

Territories could be dissolved by a divorce decree. The new legislation in 1946 following the treaty of 1940, it is too obvious, must have been embarked upon as a matter of State policy, and it is commonplace to state that State policies almost always correspond with the wishes and sentiments of the citizens. Hence we have no difficulty in holding that Sec. 40 of the Decree of 1946 enjoining that the marriages between Roman Catholics of the Union Territory celebrated in the church shall not be dissoluble represents a principle of Portuguese 'public order'. Therefore, the defence raised by Joaquina falls within the ambit of cl. 6 of S. 1103 of the Code and as such the decree secured by Pires from the High Court at Kampala can-not be confirmed by this Court and we hold accordingly.

12. Apparently It looks odd and astonishing that a divorce decree between the two parties should be valid and binding between them in one State (in our case it is the State of Uganda) and not binding between the same persons in another State, viz., India, and this despite the known nature of divorce decrees that they are decrees *in rem* and not *in persona*. However, this is not quite an uncommon situation. The commentator Cheshire, to whose work reference has been made above has described such marriages as limping marriages, marriages regarded as valid in one country but void in another. He has also suggested a way out, viz., to have some uniform principles of Private International Law. A day may not be distant when we can have that utopia within human grasp but just at present we are to follow the law as it is.

13. We are now left to touch upon the second ground of defence adopted by Joaquina. That defence is that proper service had not been effected on her before the divorce decree was made. If actually no service had been effected on her then the decree made would be in conflict with the principles of natural justice and as such not binding between the parties. The relevant facts are that a summons issued by the Kampala High Court was received in Goa for service on the respondent. On 19-8-1961 the Court at Margao directed that the summons be served upon Joaquina and service was effected on her on 25-8-1961. She filed an *agravo* appeal on 2-9-1961 and the Court which had effected service on the respondent admitted that appeal on 9-9-1961. In terms of the Code that judge had the legal authority to revise his order on receipt of grave appeal and he actually rescinded his order dated 19-8-1961 by his order dated 7-11-1961.

The substance of the latter order was that the summons should not be served on the present respondent. When this situation came to the notice of Government, it filed an appeal in the Judicial Commissioner's Court through the Public Prosecutor. That appeal was accepted on 3-11-1962. It was held by the Judicial Commissioner's Court that the service of the summons could he legally effected on Joaquina. The Judicial Commissioner's Court also happened to remark in the appellate order that the summons be notified to Joaquina. It is admitted that no fresh service was made on Joaquina as directed by this Court in its order dated 3-11-1962. In para 6 of her objection petition (on pages 39 to 42 of the file) Joaquina admitted that she had submitted her written statement to the Court at Kampala wider registered cover. She also placed on the record the postal receipt showing that she had sent a registered cover to the High Court at Kampala.

Mr. Prazeres contended that in view of these facts it is obvious that the service had been duly effected on the respondent and that she also filed a written statement. Mr. Shinkre, the counsel for the petitioner, canvassed, on the contrary, that though the service had been effected on his client on 25-8-1961 but since the Judicial Commissioner's Court had directed on 3-11-1962 that summons be served upon Joaquina and since admittedly no service was effected on Joaquina pursuant to that direction, It cannot be said that service had been duly effected on Joaquina. We are unable to appreciate the approach of Mr. Shinkre

The substance of finding given in the order dated 3-11-1962 was that the lower court was wrong in holding that the service of the summons could not be effected on Joaquina It could never

have been the intention of the Judicial Commissioner's Court that even if service had already been effected it should necessarily be re-effected on Joaquina. The facts made it altogether plain that summons issued by the High Court at Kampala had been served on Joaquina and that she had also submitted her written statement to that Court Therefore, we hold that it is not open to Joaquina to contend that she had not been served by the High Court at Kampala.

14. As a result of the conclusion that the decree made by the High Court at Kampala is in conflict with the principles of 'public order', which is a rule of law in the Union Territory, viz., that marriages entered into between Roman Catholics in church in the Union Territory constitute sacraments and as such are indissoluble, we have no option but to refuse to confirm the decree made by the High Court at Kampala and so reject the petition made by Pires. He shall also pay the costs to the respondent but they shall be adjudged at the minimum.

15. Announced in open Court Parties Counsels present.

Alvaro Dias A.J.C.

15a. I endorse the judgment of my learned Brother, Justice Bindra, with my supplementary views as under:

16. Though the Sec. 27 of the Civil Code lays down that "the state and the civil capacity of a foreigner is governed by the law of his country", this precept is of no assistance to the petitioner, for having acquired, by naturalization, the British Nationality at the time the Decree was passed in the divorce suit, since his national law is as defined in the 2nd Convention of Hague, dated 12-6-1902, article 8: "If the consorts do not have the same nationality for one of them having been naturalized or having acquired another nationality or by some other way having lost the nationality which he held before, the last common law shall be deemed to be the national law". (Treatise of Civil Law by Dr. Luizda CunhaGonsalvesp. 671).

17. Now, the last common legislation was the precept laid down by the "Concordata", regarding the indissolubility of the marriage as celebrated between Roman Catholic consorts.

18. Thus, even though the petitioner did change his nationality his national law, in terms of the Sec. 8 of the 2nd Convention of Hague, dated 12-6-1902, continues to be the Portuguese Law and, therefore, it is easy to arrive at the conclusion that the dissolution of the canonical marriage posterior to the celebration of Concordat between the Portuguese Government and the Holy See is not admissible.

19. Moreover, the respondent No. 1 holds Indian Nationality, for Sec. 22° (pl) of the Civil Code, does not alter the nationality of the wife, in case the husband changes his nationality by naturalization and as far as she is concerned, the case attracts the provision of Sec. 4 of the Decree No, 35461, published subsequently and in full force, which lays down that the celebration of a canonical marriage implies the tacit renunciation by both the consorts In the right of seeking divorce.

Petition Dismissed.

Satya v. Teja Singh
AIR 1975 SC 105

Chandrachud, J. – 1. This appeal by special leave arises out of an application made by the appellant under section 488, Code of Criminal Procedure, 1898. it raises issues for beyond the normal compass of a summary maintenance proceeding designed primarilyto give quick relief to a neglected wife and children. Are Indian courts bound to give recognition to divorce decrees granted by foreign courts ? That, broadly, is the question for decision.

2. Satya, the appellant herein, married the respondent Teja Singh on July 1, 1955 according to Hindu rites. Both were Indian citizens and were domiciled in India at the time of their marriage. The marriage was performed at Jullundur in the State of Punjab., Two children were born of the marriage, a boy in 1956 and a girl in 1958. On January 23, 1959 the respondent, who was working as a Forest Range Officer at Gurdaspur, left for U.S.A. for higher studies in Forestry. He spent a year in a New York Universityand then joined the Utah State Universitywhere he studied for about 4 years for a Doctorate in Forestry. On the conclusion of his studies, he secured a job in Utah on a salary of the equivalent of about 2500 rupees per month. During these 5 years the appellant continued to live in India with her minor children. She did not ever join the respondent in America as, so it seems, he promised to returnto Indiaon completing his studies.

3. On January 21, 1965 the appellant moved an application under section 488, criminal Procedure Code, alleging that the respondent had neglected to maintain her and the two minor children. She prayed that he should be directed to pay a sum of Rs. 1000/- per month for their maintenance.

4. Respondent appeared through a counsel and demurred that his marriage with the appellant was dissolved on December 30, 1964 bya decree of divorce granted by the 'Second Judicial District Court of the State of Nevada and for the County of Washoe, U.S.A.'. He contended that the appellant had ceased to be his wife by virtue of that decree and, therefore, he was not liable to maintain her any longer. He expressed his willingness to take charge ofthe children and maintain them.

5. The Judicial Magistrate, First Class, Jullundur held by her judgment dated December 17, 1966 that the decree of divorce was not binding on the appellant as the respondent had not "permanently settled" in the State of Nevada and that the marriage between the appellant and the respondent could be dissolved only under the Hindu Marriage Act, 1955. The learned Magistrate directed the respondent to pay a sum of Rs. 300/- per month for the maintenance of the appellant and Rs. 100/- per month for each child. This order was confirmed in revision by the Additional Session Judge, Jullundur, on the ground that the marriage could be dissolved only under the Hindu Marriage Act.1955.

6. In the third round of litigation, the husband succeeded. in a Revision Application filed by him in the High Court of Punjab and Haryana. A learned single Judge of that Court found that "at the crucial time of the commencement of the proceedings for divorce before the Court in Nevada, the petitioner was domiciled within that State in United States of America". This finding is the corner-stone of the judgment of the High Court. Applying the old English rule that during marriage the domicile of the wife, without exception, follows the domicile of the husband, the learned Judge held that since the respondent was domiciled in Nevada so was the appellant in the eye of law. The Nevada court had, therefore, jurisdiction to pass the decree of divorce. In coming to this conclusion the learned Judge relied principally on the decisions of the Privy Council in (i) ***Le Mesurier v. Le Mesurier***, 1895 AC 517 and (ii) ***Attorney General for Alberta v. Cook***; 1926 AC 444 and of the House of Lords in (1) ***Lord Advocate v. Jaffray,*** 1921 AC 146 and (ii) ***Salvesen or 'Von Lorang v.***

Administrator of Austrian Property, 1927 AC 641. In ***Le Mesurier's case*** which is often referred to, though not rightly, as the "starting point", it was held that "according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage".

7, The High Court framed the question for consideration thus: "whether a Hindu marriage solemnised within this country can be validly annulled by a decree of divorce granted by a foreign court". In one sense, this frame of the question narrows the controversy by restricting the inquiry to Hindu marriages. In another, it broadens the inquiry by opening up the larger question whether marriages solemnised in this country can at all be dissolved by foreign courts. In any case, the High Court did not answer the question and preferred to rest its decision on the Le Mesurier doctrine that domicile of the spouses affords thee only true test of jurisdiction. In order to bring out the real point in controversy, we would prefer to frame the question for decision thus: Is the decree of divorce passed by the Nevada Court in U.S.A., entitled to recognition in India ? The question is a vexed one to decide and it raises issues that transcend the immediate interest which the parties have in this litigation. Marriage and divorce are matters of social significance.

8. The answer to the question as regards the recognition to be accorded to the Nevada decree must depend principally on the rules of our Private International Law. It is a well- recognized principle that "Private international law is not the same in all countries". There is no system of private international law which can claim universal recognition and that explains why Cheshire, for example, says that his book is concerned solely with that system 'which obtains in England, that is to say, with the rules that guide an English court whenever it is seized of a case that contains some foreign element. The same emphasis can be seen in the works of other celebrated writers like Graveson, Dicey & Morris, and Martin Wolff. Speaking of the "English (1) [1895] A. C. 517. (2) 1926 A.C. 444. (3) [1921] 1. A. C. 146. (4) [1927] A.C. 641. (5) Cheshire's Private International Law, Eighth Ed., (1970) p. 10, conflict of laws" Graveson says: "Almost every country in the modern world has not only its own system of municipal law differing materially from those of its neighbours, but also its own system of conflict of, laws, "(1) According to Dicey & Morris.
"The conflict of. laws exists because there are different systems of domestic law. But systems of the conflict of laws also differ".(2) Martin Wolf advocates the same point of view thus: "Today undoubtedly Private International Law is National law. There exists an English private international law as distinct from a French, a German, an Italian private international law. The rules on the conflict of laws in the various countries differ nearly as much from each other as do those on internal (municipal) law".(1) It is thus a truism to say that whether it is a problem of municipal law or of Conflict of decided in accordance with Indian law. it is another matter that the Indian conflict of laws may require that the law of a foreign country ought to be applied in a given situation for deciding a case which contains a foreign element. Such a recognition is accorded not as an act of courtesy but on considerations of justice. (4) It is implicit in that process, that the foreign law must not offend against our public policy.

9, We cannot therefore adopt mechanically the rules of Private International Law evolved by other countries. These principles vary greatly and are moulded by the distinctive social, political and economic conditions obtaining in these countries. Questions relating to the personal status of a party depend in England and North America upon the law of his domicile, but in France, Italy, Spain and most of the other European countries upon the law of his nationality. Principles governing matters within the divorce jurisdiction are so conflicting in the different countries that not unoften a man and a woman are husband and wife in one jurisdiction but treated as divorced in another jurisdiction. We have before us the problem of such a limping marriage.

10. The respondent petitioned for divorce in the Nevada court on November 9, 1964. Paragraph 1 of the petition which has a material bearing on the matter before us reads thus: "That for more than six weeks preceding the commencement of this action plaintiff has been, and now is, a bona fide resident of and domiciled in the County of Washoe, State of Nevada, with the intent to make the State of Nevada his home for an indefinite period of time. and that he has been actually, physically and corporeally present in said County and State for more than six weeks."

By Para IV, the respondent alleged:

"That plaintiff is a student who has not yet completed his education, that by defendant's choice she and the minor

(1) The Conflict of Laws, R. H. Graveson, Sixth Ed., (1969) pp. 3, 5, 6.

(2) "The Conflict of Laws", Dicey & Morris, Eighth Ed., (1967) p. 10.

(3) "Private International Law", Martin Wolff Second Ed., (1950) p. 11.

(4) See G. Melville Bigelow's Note to Story's "Commentaries on the Conflict of Laws" Eighth Ed. (1883) p. 38.

children the issue of the marriage reside with her parents and are supported by her parents; that at the place in India where defendant and the minor children reside, seven and 50/100 (7.50) Dollars per month per child is more than adequate to support. maintain and educate a child in the best style; and that plaintiff should be ordered to pay to defendant the sum of 7.50 per month per child for the support, maintenance and education of the aforesaid two minor children

The cause of action is stated in Para VI of the petition in these words

"That plaintiff alleges for his cause of action against defendant that he and defendant have lived separate and apart for more than three (3) consecutive years without cohabitation; and that there is no possibility of a reconciliation."

The relief asked for by the respondent is: "That the bonds of matrimony now and heretofore existing between plaintiff and defendant be forever and completely dissolved, and that each party hereto be freed and released from all of the responsibilities and obligations thereof and restored to the status of an unmarried person."

11. The judgment of the Nevada court consists of four parts: (i) The preliminary recitals; (ii) "Findings of Fact"; (iii) "Conclusions of Law"; and (iv) The operative portion, the Decree of Divorce".

12. The preliminary recitals show that the respondent appeared personally and through his attorney, that the appellant "failed to appear or to file her answer or other responsive pleadings within the time required by law after having been duly and regularly served with process by publication And mailing as required by law", that the case came on for trial on December 30, 1964 and that evidence was submitted to the court for its decision.

13. The next part of the judgment, "Findings of Fact", consists of five paragraphs which, with minor modifications, are a verbatim reproduction of the averments contained in the respondent's petition for divorce. The relevant portion of that petition is extracted above. The first paragraph of this part may usefully be reproduced:

> "That for more than six weeks preceding the commencement of this action, the plaintiff was, and now- is, a bona fide resident of and domiciled in the County of Washoe, State of Nevada with the intent to make the State of Nevada his '-home for an indefinite period of time, and that he has been actually, physically and corporeally present in said county and State for more than six weeks.

The second paragraph of the part refers to the *factum* of marriage between the appellant and the respondent, the third contains the finding that 7.50 Dollars per month for each of the two minor children was a "reasonable sum for plaintiff to pay to defendant as and for the support, care,

maintenance and education of the said minor children", the fourth recites that there was no community property to be adjudicated by the Court and the fifth contains the findings:

"That the plaintiff and defendant have lived separate and apart for more than three (3) consecutive years without co-habitation, and that there is no possibility of a reconciliation between them."

14. The part of the Judgment headed "Conclusions of Law" consists of two paragraphs. The first paragraph states: "That this Court has jurisdiction over the plaintiff and over the subject matter of thissection."

The second paragraph says:

"That the plaintiff is entitled to the relief hereinafter granted."

The operative portion of the Judgment, "Decree of Divorce" says by its first paragraph:

"That plaintiff, Teja Singh, be and he hereby is, given and granted a final and absolute divorce from defendant, Satya Singh on the ground of their having lived separate and apart for more than three (3) consecutive years without cohabitation. there being no possibility of reconciliation between them.....

The second paragraph contains the provision for the payment of maintenance to the minor children.

15. It is clear from the key recitals of the petition and the judgment that the Nevada Court derived jurisdiction to entertain and hear the divorce petition because it was alleged and held that the respondent was "a bona fide resident of and domiciled in the County of Washoe, State of Nevada, with the intent to make the State of Nevada his home for an indefinite period of time".

16. Since we are concerned with recognition of a divorce decree granted by an American court, a look at the American law in a similar jurisdiction would be useful. It will serve a two-fold purpose: a perception of principles on which foreign decrees of divorce are accorded recognition in America and a brief acquaintance with the divorce jurisdiction in Nevada.

17. The United States of America has its own peculiar problems of the conflict of laws arising from the co-existence of 50 States each with its own autonomous legal system. The domestic relations of husband and wife constitute a subject reserved to the individual States and does not belong to the United States under the American Constitution. Article IV, section 1, of that Constitution requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State". The Validity of a divorce decree passed by a State court is in other States tested at if it were a decree granted by foreign court. In general, a foreign decree of divorce is recognised in any other jurisdiction either on the ground, in the case of a decree of a sister State, that the decree is entitled to full faith and credit under Article IV, Section 1, or in the case of a decree of a foreign court and in some instances a decree of a State court, on, the ground of 'comity'.(1) The phrase "comity of nations" which owes its origin to the theory of a Dutch jurist, John Voet, has, however, been widely criticised as "granting to the ear, when it proceeds from a court of justice". (2) Comity, as said by Livermore is a matter for sovereigns, not for Judges required to decide a case according to the rights of parties.

18. In determining whether a divorce decree will be recognised in another jurisdiction as a matter of comity, public policy and good morals may be considered. No country is bound by comity to give effect in its courts to divorce laws of another country which are repugnant to its own laws and public policy. Thus, where a "mail-order divorce" granted by a Mexican court was not based on jurisdictional finding of domicile, the decree was held to have no extraterritorial effect in New Jersey.(1) American courts generally abhor the collusive Mexican mail-order divorces and refuse to recognise them.(4) Mail order divorces are obtained by correspondence by a spouse not

domiciled in Mexico. Lately, in his well-known book on divorce says that "The facilities afforded by the Mexican courts to grant divorces to all and sundry whatsoever their nationality or domicile have become even more notorious than those in Reno, Nevada"(5) Recognition is denied to such decrees as a matter of publicpolicy.

19. Foreign, decrees of divorce including decrees of sister States save been, either accorded recognition or have been treated as invalid, depending on the circumstances of each particular case. But if a decree of divorce is to be accorded full faith and credit in the courts of another jurisdiction it is necessary that the court granting the decree has jurisdiction over the proceedings. A decree of divorce is thus treated as a conclusive adjudication of all matters in controversy except the jurisdictional facts on which it is founded. domicile is such a jurisdictional fact. A. foreign divorce decree is therefore subject to collateral attack for lack of jurisdiction even where the decree contains the, findingsor recitals of jurisdiction facts.(6)

20. To confer jurisdiction on the ground of plaintiff's residence and entitle the decree to extraterritorial recognition, the residence must be actual and genuine, and accompanied by an intent to make the State his home. A mere sojourn or temporary residence as distinguished from legal domicile is not sufficient. ***Harrison* v. *Harrison***, 99 L. Ed. 704. 205. In ***Untermann* v. *Untermann,*** 19 NJ 507 a divorce decree obtained by a husband in Mexico after one day's residence therein was held invalid..

21. A foreign decree of divorce is subject to collateral attack for fraud or for want of jurisdiction either of the, subject matter or of the parties provided that the attacking party is not estopped from doing so: ***Cohen* v. *Randall***, 88 L. Ed. 480 A foreign decree of divorce, obtained by fraud is void. Fraudulent simulation of domicile is impermissible. A spouse who goes to a State or country other than that of the matrimonial domicile for the sole purpose of obtaining a divorce perpetrates a fraud, and the judgment is not binding on the courts of other States Corpus Juris Secundum, Vol. 27B, Paragraph 361, p. 847. (4) ***Cohen* v. *Cohen,*** 319 Mass. 31; Corpus Juris Secundum, Vol. 27B, p. 799 -Footnote 29: 'Residence', 'domicile'.

22. In regard to the divorce law in force in Nevada it is only necessary to State that though the plaintiff in a divorce action is required to "reside" in the State for more than six weeks immediately preceding the petition, the requirement of residence is construed in the sense of domicile ***Cohen* v. *Cohen,*** 319 Mass. 31; Corpus Juris Secundum, Vol. 27B, p. 799. In ***Lane* v. *Lane***, 68 N. Y. S. 2d. 712 it was held that under the Nevada law, intent to make Nevada plaintiff's home is a necessary jurisdictional fact without which the decreeing court is powerless to act in divorce action. Accordingly, a husband who did not become a bona fide resident of Nevada, who continued lease of his New Jersey apartment, who failed to transfer his accounts, who continued his business activities in New York City, and who departed from Nevada almost immediately after entry of divorce decree, was held never to have intended to establish a fixed and permanent residence in Nevada, and, therefore any proof, which he submitted to Nevada court in his divorce action, and on which such finding by court of bona fide residence was based was held to constitute a fraud on such court.***Edleman* v. *Edelman***,161 N. Y. S. 2d 717.(7) 89 L. Ed. 1577.

23. A survey of American law in this jurisdiction would be incomplete without reference to a decision rendered by the American Supreme Court in ***Williams* v. *State of North Carolina,*** 194489 Law Ed 1577 the second Williams case. Mr. Williams and Mrs. Hendrix who were long-time residents of North Carolina went to Nevada, stayed in an auto court for transients, filed suits for divorce against their respective spouses immediately after a six weeks' stay, married one another as soon as the divorces were obtained and promptly returned to North Carolina. They were prosecuted for bigamous cohabitation under section 14-183 of the General Statutes of North Carolina (1943).

Their defence to the charge of bigamy was that at the time of their marriage they were each lawfully divorced from the bond of their respective first marriages. The question which arose on this defence was whether they were "lawfully divorced", that is, whether the decrees of divorce passed by the Nevada court were lawful. Those decrees would not be lawful unless the Nevada court had jurisdiction to pass them. The jurisdiction of the Nevada court depended on whether Mr. Williams and Mrs. Hendrix were domiciled in Nevada at the time of the divorce proceedings. The existence of domicile in Nevada thus became the decisive issue.

24. While upholding the conviction recorded in North Carolina, Frankfurter J., speaking for the majority, said, (i) a judgment in one State is conclusive upon the merits in every other State, only if the court of the first State had jurisdiction to render the judgment; (ii) a decree of divorce passed in one State can be impeached collaterally in another State on proof that the court had no jurisdiction even when the record purports to show that it had jurisdiction; (iii) under the American system of law. judicial power of jurisdiction to grant. a divorce is founded on domicile; and (iv) domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The learned Judge observed: "We conclude that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domiciles in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations." Murphy J. in his concurring judgment said:

"No justifiable purpose is served by imparting constitutional sanctity to the efforts of petitioners to establish a false and fictitious domicile in Nevada And Nevada has no interest that we can respect in issuing divorce, decrees with extraterritorial effect to those who are domiciled elsewhere and who secure sham domicile in Nevada solely for divorce purposes."

25. These then are the principles on which American courts grant or refuse to grant recognition to divorce decrees passed by foreign courts which includes the courts of sister States. Shorn of confusing refinements, a foreign decree of divorce is denied recognition in American courts if the judgment is without jurisdiction or is procured by fraud or if treating it as valid would offend against public policy. Except where the issue of jurisdiction was litigated in the foreign action or the defendant appeared and had an opportunity to contest it, a foreign divorce may be collaterally attacked for lack of jurisdiction, even though jurisdictional facts are recited in the judgment. Such recitals are not conclusive and may be contradicted by satisfactory proof. domicile is a jurisdictional fact. Therefore, a foreign divorce decree may be attacked, and its invalidity shown, by proof that plaintiff did not have, or that neither party had, a domicile or bona fide residence in the State or country where the decree was rendered. In order to render a foreign decree subject to a collateral attack on the ground of fraud, the fraud in procurement of the judgment must go to the jurisdiction of the court. It is necessary and sufficient that there was a fraudulent representation designed and intended to mislead and resulting in damaging deception. In America, in most of the States, the wife can have a separate domicile for divorce and it is easy enough for anyone, man or woman, to acquire a domicile of choice in another State.

26. The English law on the subject has grown out of a maze of domiciliary wilderness but English courts have, by and large, come to adopt the same criteria as the American courts for denying validity to foreign decrees of divorce. Recent legislative changes have weakened the authority of some of the archaic rules of English law like the one by which the wife's domicile follows that of the husband; a rule described by Lord Denning M. R. in ***Formosa* v. *Formosa***, [1962] (3) A. E. R. 419. as "the last barbarous relic of a wife's servitude". The High Court has leaned

on that rule heavily but in the view which we are disposed to take, the rule will have riot relevance. The wife's choice of a domicile may be fettered by the husband's domicile but that means by a real, not a feigneddomicile.

27. From ***Lolleys case***, (1812) 2 Cl & 567n which is the true starting point of the con. troversy, to ***Indyka* v. *Indyka***, [1967] (2) A. 'P. R. 689 which is treated as the cause celebre, the law has gone through many phases. The period of over a century and half is marked by a variety of views showing how true it is that there is scarcely a doctrine of law which as regards a formal and exact statement is in a more uncertain condition than that which relates to the question as to what effect should be given by courts of one nation to the judgments rendered by the courts of another nation.

28. Lolley's case was for long considered as having decided that a foreign decree of divorce could not ever dissolve a marriage celebrated in England. "Its ghost stalked the pages of the law reports for much of the remainder of the nineteenth century before it was finally laid. "The Old Order Changeth-Travers v. Holley Reinterpreted "by P. R. B. Webb, International & Comparative-Law Quarterly, 1967 (Vol16), pp. 997, 1000. (5) (7) (1878) 4 P. D. 1." in ***Dolhpin* v. *Robbins,*** (1859) 7 H. L. Cas. 390.and ***Shaw* v. *Gould***, (1868) 3 HL 55 the House of Lords declined to grant validityto Scots divorces as in the former case parties were not bona fide domiciled in Scotland and in the latter, residence in Scotland did not involve the acquisition of a Scots domicile. These were cases of "migratory" divorces and the court applied the universalise doctrine that questions of personalstatus depended, as a matter of "universal jurisprudence", on the law of domicile.

29. In this climate, the decision of the Court of Appeal in ***Niboyet* v.. *Niboyet,*** (878) 4 PD 1 came as a surprise. The majority took the view that if the spouses actually resided in England and were not merely present there casually or as travellers, the English courts were competent to dissolve their marriage even though theywere not actuallydomiciled in England. Several Christian European Countries had by this time adopted the test of nationality in preference to that of domicile in matters of personal status. The dissenting Judge, Brett L. J. preferred in Niboyet's case to stick to the domiciliary test but he perceived how a strict application of the test would result in hardship to the desertedwife:

Le Mesurier* v. *Mesurier, [1895] A.C. 517 on which the judgment of the High Court rests, is a decision of the Privy Council in an appeal from Ceylon but it was always treated as laying down the law for England. Observing that there was an "obvious fallacy" in the reasoning in Niboyet's case, the Privy Council held that although the matrimonial home of the petitioning husband was in Ceylon, the courts of that countrywere disentitled from entertaining his divorce petition because he was not, in the strict sense, domiciled there. Lord Watson, who delivered the opinion of the Board said:

"Their Lordships have come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." Later cases like the decision of the House of Lords in ***Lord Advocate* v. *Jaffrey***, [1921] A. C. 146 and of the PrivyCouncil in ***Att. Gen. for Alberta* v. *Cook***, [1926] A. C. 444 show faith in the dominance of the domicile principle. Under the former decision the wife was incapable of acquiring a domicile separate from her husband even if he had afforded her grounds for divorce, while under the latter even a judiciallyseparated wife could not acquire a separate domicile.

31. These decisions caused great hardship to deserted wives for they had to seek the husband in his domicile to obtain against him a decree of divorce recognizable in England. During something like a game of chess between the judiciary and the legislature, the rigour of the rule regarding the dominance of domicile was reduced by frequent legislative interventions.

32. By section 1 of the Law Reforms (Miscellaneous Provisions) Act, 1949, English courts were given jurisdiction to entertain proceedings for divorce by a wife even if the husband was not domiciled in England, provided that the wife had resided in England for a period of three years immediately preceding the commencement of the proceedings. In ***Travers* v. *Holley***, (1953) 2 All ER 794 the Court of Appeal, drawing on this provision, accepted as valid a decree of divorce granted to the wife by an Australian Court though the husband after acquiring a domicile in New South Wales had reverted to his English domicile at the time of the wife's petition. This was put on the ground that "what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court". Section 40(1) (a) and (b) of the Matrimonial Causes Act, 1965 confer upon a wife the right, in some circumstances, to sue for divorce in England even if the husband is not domiciled there the time of the proceedings.

33. The decision in ***Travers* v. *Holley***, [1953] (2) All. E. R. 794 was accepted as correct by the House of Lords in ***Indyka* v. *Indyka***, [1967] (2) All. E. R 689. The husband, a Czech national married his first wife, also a Czech national, in Czechoslovakia. He acquired an English domicile in 1946 but his wife who was continuously residing in Czechoslovakia obtained in 1949 a decree of divorce in that country in 1949 the husband married his second wife in England who petitioned for divorce on the ground of cruelty. The husband cross-petitioned for nullity alleging that the Czech divorce would not be recognised in England since England was the country of common domicile and the decree of the Czech Court was therefore without jurisdiction. The House of Lords upheld the. validity of the Czech divorce. Though the decision in Indyka broadened the prevalent rules for recognition of foreign decree and though a new look at the Le Mesurier doctrine was imperative in a changed world, it is not easy on a reading of the five judgments in the Indyka case to lay down a definitive act of rules as to when an English court will or will not recognise a foreign decree of divorce. Cheshire says:

"One cannot turn from ***Indyka* v. *Indyka*** without expressing grave concern at decisions of the House of Lords which, though unanimous., epitomize the adage "tot hominess, quest sententiao' Graveson observes: "Although each of the five judgments in this case differs from the other four, none is dissenting; ..... The English Law Commission opined that "in any case a complete overhaul of the relevant law is urgently needed since recent decisions have left it in a state of considerable uncertainty."

34. Very recently, the extended rule in Indyka was applied in ***Nessina* v. *Smith***,(1971) 2 All ER 689 where a Nevada decree of divorce obtained by the wife was granted recognition in England. The wife was resident in the United States for a period of six years but the domicile of the spouses, in the strict sense, was in England. The Nevada decree was accepted as valid on the ground that the wife had a sufficient connection with the court granting the decree and that if the Nevada decree could be recognised as valid by the other States in America under Article IV, Section 1 of the American Constitution, there was no justification for the English courts to deny recognition to that decree. English courts have thus been attempting to free the law of divorce from the stranglehold of the Councilrule.

35. The Recognition of Divorces and Legal Separations Act, 1971 which came into force on January 1, 1972 has brought about important changes in the law of England and Scotland relating to the recognition of divorces and legal separations in the British Isles and abroad. The Act results from the Hague Convention agreed to by most countries in 1970, and ratifies that Convention in accordance with the terms set out in the Act.

36. Section 2 provides for the recognition in Great Britain of overseas divorces and legal separations obtained or judicial or other proceedings in any country outside the British Isles which

are effective according to the law of that country. Section 3 provides for the validity of an overseas divorce or legal separation to be recognised if, at the date of institution of proceedings in the country in which it was obtained, either spouse was habitually resident in that country or either spouse was a national of that country. In a country comprising territories in which different systems of law are in force in matters of divorce or legal separation (e.g. United States or Canada), the provisions of section 3 have effect as if each territory were a separate country. Where the concept of domicile as a ground of jurisdiction for divorce or legal separation supplies, this is to have effect as if reference to habitual residence included a reference to domicile Under section 5, any finding of fact made in proceedings by which a decree was obtained and on the basis of which jurisdiction was assumed is conclusive evidence of the fact found if both spouses took part in such proceedings, and in any other case is sufficient proof of that fact unless the contrary is shown. Section 6 provides that certain existing rules of recognition are, to continue in force, so that decree obtained in the country of the spouses' domicile or obtained elsewhere but recognised. as valid in that country or by virtue of any Act will be recognised; "but save as aforesaid no such divorce or legal separation shall be recognised as valid in Great Britain except as provided in this Act". According to the English Law Commission, the effect of this provision would seem to preclude any further development of judge-made rules of recognition of divorces and legal separations and further the principles laid down in ***Traders* v. *Halley*** and ***Indyka* v. *Indyka*** would be excluded. By section 8(2), recognition of an overseas divorce or legal separation may be refused if a spouse obtained it without notice of the proceedings to the other spouse or if the "recognition would manifestly be contrary to public policy".

We have treated the development of the English Law of divorce prior to the passing of the Act of 1971 as we have in India on corresponding enactment. Besides, the judgment of the High Court is wholly founded on English decisions and the respondent's counsel also based his argument on these decisions.

37. Turning to proof of fraud as a vitiating factor, if the foreign decree was obtained by the fraud of the petitioner, then fraud as to the merits of the petition was ignored in England, but fraud as to the jurisdiction of the foreign court, i.e. where the petitioner had successfully invoked the jurisdiction by misleading the foreign court as to the jurisdictional facts, used to provide grounds for not recognizing the decree. In ***Middleton* v. *Middleton***,(1966) 1 All ER 168 the husband domiciled and resident in Indiana petitioned for divorce in Illinois. He alleged that he had been resident in Illinois for over a year before taking the proceedings and he alleged further that his wife had deserted him. Both of these allegations, unknown to the Illinois court, were false. The decree was granted and when the wife petitioned in England for a declaration as to the validity of the Illinois divorce, evidence was given that, notwithstanding the fraud, that decree was a lawful decree and would be recognised by the let domiciling, Indiana, Chairns, J. held that the husband's false and fraudulent evidence as to the matrimonial offence was not a ground for refusal to recognise the Illinois decree, but that his fraud as to the jurisdiction of the Illinois court did justify a refusal to recognize the decree. According to Cheshire: "it is firmly established that a foreign judgment is impeachable for fraud in the sense that upon proof of fraud it cannot be enforced by action, in England.

38. As we have stated at the outset, these principles of the American and English conflict of laws are not to be adopted blindly by Indian courts. Our notions of a genuine divorce and of substantial justice and the distinctive principles of our public policy must determine the rules of our Private International Law. But an awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining these rules. We are sovereign with our territory but "it is no derogation of sovereignty to take amount of foreign law" and as said by Cardozo J. "We are not so

provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home"; and we shall not brush aside foreign judicial processes unless doing so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal." ***Loucks* v. *Standard Oil Co, of New York,*** (1918) 224 N.Y. 99 at p. 111.

39. The decree of divorce obtained by the respondent from the Nevada court is, prima facie, a complete answer to the appellant's claim for maintenance under section 488, Code of Criminal Procedure. If that decree is valid the appellant's claim for maintenance, though not her childrens' must fail, as section 488 enables a "wife" and children to apply for maintenance. But was the decree of divorce procured by fraud and if so, is it entitled to recognition here ? That is the essence of the matter.

40. The Nevada court assumed and exercised jurisdiction to pass the divorce decree on the basis that the respondent was a bona fide resident of and was domiciled in Nevada. domicile being a jurisdictional fact, the decree is open to the collateral attack that the respondent was not a bona fide resident of Nevada, much less was he domiciled in Nevada. The recital is the judgment of the Nevada court that the respondent was a bona fide resident of and was domiciled in Nevada is not conclusive and can be contradicted by satisfactory proof. The appellant did not appear in the Nevada court, was unrepresented and did not submit to the jurisdiction of that court.

41. The record of the present proceeding establishes certain important facts: The respondent left India for the United States of America 'On January 23, 1959. He spent a year in a New York University. He then joined the Utah State University where he studied for his doctorate for 4 years. In 1964, on the conclusion of his studies he secured a job in Utah. On August 17, 1964 he wrote a letter (Ex. RW 7/1) to his father Gian Singh from "791 North, 6 East Logan, Utah",, U.S.A.

42. The respondent filed his petition for divorce in the Nevada court on November 9, 1964 and obtained a decree on December 30, 1964.

43. Prior to the institution of the divorce proceedings the rest) respondent might have stayed, but never lived. in Nevada. He made a false representation to the Nevada court that he was a, bona fide resident of Nevada. Having secured the divorce decree, he left Nevada almost immediately thereafter rendering it false again that he had "the intent to make the State of Nevada his home for an indefinite period of time'.

44. The appellant filed the maintenance petition on January 21, 1965. On November 4, 1965 the respondent applied exemption from personal appearance in those proceedings mentioning his address as "791 North, 6 East Logan, Utah, 228, 4th, U. S. A.". The letter dated December 13, 1965 from the Under Secretary, Ministry of External Affairs, Government of India to one Lakhi Singh Chaudhuri, a Member of the Punjab Vidhan Sabha, shows that by then the respondent had taken a job as Research Officer in the Department of Forestry, Alberta, Canada. The trial court decided the maintenance proceeding against the respondent on December 17, 1966. Early in 1967, the respondent filed a revision application in the Sessions Court, Jullundur mentioning his then address as "Deptt. of Forestry, Public Building, Calgary, Alberta (Canada)". The revision was dismissed on June 15, 1968. The respondent filed a further revision application in the High Court of Punjab & Haryana and gave the same Canada address.

45. Thus, from 1960 to 1964 the respondent was living in Utah and since 1965 he has been in Canada. It requires no great persuasion to hold that the respondent went to Nevada as a bird-of-passage, resorted to the court there solely to found jurisdiction and procured a decree of divorce on a misrepresentation that he was domiciled in Nevada. True, that the concept of domicile is not uniform throughout the world and just as long residence does not by itself establish domicile brief

residence may not negative it. But residence for a particular purpose fails to answer the qualitative test for, the purpose being accomplished the residence would cease. The residence must answer "a qualitative as well as a quantitative test", that is, the two elements of *factum et animus* must concur. The respondent went to Nevada forum-hunting, found a convenient jurisdiction which would easily purvey a divorce to him and left it even before the, ink on his domiciliary assertion was dry. Thus, the decree of the Nevada court lacks jurisdiction. It can receive no recognition in our courts.

46. In this view, the Le Mesurier doctrine on which the High Court drew loses its relevance. The Privy Council held in that case that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage". The High Court assumed that the respondent was domiciled in Nevada. It then applied the old English rule that the wife's domicile in all events, follows the domicile of the husband.

47. Deducing that the appellant must also be deemed to have been domiciled in Nevada, the High Court concluded that the Nevada court had jurisdiction to pass the decree of divorce.

48. To an extent, the appellant is to blame for her failure to put the plea of fraud in the forefront. If the fact-, referred to by us were pointed out to the High Court, it would probably have seen the futility of relying on the rule in Le Mesurier and then in applying the principle that the wife takes the domicile of the husband. But facts on which we have relied to show a lack of jurisdiction in the Nevada court are mostly facts to be found in the pleadings and documents of the respondent himself. Those incontrovertible facts establish that Nevada was not and could not be the home, the permanent home of the respondent. If the High Court were invited to consider the conduct and projects of the respondent it would have perceived that the respondent had merely simulated a domicile in Nevada. In that event, even applying the Le Mesurier doctrine the Nevada court would have had no jurisdiction to pass the decree of divorce.

49. Section 13(a) of the Code of Civil Procedure, 1908 makes a foreign judgment conclusive as to any matter thereby directly adjudicated upon except "where it has not been pronounced by a court of competent jurisdiction". Learned counsel for the respondent urged that this provision occurring in the, Civil Procedure, Code cannot govern criminal proceedings and therefore the want of jurisdiction in the Nevada court to pass the decree of divorce can be no answer to an application for maintenance under section 488, Criminal Procedure Code. This argument is misconceived. The judgment of the Nevada court was rendered in a civil proceeding and therefore its validity in India must be determined on the terms of section 13. It is beside the point that the validity of that judgment is questioned in a criminal court and not in a civil court. If the judgment falls under any of the clauses (a) to (e) of section 13, it will cease to be conclusive as to any matter thereby adjudicated upon. The judgment will then be open to a collateral attack on the grounds mentioned in the five clauses of section 13.

50. Under section 13(e), Civil Procedure Code, the foreign judgment is open to challenge "where it has been obtained by fraud". Fraud as to the merits of the respondent's case may be ignored and his allegation that he and his wife "have lived separate and apart for more than, three (3) consecutive years without cohabitation and that there is no possibility of a reconciliation" may be assumed to be true. But fraud as to the jurisdiction of the Nevada court is a vital consideration in the recognition of the decree passed by that court. It is therefore relevant that the respondent successfully invoked the jurisdiction of the Nevada court by lying to it on jurisdictional facts. In the Duchess of Kingston's Case,(':) De Grey C.J. explained the nature of fraud in this context in reference to the judgment of a spiritual court. That judgment, said the learned Chief Justice, though yes judicature and not impeachable from within, might be impeachable from without. In other words, though it was not permissible to allege that the court was "mistaken", it was permissible to

allege that the court was "misled". The essential distinction thus was between mistake and trickery. The appellant's contention is not directed to showing that the Nevada court was mistaken but to showing that it was imposed upon.

51. Learned counsel for the respondent argued that judgments on status ire judgments in rem, that such is the character of Nevada judgment and therefore that judgment is binding on the whole world. Section 41 of the Indian Evidence Act provides, to the extent material, that a. final judgment of a competent court in the exercise of matrimonial jurisdiction is conclusive proof that the legal character which it confers or takes away accrued or ceased at the time declared in the judgment for that purpose. But the judgment has to be of a "competent Court", that is, a court having jurisdiction over the parties and the subject matter. Even a judgment in rem is therefore open to attack on the ground that the court which gave it had no jurisdiction to do so. In ***R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul Majid***, [1963] 3 S.C.R. 22 at 42 this Court held that "a judgment of a foreign court to be conclusive between the parties must be a judgment pronounced by a court of competent jurisdiction and competence contemplated by section 13 of the Code of Civil Procedure is in an international sense and not merely by the law of foreign State in which the Court delivering judgment functions". In fact section 44 of the Evidence Act gives to any party to a suit or proceeding the right to show that the judgment which is relevant under section 41 "was delivered by a court not competent to deliver it, or was obtained by fraud or collusion". It is therefore wrong to think that judgments *in rem* are inviolable. Fraud, in any case bearing on jurisdictional facts, vitiates all judicial acts whether *in rem* or *in personam*.

52. Unhappily, the marriage between the appellant and respondent has to limp. They will be treated as divorced in Nevada but their bond of matrimony will remain unsnapped in India, the country of their domicile. This view, it is urged for the respondent, will lead to difficulties. It may. But "these rules of private international law are made for men and women-not the other way round-and a nice tidy logical perfection can never be achieved" Per Denovan L.J., ***Formosa* v. *Formosa,*** [1962]. 3 All E.R. 419, 424.

53. Our legislature ought to find a solution to such schizoid situations as the British Parliament has, to a large extent, done by passing the "Recognition of Divorces and Legal Separations Act, 1971". Perhaps, the International Hague Convention of 1970 which contains a comprehensive scheme for relieving the confusion caused by differing. systems of conflict of laws may serve as a model. But any such law, shall have to provide for the non-recognition of foreign decrees procured by fraud bearing on jurisdictional facts as also for the non recognition of decrees, the recognition of which would be contrary to our public policy. Until then the courts shall have to exercise a residual discretion to avoid flagrant injustice for, no rule of private inter- national law could compel a wife to submit to a decree procured by the husband by trickery. Such decrees offend against our notions of. substantial justice.

54. In the result we allow the appeal with costs set aside the judgment of the High Court and restore that of the trial court.

Appeal allowed.

Neeraja Saraph v. Jayant V. Saraph
1994(4) SCALE 445

R.M. Sahai, J.

1. These appeals directed against the interim order passed by the High Court in an appeal filed by respondent No. 2 against rejection of an application for setting aside of an ex-parte decree, raises important issue as how to protect the right and interest of women who are deserted by non-resident Indians on decree of annulment obtained from foreign courts.

2. Plight of women and their exploitation both inside and outside the house socially and economically is ancient. Mass of literature has been written to elevate their status. But a new social evil is surfacing. Any matrimonial column of any newspaper or magazine would carry a column that a NRI seeks Indian bride without any demand. The attraction of getting a groom and that too serving or earning abroad without dowry, lures many specially from middle class. Even otherwise parental insistence for Indian bride in the hope that his son is not lost for ever is not uncommon. Result, at times, is matrimonial alliance by a reluctant husband to assuage the sentiments of his parent. Victim is the helpless, poor, educated girl, normally, of a middle class family with dreams of foreign land.

3. To what extent such misfortune may befall on any innocent girl is vividly transparent by this unfortunate case. The appellant M.A. , B.Ed, daughter of a senior Air Force officer serving as a teacher and drawing salary of Rs. 3000/- was married to the respondent No. 1, a Doctor in Computer Hardware and employed in United States, at the behest of her father-in-law approached through a common family friend. How the respondent No. 1 met the appellant at Delhi on his own request then picked her from her aunt's place at Bombay before marriage is not necessary to be stated nor it is necessary to narrate that the marriage was performed with gusto befitting to the status of both the families. The marriage was performed on 6th August, 1989 and the appellant was taken for honeymoon to Goa for few days. Respondent No. 1 returned to America on 24th August, 1989, wrote letters to appellant on 15th September, 20th October and 14th November, 1989 persuading her to give up her job and suggesting the various avenues for her career in America. Appellant believing all that tried for visa and ultimately resigned her job in November, 1989. But from December things started getting cold. And when father of appellant wrote a letter in January, 1990 to the respondent-husband about the sufferings of her daughter, it did not bring forth any favourable response and in June, 1990 the respondent's brother came to Delhi handed over two envelopes, one petition for annulment of marriage in a USA Court and another a letter from her father-in-law which reads as under:

I have no words to express my feelings at Jayant's decision which is very unfortunate. I was hoping against hope. I have to accept the moral responsibility for Jayant's decision and apologise Baba and your Mausa, they can squarely blame me for not knowing my son.

This is agonizing experience for you in your life. I cannot say any more.

Please bear in my mind that we share your grief. I earnestly request you to see us when you come here in Bombay and keep friendly relations. God bless you.

Yours affectionately,

Nana.

4. For the father-in-law it was an unfortunate experiment, an effort, 'hoping against hope' forgetting that failure of it would be ruination of the other. For the son it was a pleasure trip. But for the daughter-in-law it was loss of everything, her maidenhood, status, service, dignity and peace. Her dreams stood shattered and she is reduced to nothing. 'Accepting moral responsibility', 'not knowing the son', "sharing the grief by the father-in-law arc of little avail to the appellant. "['here is

no whisper in the letter that he was willing to compensate for the wrong done to the appellant due to error in his assessment of his own son. It is not the soothing words alone which were needed but some practical solution to the disaster brought by him. In these desperate circumstances, the wife having been forsaken by her husband and having lost the job had no alternative except to file a suit for damages against the husband and father-in-law for ruining her life in *forma pauperis*. And the father-in-law who has words of sympathy for the appellant contested her claim to sue in *forma pauperis* vehemently, though without any success. The suit was decreed *ex-parte* for Rs. 22 lakhs and odd. In an appeal filed by the respondent No. 2 the High Court stayed the operation of the decree subject to the appellant, who is respondent No. 2 in this Court, depositing a sum of Rs. 1,00,000/- within one month from the date the order was passed. It permitted the appellant to withdraw 50% of it. Various submissions have been advanced on behalf of the father-in-law to support the order of the High Court including his helplessness financially. Is it a case of any sympathy for the father-in-law at this stage? In our opinion not. True the decree is ex-parte. Yet it is a money decree. However, no opinion is expressed on this aspect as the appeal is pending in the High Court. But the order of the High Court is modified by directing that the execution of the decree shall remain stayed if the respondents deposit a sum of Rs. 3,00,000/- including Rs. 1,00,000/- directed by the High Court within a period of two months from today, with the Registrar of the High Court. The appellant shall be entitled to withdraw Rs. 1,00,000/-without any security. The remaining Rs. 2,00,000/- shall be deposited in a nationalised bank in fixed deposit. The interest accruing on it shall be paid to the appellant every month. If the proceedings are not decided within reasonable time, it shall be open to the appellant to move an application for withdrawal of further amount.

5. Why the facts of this case have been narrated in brief with little background is to impress upon the need and necessity for appropriate steps to be taken in this direction to safeguard the interest of women. Although it is a problem of private International Law and is not easy to be resolved, but with change in social structure and rise of marriages with NRI the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament under Section 1 in pursuance of which the Government of United Kingdom issued Reciprocal Enforcement of Judgments (India) Order, 1958. Apart from it there are other enactments such as Indian and Colonial Divorce Jurisdiction Act, 1940 which safeguard the interest so far United Kingdom is concerned. But 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 this domicile rule is not necessary to be gone into. But feasibility of a legislation safeguarding interest of women may be examined by incorporating such provisions as-

(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 44A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court.

6. The appeals are disposed of accordingly. Any observation made shall not be taken as expressing of any opinion when the case is decided on merits.

Y. Narasimha Rao v. Y. Venkatalakshmi
(1991) 3 SCC 451

Sawant, J. - Leave is granted. Appeal is taken on board for final hearing by consent of parties.

The 1st appellant and the 1st respondent were married at Tirupati on February 27, 1975. They separated in July 1978. The 1st appellant filed a petition for dissolution of marriage in the Circuit of St. Louis Country Missouri, USA. The 1st respondent sent her reply from here under protest.The Circuit Court passed a decree for dissolution of marriage on February19, 1980 in the absence of the 1st respondent.

2. The 1st appellant had earlier filed a petition for dissolution of marriage in the Sub-Court of Tirupati being O.P. No. 87/86. In that petition, the 1st appellant filed an application for dismissing the same as not pressed in view of the decree passed by the Missouri Court. On August 14, 1991 the learned sub-Judge of Tirupati dismissed the petition.

3. On November 2, 1981, the 1st appellant married the 2nd appellant in Yadgirigutta, 1st respondent filed a criminal complaint against the appellants for the offence of bigamy. It is not necessaryto refer to the details of the proceedings in the said complaint. Suffice it to say that in that complaint, the appellants filed an application for their discharge in view of the decree for dissolution of marriage passed by Missouri Court. By this judgment of October 21, 1986, the learned Magistrate discharged the appellants holding that the complainant, i.e., the 1st respondent had failed to make out a prima facie case against the appellants. Against the said decision, the 1st respondent preferred a Criminal Revision Petition to the High Court and the High Court by the impugned decision of April 18, 1987 set aside the order of the magistrate holding that a photostat copy of the judgment of the Missouri Court was not admissible in evidence to prove the dissolution of marriage. The Court further held that since the learned Magistrate acted on the photostat copy, he was in error in discharging the accused and directed the Magistrate to dispose of the petition filed by the accused, i.e., appellants herein for their discharge, afresh in accordance with law. It is aggrieved by this decision that the present appeal is filed.

4. It is necessaryto note certain facts relating to the decree of dissolution of marriage passed by the Circuit Court of St. Louis Country Missouri, USA. In the first instance, the Court assumed jurisdiction over the matter on the ground that the 1st appellant had been a resident of the State of Missouri for 90 days next preceding the commencement of the action and that petition in that Court. Secondly, the decree has been passed on the only ground that there remains no reasonable likelihood that the marriage between the parties can be preserved, and that the marriage is, therefore, irretrievably broken". Thirdly, the 1st respondent had not submitted to the jurisdiction of the Court. From the record, it appears that to the petition she had filed two replies of the same date. Both are identical in nature except that one of the replies begins with an additional averment as follows: ``without prejudice to the contention that this respondent is not submitting to the jurisdiction of this hon'ble court, this respondent submits as follows". She had also stated in the replies, among other things, that (i) the petition was not maintainable, (ii) she was not aware if the first appellant had been living in the State of Missouri for more than 90 days and that he was entitled to file the petition before the Court, (iii) the parties were Hindus and governed by Hindu Law, (iv) she was an Indian citizen and was not governed by laws in force in the State of Missouri and , therefore, the Court had no jurisdiction to entertain the petition, (v) the dissolution of the marriage between the parties was governed by the Hindu Marriage Act and that it could not be dissolved in any other way except as provided under the said Act, (vi) the Court had no jurisdiction to enforce the foreign laws and none

of the grounds pleaded in the petition was sufficient to grant any divorce under the Hindu Marriage Act.

Fourthly, it is not disputed that the 1st respondent was neither present nor represented in the Court passed the decree in her absence. In fact, the Court has in terms observed that it had no jurisdiction ``in personam'' over the respondent or minor child which was born out of the wed- lock and both of them had domiciled in India. Fifthly, in the petition which was filed by the 1st appellant in that Court on October 6, 1980, besides alleging that he had been a resident of the State of Missouri for 90 days or more immediately preceding the filing of the petition and he was then residing at 23rd Timber View Road, Kukwapood, in the Countryof St. Louis, Missouri, he had also alleged that the 1st respondent had deserted him for one year or more next preceding the filing of the petition by refusal to continue to live with the appellant in the United States and particularly in the State of Missouri. On the other hand, the averments made by him in his petition filed in the court of the Subordinate Judge, Tirupati in 1978 shows that he was a resident of Apartment No. 414, 6440, South Claiborn Avenue, New Orleans, Louisiana, United States and that he was a citizen of India. He had given for the service of all notices and processes in the petition, the address of his counsel Shri PR Ramachandra Rao, Advocate, 16-11-1/3, Malakpet, Hyderabad-500 036. Even according to his averments in the said petition, the 1st respondent had resided with him at Kuppanapudi for about 4 to 5 months after th marriage. Thereafter she had gone to her parental house at Relangi, Tanuka Taluk, West Godawari District. He was, thereafter, sponsored by his friend Prasad for a placement in the medical service in the United States and had first obtained employment in Chicago and thereafter in Oak Forest and Greenville Springs and ultimately in the Charity Hospital in Louisiana at New Orleans where he continued to be employed. Again according to the averments in the said petition, when the 1st respondent joined him in the United States, both of them had stayed together as husband and wife at New Orleans. The 1st respondent left his residence in New Orleans and went first to Jackson, Texas and, thereafter, to Chicago to stay at the residence of his friend, Prasad. Thereafter she left Chicago for India. Thus it is obvious from these averments in the petition that both the 1st respondent and the 1st petitioner had last resided together at New Orleans, Louisiana and never within the jurisdiction of the Circuit Court of St. Louis Country in the State of Missouri. The averments to that effect in the petition filed before the St. Louis Court are obviously incorrect.

5. Under the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as the ``Act'') only the District Court within the local limits of whose original civil jurisdiction (i) the marriage was solemnized, or (ii) the respondent, at the time of the presentation of the petition resides, or (iii) the parties to the marriage last resided together, or (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at the time, residing outside the territories to which the Act extends, or has not been heard of as being alive for a period of seven years of more by those persons who would naturally have heard of him if he were alive, has jurisdiction to entertain the petition. The Circuit Court of St. Louis Country, Missouri had, therefore, no jurisdiction to entertain the petition according to the Act under which admittedly the parties were married. Secondly, irretrievable breakdown of marriage is not one of the grounds recognised by the Act for dissolution of marriage. Hence, the decree of divorce passed by the foreign court was on a ground unavailable under the Act.

6. Under Section 13 of the Code of Civil Procedure 1908 (hereinafter referred to as the ``Code''), a foreign judgment is not conclusive as to any matter thereby directly adjudicated upon between the parties if (a) it has not been pronounced by a Court of competent jurisdiction; (b) it has not been given on the merits of the case; (c) it is founded on an incorrect view of international law

or a refusal to recognize the law of India in cases in which such law is applicable; (d) the proceedings are opposed to natural justice, (e) it is obtained by fraud, (f) it sustains a claim founded on a breach of any law in force in India.

7. As pointed out above, the present decree dissolving the marriage passed by the foreign court is without jurisdiction according to the Act as neither the marriage was celebrated nor the parties last resided together nor the respondent resided within the jurisdiction of that Court. The decree is also passed on a ground which is not available under the Act which is applicable to the marriage. What is further, the decree has been obtained by the 1st appellant by stating that he was the resident of the Missouri State when the record shows that he was only a bird of passage there and was ordinarily a resident of the State of Louisiana. He had, if at all, only technically satisfied the requirement of residence of ninety days with the only purpose of obtaining the divorce. He was neither domiciled in that State nor had he an intention to make it his home. He had also no substantial connection with the forum. The 1st appellant has further brought no rules on record under which the St. Louis Court could assume jurisdiction over the matter. On the contrary, as pointed out earlier, he has in his petition made a false averment that the 1st respondent had refused to continue to stay with him in the State of Missouri where she had never been. In the absence of the rules of jurisdiction of that court, we are not aware whether the residence of the 1st respondent within the State of Missouri was necessary to confer jurisdiction on that court, and if not, of the reasons for making the said averment.

8. Relying on a decision of this Court in ***Smt. Satya* v. *Teja Singh***, [1975] 2 SCR 1971 it is possible for us to dispose of this case on a narrow ground, viz., that the appellant played a fraud on the foreign court residence does not mean a temporary residence for the purpose of obtaining a divorce but habitual residence or residence which is intended to be permanent for future as well. We remain from adopting that course in the present case because there is nothing on record to assure us that the Court of St. Louis does not assume jurisdiction only on the basis of a mere temporary residence of the appellant for 90 days even is such residence is for the purpose of obtaining divorce. We would, therefore, presume that the foreign court by its own rules of jurisdiction had rightly entertained the dispute and granted a valid decree of divorce according to its law. The larger question that we would like to address ourselves to is whether even in such cases, the Courts in this country should recognise the foreign divorce decrees.

9. The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules have also been evolved by judicial decisions. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. The distinction between matters which concern personal and family affairs and those which concern commercial relationships, civil wrongs etc. is well recognised in other countries and legal systems. The law in the former area tends to be primarily determined and influenced by social, moral and religious considerations, and public policy plays a special and important role in shaping it. Hence, in almost all the countries the jurisdictional procedural and substantive rules which are applied to disputes arising in this area are significantly different from those applied to claims in other areas. That is as it ought to be. For, no country can afford to sacrifice its internal unity, stability and tranquillity for the sake of uniformity of rules and comity of nations which considerations are important and appropriate to facilitate international trade, commerce, industry, communication, transport, exchange of services, technology, manpower etc. This glaring fact of national life has been recognised both by the Hague Convention of 1968 on the

Recognition of Divorce and Legal Separations as well as by the Judgments Convention of the European Community of the same year. Article 10 of the Hague Convention expressly provides that the contracting States may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy. The Judgments Convention of the European Community expressly excludes from its scope (a) status or legal capacity of natural persons, (b) rights in property arising out of a matrimonial relationship, (c) wills and succession, (d) social security and (e) bankruptcy. A separate convention was contemplated for the last of the subjects.

10. We are in the present case concerned only with the matrimonial law and what we state here will apply strictly to matters arising out of and ancillary to matrimonial disputes. The Courts in this country have so far tried to follow in these matters the English rules of Private International Law whether common law rules or statutory rules. The dependence on English Law even in matters which are purely personal, has however time and again been regretted. But nothing much has been done to remedy the situation. The labours of the Law Commission poured in its 65th Report on this very subject have not fructified since April 1976, when the Report was submitted. Even the British were circumspect and hesitant to apply their rules of law in such matters during their governance of this country and had left the family law to be governed by the customary rules of the different communities. It is only where was a void that they had stepped in by enactments such as the Special Marriage Act, Indian Divorce Act, Indian Succession Act etc. In spite, however, of more than 43 years of independence we find that the legislature has not thought it fit to enact rules of Private International Law in this area and in the absence of such initiative from the legislature the courts in this country their inspiration, as stated earlier, from the English rules. Even in doing so they have not been uniform in practice with the result that we have some conflicting decisions in the area.

11. We cannot also lose sight of the fact that today more than ever 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. Many a man and woman of this land with different personal laws have migrated and are migrating to different countries either to make their permanent abode there or for temporary residence. Likewise there is also immigration of the nationals of other countries. The advancement in communication and transportation has also made it easier for individuals to hop from one country to another. It is also not unusual to come across cases where citizens of this country have been contracting marriages either in this country or abroad with nationals of the other countries or among themselves, or having married here, either both or one of them migrate to other countries. There are also cases where parties having married here have been either domiciled or residing separately in different foreign countries. This migration, temporary or permanent, has also been giving rise to various kinds of matrimonial disputes destroying in its turn the family and its peace. A large number of foreign decrees in matrimonial matters is becoming the order of the recognition of the foreign judgments in these matters. The minimum rules of guidance for securing the certainty need not await legislative initiative. This Court can accomplish the modest job within the framework of the present statutory provisions if they are rationally interpreted and extended to achieve the purpose. It is with this intention that we are undertaking this venture. We aware that unaided and left solely to our resources the rules of guidance which we propose to lay down in this area may prove inadequate or miss some aspects which may not be present to us at this juncture. But a beginning has to be made as best as one can, the lacunae and the errors being left to be filled in and corrected by future judgments.

12. We believe that the relevant provisions of Section 13 of the Code are capable of being interpreted to secure the required certainty in the sphere of this branch of law in conformity with public policy, justice, equity and good conscience, and the rules so evolved will protect the sanctity

of the institution of marriage and the unity of family which are the corner stones of our societal life. Clause (a) of Section 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. We are of the view that this clause should be interpreted to mean that only that court will be a court of competent jurisdiction which the Actor the law under which the parties are married recognises as a court of competent jurisdiction to entertain the matrimonial dispute. 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. The expression ``competent court'' in Section 41 of the Indian Evidence Act has also to be construedlikewise.

Clause (b) of Section 13 states that if a foreign has not been given on the merits of the case, the courts in this country will not recognise such judgment. This clause should be interpreted 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. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court, should not be considered as a decision on the merits of the case. In this respect the general rules of the acquiescence to the jurisdiction of the Court which may be valid in other matters and areas should be ignored and deemedinappropriate.

The second part of clause (c) of Section 13 states that where the judgment is founded on a refusal to recognise the law of this country in cases in which such law is applicable, the judgment will not be recognised by the courts in this country. The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and no other law. When, therefore, a foreign judgment is founded on a jurisdiction or on ground not recognised 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 this country. For the same reason, such a judgment will also be unenforceable under clause (f) of Section 13, since such a judgment would obviouslybe in breach of the matrimonial law in force in this country.

Clause (d) of Section 13 which makes a foreign judgment unenforceable on th ground that the proceedings in which it is obtained are opposed to natural justice, states no more than an elementary principle on which any civilised system of justice rests. However, in matters concerning the family law such as the matrimonial disputes, this principle has to b extended to mean something more than mere compliance with the technical rules of procedure. If the rule of *audi alteram partem* has any meaning with reference to the proceedings in a foreign court, for the purposes of the rule it should not be deemed sufficient that the respondent has been duly served with the process of the court. It is necessary to ascertain whether the respondent was in a position to present or represent himself/herself and contest effectively the said proceedings. This requirement should applyequally to the appellate proceedings if and when they are file by either party. If the foreign court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the costs of travel, residence and litigation where necessary, it should be held that the proceedings are in breach of the principles of natural justice. It is for this reason that we find that the rules of Private International Law of some countries insist, even in commercial matters, that the action should be filed in the forum where the defendant is

either domiciled or is habitually resident. It is only in special cases which is called special jurisdiction where the claim has some real link with other forum that a judgment of such forum is recognised. This jurisdiction principle is also recognised by the Judgments Convention of this European Community. If, therefore, the courts in this country also insist as a matter of rule that foreign matrimonial judgment will be recognised only it it is of the forum where the respondent is domiciled or habitually and permanently resides, the provisions of clause (d) may be held to have been satisfied. The provision of clause (e) of Section 13 which requires that the courts in this country will not recognise a foreign judgment if it has been obtained by fraud, is self-evident. However, in view of the decision of this Court in ***Smt. Satya* v. *Teja Singh***, (supra) it must be understood that the fraud need not be only in relation to the merits of the mater but may also be in relation to jurisdictionalfacts.

13. From the aforesaid discussion the following rule can be deduced for recognising foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, 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. The rule further takes account of the needs of modern life and makes due allowance to accommodate them. 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 wife's domicile follows that of her husband and that it is the husband's domicilliary law which determines the jurisdiction and judges the merits of the case.

14. Since with regard to the jurisdiction of the forum as well as the ground on which it is passed the foreign decree in the present case is not in accordance with the Act under which the parties were married, and the respondent had not submitted to the jurisdiction of the court or consented to its passing, it cannot be recognised by the courts in this country and is, therefore, unenforceable.

15. The High Court, as stated earlier, set aside the order of the learned Magistrate only on the ground that the photostat copy of the decree was not admissible in evidence. The High Court is not correct in its reasoning. Under Section 74(1)(iii) of the Indian Evidence Act (Hereinafter referred to as the "Act") documents forming the acts or records of the acts of public judicial officers of a foreign country are public documents. Under Section 76 read with Section 77 of the Act, certified copies of such documents may be produced in proof of their contents. However, under Section 86

of the Act there is presumption with regard to the genuineness and accuracy of such certified copy only if it is also certified by the representative of our Central Government in or for that country that the manner in which it has been certified is commonly in use in that country for such certification.

Section 63(1) and (2) read with Section 65(e) and (f) of the Act permits certified copies and copies made from the original by mechanical process to be tendered as secondary evidence. A photostat copy is prepared by a mechanical process which in itself ensures the accuracy of the original. The present photostat copies of the judicial record of the Court of St. Louis is certified for the Circuit Clerk by the Deputy Clerk who is a public officer having the custody of the document within the meaning of Section 76 of the Act and also in the manner required by the provisions of the said section. Hence the Photostat copy per se is not inadmissible in evidence. It is inadmissible because it has not further been certified by the representative of our Central Government in the United States as required by Section 86 of the Act. The expression "certified copy" of a foreign judgment in Section 14 of the Code has to be read consistent with the requirement of Section 86 of the Act.

16. While, therefore, holding that the document is not admissible in evidence for want of the certificate under Section 86 of the Act and not because it is a photostat copy of the original as held by the High Court, we uphold the order of the High Court also on a more substantial and larger ground as stated in paragraph 14 above. Accordingly, we dismiss the appeal and direct the learned Magistrate to proceed with the matter pending before him according to law as expeditiously as possible, preferably within four months from now as the prosecution is already a decade old. T.N.A. Appeal dismissed.

Sankaran Govindan v. Lakshmi Bharathi
AIR 1974 SC 1764

K.K. Mathew, J.

1. This is an appeal, on the basis of a certificate, by the first defendant, from a decree in a suit for partition of the assets of one Dr. Krishnan who died in England on October 18, 1950, according to the provisions of the Travancore Ezhava Act and the dispute between the parties now is concerned with the question of succession to the sale proceeds of the movables and other moneys included in Schedule-C to the plaint.

2. Krishnan had two brothers, namely, Padmanabhan and Govindan, the first defendant, and a sister, the second defendant. Krishnan went to England in 1920 for higher studies in medicine. For some time his father helped him with money but, after the father's death, his elder brother Padmanabhan did not send him any money and, therefore, Krishnan had to find his own resources for prosecuting his studies. He received considerable encouragement and financial help for carrying on his studies from an elderly English lady by name Miss Hepworth. When Krishnan became qualified to practise medicine, he set up practice at Sheffield and in course of time hewas able to build up a good practice. He was later employed in the National Health Scheme. He purchased a building viz., 75-Wood-house Road, Sheffield, where he carried on his profession. He was living in a rented house at 97-Pfince of Wales Road with Miss Hepworth. He had, at the time of his death, a private secretary named Mary Woodliff.

3. The first defendant-appellant came to England both for the purpose of qualifying himself for F.R-C.S. and for taking back Krishnan to India. He prosecuted his studies in England for which Krishnan helped him with money and, by the end of 1949, he returned to India. Contrary to his expectation, Krishnan did not accompany him. Krishnan died suddenly in England on October 18, 1950 intestate. He had no wife and children and his assets in England consisted of the house at 75-Woodhouse Road, Sheffield, valuable movable properties and moneys.

4. While Krishnan was away in England, a partition took place in his family and a share in the properties of the family was allotted to him. Padmanabhan, his elder, brother, was managing the properties till his death. The properties included in Schedules A and B to the plaint are those properties.

5. As already stated, the second defendant is the sister of Krishnan and 1st defendant, and plaintiffs 2 to 6 are the children of the first plaintiff, daughter of the second defendant. Defendants 22 and 23 are Mr. Cyrin Lawlin Arksey and Miss Mary Woodliff, the administrators of Krishnan's estate, appointed by the High Court of Judicature in England and they were impleaded in the suit some time in 1953, well nigh two years' after the original plaint was filed.

6. In the suit, as originally framed, the plaintiffs claimed partition of the items mentioned in Schedules A and B of the plaint. After the institution of the suit, proceedings were "started in England by Arksey and Mary Woodliff on the basis of a power of attorney executed by the appellant for obtaining letters of administration of the estate of Krishnan Letters of administration were issued in their favour. As there was likelihood of dispute as respects the domicile of Krishnan, the administrators took out originating summons in the High Court of Judicature in England for deciding the question whether Krishnan was domiciled in England at the time of his death, By ex. 56 order, the High Court held that Krishnan died domiciled in England. The house and the movables in England were sold and the proceeds together with the moneys were handed over to defendants 1 and 2 after taking from them a bond of indemnity.

7. After Ex. 56 order was passed by the High Court in England, the plaint was amended with a prayer to divide this amount also which was separately mentioned as Schedule-C.

8. The first defendant contended that the amount specified in Schedule-C was not liable to be divided among the parties to the suit, that as Krishnan died domiciled in England, succession to the assets in Schedule-C was governed by the English Law and that he and his sister, the second defendant, were alone entitled to the same as next of kin of the deceased.

9. The trial court overruled the contention of the first defendant and held that Krishnan was not domiciled in England at the time of his death, that ex. 56 order was obtained by fraud, that the proceedings which culminated in ex. 56 order were opposed to natural justice and so ex. 56 order did not operate as *res judicata* and directed a partition of the amount specified in Schedule-Calso according to the provisions of the Ezhava Act.

10. It was against this decree that the appeal was preferred to the High Court by the first defendant.

11. Before the High Court, the appellant contended, among other things, that ex. 56 order operated as *res judicata* on the question of domicile of Krishnan and that as Krishnan died domiciled in England, succession to his movables including moneys would be governed by English law and that, in any event, succession to the immovable property in England would be determined bythe *lex situs*.

12. The High Court confirmed the finding of the trial court that Krishnan was not domiciled in England, that ex. 56 order was obtained by fraud of the appellant, that the proceedings in which ex. 56 order was obtained were opposed to the principles of natural justice and therefore, ex. 56 order would not operate as *res judicata* on the question of domicile of deceased Krishnan. The Court further found that Krishnan did not acquire a domicile of choice in England and so, succession to movables including the moneys left by Krishnan was not governed by English law but ought to be distributed among the parties according to the provisions of the Ezhava Act. The Court also held that succession to the house in Sheffield is governed by the law of *situs* and that the next of kin of Krishnan are his legal heirs in respect of the sale proceeds of that property. The High Court, therefore, confirmed the decree of the trial court with the modification that the proceeds of the house propertywin be divided between the first and the second defendant alone.

13. There is no dispute between the parties that the sale proceeds of the immovable property, namely, the house in Sheffield, should be distributed among the next of kin of Krishnan, as succession to them should be governed by the English law whether or not Krishnan had acquired domicile in England. Therefore, the only question for consideration in this appeal is as regards the law which governs the succession to movable properties and the moneys left by Krishnan. If Krishnan had acquired a domicile of choice in England, there can be no doubt that English law would govern the succession to them.

14. To answer the question, we have to decide: (1) whether ex. 56 order operates as *res judicata* on the question of the domicile of Krishnan, and, if it does not, (2) whether there was sufficient evidence to show that Krishnan died domiciled in England.

15. We will take up the first question. As already stated, the High Court was of the view that ex. 56 order was obtained by fraud practised by the first defendant upon the court which pronounced it and that, the proceedings which culminated in ex. 56 order were opposed' to natural justice and, therefore, it did not operate as *res judicata*.

16. It is a well established principle of private international law that if a foreign judgment was obtained by fraud, or if the proceedings in which it was obtained were opposed to natural justice, it will not operate as *res judicata* see Section 13 of the Civil Procedure Code.

17. After the death of Krishnan, the first defendant addressed a letter to the High Commissioner for India, London (ex. 22 dated October 23, 1950) as to the course to be adopted

with regard to the assets, left by Krishnan in England. On November 10, 1950, Miss Hepworth wrote a letter to the first defendant stating that Krishnan had left movable properties worth considerable amount in England and that his intention was to settle down in England and that he had expressed that intention to her (ex. 12). On November 27, 1950, Arksey wrote a letter to the first defendant stating that he knew that Krishnan was domiciled in England, and asking the first defendant about the assets which Krishnan had in India (ex. 44). On September 25, 1951, Arksey sent a letter to Damodaran, the husband of the first daughter of defendant No. 2 (ex. H) indicating the assets of Krishnan in England and that letters of administration were obtained in good faith on the basis that Krishnan had died domiciled in England and that he was instructed by M/s. King and Partridge that according to the Constitution of India, Krishnan would be deemed to have died domiciled in England and that the first defendant and his sister would? be the legal heirs of Krishnan if he had died domiciled in England.

18. After having obtained the letters of administration, the administrators, namelyArksey and Mary Woodliff, found that there was dispute among the patties to the, suit about the domicile of Krishnan at the time of his death. The administrators wanted to be sure of their position. So they applied by originating summons before the High Court of Judicature in England for determination of the question whether Krishnan died domiciled in England. The application was made under Order 11 of the Rules of the Supreme Court of England and notices of the proceedings were served upon all the parties to the present suit, the notices to the minors being served on their natural guardians. The parties appeared before the High Court of Judicature in England in the proceedings through their attorneys. In the proceedings, two affidavits were filed by the administrators, two by the first defendant and one each by Miss Hepworth, R.P. Nair (DW-3), T. C. George (DW-4), Toleti Kanakaraju (DW-5), S.S. Piilai, N. G. Gangadharan and P.K.P. Lakshmanan. Miss Hepworth was also orally examined in court. It was on the strength of the affidavits and the oral evidence that the court came to the conclusion that Krishnan died domiciled in England. The question is, whether there are any circumstances in the case to show that ex. 56 order was obtained by trickeryor the court was misled in any way by the administrators either by knowingly adducing false evidence or procuring evidence which to their knowledge was false.

19. Arksey and Mary Woodliff were firmly of the opinion that Krishnan was domiciled in England. There is no reason to think that this opinion was formed under the influence of the first defendant. They had the best opportunity to know the mind of Krishnan and they were the most competent persons to say whether Krishnan died domiciled in England. There is not even a faint suggestion that they had anything to gain by making out that Krishnan died domiciled in England. They could not be said to have adduced any evidence which to their knowledge was untrue. There is nothing in the case to show that they did not make a true and full disclosure of all the material facts known to them concerning the domicile of Krishnan when they applied by way of originating summons as required. From the letter of Arksey it is clear that his opinion was that Krishnan died domiciled in England. Mary Woodliff as the private secretary of Krishnan had the closest association with him and was in a better position than anybody else to form an opinion from the habits, tastes, actions, ambitions, health, hopes and projects of Krishnan whether he was domiciled in England. Krishnan was living with Miss Hepworth. We do not think there was any one more intimate with Krishnan than Miss Hepworth. It was not a matter of any moment to her whether Krishnan died domiciled in England or not. She did not stand to gain in any manner by establishing that Krishnan was domiciled' in England. She not only filed an affidavit in the proceedings but also was orally examined. Can anybodycharacterize her evidence as procured or false?

20. Domicile is a mixed question of law and fact and there is perhaps no chapter in the law that has from such extensive discussion received less satisfactory settlement. This is no doubt attributable to the nature of the subject, including as it does, inquiry into the animus of persons who have either died without leaving any clear record of their intentions, but allowing them to be collected by inference from acts often equivocal; or who, being alive and interested, have a natural tendency to give their bygone feelings a tone and colour suggested by their present inclinations. See ***Bell* v. *Kennedy,*** (1868) L.R. 1 Se & Div. 30". The traditional statement that, to establish domicile, there must be a present intention of permanent residence merely means that so far as the mind of the person at the relevant time was concerned, he possessed the requisite intention. The relevant time varies with the nature of the inquiry. It may be past or present. If the inquiry relates to the domicile of the deceased person, it must be ascertained whether at some period in his life he had formed and retained a fixed and settled intention of residence in a given country See Cheshire's Private International Law, 8th Ed., 164. One has to consider the tastes, habits, conduct, actions, ambitions, health, hopes and projects of a person because they are all considered to be keys to his intention to make a permanent home in a place See the Speech of Lord Atkinson in ***Winens* v. *A.G.***, 1904 A.C. 287. If, therefore, Govindan, the first defendant, despite his statement in some of his letters that Krishnan had the intention to return to India, made the assertion that Krishnan died domiciled in England after taking legal advice from competent lawyers in Travancore, it cannot be said straightway that the first defendant was guilty of any fraud, We do not know the contents of the affidavits filed by the first defendant in the proceedings which culminated in ex. 56 order. We are left to conjecture their contents The copies of the affidavits were not produced in this case. Be that as it may, we think that the statements made by the first defendant in some of the letters written by him while he was in England that Krishnan would return to India cannot be taken as conclusive of the fact that he entertained the view after taking legal advice from his lawyers that Krishnan was not domiciled in England and the affidavits filed were, therefore, necessarily false. At any rate, it is impossible to say that the High Court of: Judicature in England was tricked or misled to grant the declaration that Krishnan was domiciled in England on the basis of the affidavits filed by the first defendant. There is nothing on record to indicate that it was the affidavits of the first defendant which weighed with the High Court to grant the declaration. In these circumstances we think the High Court was not justified in imputing fraud to the first defendant in procuring ex. 56 order.

21. It was argued that the evidence adduced in this case would show that Krishnan was not domiciled in England, that he did not renounce his domicile of origin and acquired a domicile of choice and therefore, this Court should hold that ex. 56 order was obtained by fraud.

22. The nature of fraud which vitiates a judgment was explained by De Grey, C. J. in The Duchess of Kingston's Case [Smith's Leading Cases, 13th ed., 88, 641 at 651]. He said that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was mistaken, it might be shown that it was misled. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely that on the merits, the decision was one which should not have been rendered, but that it can be set aside if the Court was imposed upon or tricked into giving the judgment.

23. We make it clear at the outset that we do not propose to discuss the circumstances under which a domestic judgment can be set aside or shown to be bad on the ground of fraud or to indicate the nature of grounds or facts necessary to constitute fraud for that purpose.

24. It is now firmly established that a foreign judgment is impeachable for fraud in the sense that upon proof of fraud it cannot be enforced by action or operate as *res judicata*. The leading case on the subject in England is ***Abouloff (sic)* v. *Oppenheimer,*** [1882] 10 Q.B.D. 295. This was an action brought on a Russian judgment which ordered the return of certain goods unlawfully detained by the defendant, or alternatively, the payment of their value. One defence was that the judgment had been obtained by fraud in that the plaintiff had falsely represented to the Russian Court that the defendant was in possession of the goods the truth being that the plaintiff himself continued in possession of them throughout. It was demurred that this was an insufficient answer in point of law, sine the plea was one which the Russian Court could, as a matter of fact did, consider, and that to examine it again would mean a new trial on merits Lord Coleridge, C.J. said that that English Court will have to decide whether the foreign court has been misled by the fraud of the plaintiff as the question whether it was misled could never have been submitted to it, and never could have been in issue between the parties and never could have been decided by it and, therefore, the English Court was not re-trying any issue which was or could have been submitted to the determination of the Russian Court. The learned Chief Justice also said that "the fraud of the person who has obtained the foreign judgment, is none the less capable of being pleaded and proved as an answer to an action on the foreign judgment in a proceeding in this country, because the facts, necessary to be proved in the English Courts were suppressed in the foreign court by the fraud on the part of the person who seeks to enforce the judgment which the foreign court was by that person misled so as to pronounce. Where a fraud has been successfully perpetrated for the purpose of obtaining the judgment Of a Court, it seems to me fallacious to say, that because the foreign court believes what at the moment it has no means of knowing to be false, the court is mistaken and not misled; it is plain that if it had been proved before the foreign court that fraud had been perpetrated with the view of obtaining its decision, the judgment would have been different from what it was".

25. In ***Vadala* v. *Lawes,*** [1890] 25 Q.B.D. 310 the plaintiff sued the defendant in Italy for the non-payment of certain bills of exchange which had been accepted by the defendants' agent acting under a power of attorney. The principal defence raised in the action was that the bills, which purported to be ordinary commercial bills, were given in respect of gambling transactions without the defendant's authority. The defence was tried on its merits by the Italian court, but failed, and judgment was entered for the plaintiff. The plaintiff then brought an action in England on the judgment. Again, no new evidence was adduced. Lindley, L.J. said that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, the whole case can be reopened although the court in England will have to go into the very facts which were investigated, and which were in issue in the foreign court and that the fraud practised on the court, or alleged to have been practised on the court, was misleading of the court by evidence known by the plaintiff to be false. The learned judge also said that there are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the general rule that a party to an action can impeach the judgment for fraud and second, there is the general proposition which is perfectly well settled, that when an action is brought on a foreign judgment, a court cannot go into the merits which have been tried in the foreign court and that one has to combine these two rules and apply them in the case. He then said:

The fraud practised on the Court, or alleged to have been practised on the Court, was the misleading of the Court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the Court below was or was not false, was the very question of fact that had been adjudicated on in the foreign court; and, notwithstanding

that was so, when the Court came to consider how" the two rules, to which I have alluded, could be worked together, they said; "Well, if that foreign judgment was obtained fraudulently, and if it, is necessary, in order to prove the fraud, to re-try the merits, you are entitled to do so according to the law of this country". I cannot read that case (Abouloff's case) in any other way. Lord Coleridge uses language which I do not think is capable of being misunderstood.

26. The latest decision in England perhaps is that of the Court of Appeal in ***Syal* v. *Heyward,*** [1948] 2 All E.R. 576. The facts of the case were:

On February 12, 1947, the plaintiff obtained against the defendants in India a judgment on a plaint in which he alleged that he had lent the defendants rupees 20,000/-. On November 28, 1947, by order of a master, that judgment was registered as a judgment in the King's Bench Division under Section 2(1) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The defendants applied for an order that the registration of the judgment be set aside pursuant to Section 4(1)(a)(iv) of the Act on the ground that it had been obtained by fraud. They alleged that the plaintiff had deceived the court in India in that the amount lent to them by the plaintiff was rupees 10,800/- and not, as the plaintiff had stated, rupees 20,000/- the difference being made up by commission and interest paid in advance, and that thereby the plaintiff had concealed from the Indian court the possibility that the defendants might have a defence under the Indian usury laws.

Lord Cohen who delivered the judgment said in answer to the proposition of counsel to the effect that where a judgment is sought to be set aside on the ground of fraud, the fraud must have been discovered by the applicant since the date of the foreign judgment:

Be that as it may, counsel's real difficulty is in his fourth proposition. For it he relied on ***Boswell* v. *Cooks*** (1884) 27 Ch. D. 424; subsequent proceedings, sub nom,, ***Boswell* v. *Cooks,*** No. 2 (1894), 86 L.T. 365, a decision of the House of Lords applied in ***Birch* v. *Birch,*** (86 L.T. 364). These cases no doubt, establish that in proceedings to set aside, an English judgment the defendants cannot ask for a re-trial of the issue of fraud as between them and the plaintiff on facts known to them at the date of the earlier judgment, but in cases under Section 4, the question is not one of fraud on the plaintiff, but of fraud on the court, and it seems to us to be clearly established by authority binding, on us that, if the defendant shows a prima facie case that the court was deceived, he is entitled to have that issue tried even though, in trying it, the court may have to go into defences which could have been raised at the first trial.

It would appear that the Court of Appeal gave the widest scope to the doctrine of ***Aboulff* v. *Oppenheimer*** (*supra*) and ***Vadala* v. *Lawes*** (supra). It would follow that a situation like this may arise:

A sues B in a foreign court in respect of some transaction between them. B has a defence, but the disclosure of it may expose him to some criminal proceeding in the foreign jurisdiction. Accordinglyhe does not raise it, and judgment is given for the plaintiff. If A subsequentlybrings an action on the foreign judgment in England, it is presumably open to B to plead the defence which he did not plead in the foreign court in support of a defence that judgment in the foreign court was obtained by fraud (e.g., by A's perjury). It is submitted that this is not a very desirable result, although it seems to follow logically from ***Syal* v. *Heyward***. It is submitted, with respect, that the Court of Appeal might have taken a narrower view of ***Abouloff* v. *Oppenheimer*** and ***Vadala* v. *Lawas***, and might have held that the defence of fraud is available to the defendant where he has raised the issue in the foreign proceedings, in which it has been tried on its merits, and is also available where the facts which constitute the fraud came to the notice of the defendant after the date of the original proceedings. However, the decision in ***Syal* v. *Hevward*** goes far beyond this. 65 L q R .82

27. The courts in Canada take a different view. In ***Woodruff* v. *McLennan,*** (1887) 14 Ont. A.R. 242 which was an action brought in Ontario on a Michigan judgment, the Supreme Court of Ontario held that it was not open to the defendant to plead that the plaintiff had misled the Michigan court by perjury, where the proof of this allegation consisted substantially in tendering the same evidence which had been before the Michigan court. This had been followed by the Ontario Supreme Court and by the Supreme Court of Nova Scotia. In Jacobs v. Beaver 17 Ont. L.R. 496 Garrow. J. distinguished the case where the facts which were tendered in support of the plea of fraud were discovered after the hearing of the original action. In such a case they could be properly introduced in defence to a subsequent action on the foreign judgment.

28. So far as the American decisions are concerned, while it is clear that a foreign judgment may be attacked on the ground of fraud in its procurement, it is not clear how far this doctrine goes. ***Abouloff* v. *Oppenheimer*** (supra) and ***Vadala* v. *Lawes*** (supra) were referred to by the Supreme Court of the ***United States in Hilton* v. *Guvot,*** 159 U.S. 113, where Gray J. said: "Whether those decisions can be followed in regard to foreign judgments, consistently with our own decision as to impeaching domestic judgments, for fraud, it is unnecessary in this case to determine". The matter is open, though Goodrich points out that there is no American case in which the plea of fraud has permitted re-examination of the very matters determined in the original suit. 65 LQR 82

29. According to Cheshire, the effect of the judgments in ***Abouloff* v. *Oppenheimer***, ***Vadala* v. *Lawes*** and ***Syal* v. *Heyward*** (supra) is that the doctrine as to the collusiveness of foreign judgments is materially and most illogically prejudiced see "Private International Law," 8th Ed. P. 654.

30. Although there is general acceptance of the rule that a foreign judgement can be impeached for fraud, there is no such accord as to what kind of fraud is sufficient to vitiate a foreign judgment. Must it be only fraud which has not been in issue or adjudicated upon by the court which gave the judgment? Must the court in the subsequent action where fraudulent misleading of the foreign court is alleged refrain from going so far in its search for such fraud as to re-try the merits of the original action? The wide generality of the observations of Coleridge, C.J. in ***Abouloff* v. *Oppenheimer*** and of Lindley, J. in ***Vadala* v. *Lawes*** (supra) in favour of the vitiating effect of fraud to the utter disregard of the res judicuta doctrine certainly departs from the usual caution with which the courts proceed when dealing with a subject, the law of which is still in the making. We have already referred to what Coleridge, C.J. said in ***Abouloff* v. *Oppenheimer*** namely, that the question whether the foreign court was misled in pronouncing judgment never could have been submitted to it, never could have been in issue before it and, therefore, never could have been decided by it. This is, generally speaking, true. But it is also axiomatic that the question of credibility of witnesses, whether they are misleading the court by false testimony, has to be determined by the tribunal in every trial as an essential issue, decision of which is a prerequisite to the decision of the main issue upon the merits, A judgment on the merits, therefore, necessarily involves a *res judicata* of the credibility of witnesses insofar as the evidence which was before the tribunal is concerned. Thus, when an allegation is made that a foreign judgment is vitiated because the court was fraudulently misled by perjury, and issue is taken with that allegation and heard, if the only evidence available to substantiate it is that which was used in the foreign court, the result will be a re-trial of the merits. It is hard to believe that by his dictum Lord Coleridge ever intended, despite the abhorrence with which the Common Law regards fraud, to revert to the discredited doctrine that a foreign judgment is only prima facie evidence of a debt and may be re-examined on the merits, to the absolute disregard of any limitation that might reasonably be imposed by the customary adherence to the *res judicata* doctrine See Conflict of Laws, Foreign Judgment as Defence-Note in 8 Canadian Bar

Review 231 by Horace E. Read. Duff, J. with his usual felicity put the point thus in ***Macdonald* v. *Pier,*** [1923] S.C.R. 107:

One is constrained to the conclusion upon an examination of the authorities that there is jurisdiction in the court to entertain an action to set aside a judgment on the ground that it has been obtained through perjury. The principle I conceive to be this: such jurisdiction exists but in the exercise of it the court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used for the purpose of obtaining a re-trial of an issue already determined, of an issue which transmit in *res judicata*, under the guise of impugning a " judgment as procured by fraud. Therefore the perjury must be in a material matter and therefore it must be established by evidence not known to the parties at the time of the former trial.

As Garrow, J. said in ***Jacobs* v. *Beaver*** (supra), the fraud relied upon must be extrinsic or collateral and not merely fraud which is imputed from alleged false statements made at the trial which were met with counter-statements and the whole adjudicated upon by Court and so passed into the limbo of estoppel by the judgment. That estoppel cannot be disturbed except upon allegation and proof of new and material facts which were not before the former court and from which are to be deduced the new proposition that the former judgment was obtained by fraud.

31. What, then, are the new materials before us to say that ex. 56 order was obtained by fraud ? Do the letters written by the first defendant to Padmanabhan while he was in England or those written by Krishnan to Padmanabhan, first defendant or his niece point unequivocally to the fact that Krishnan intended to return to Travancore and settle down permanently?

32. Krishnan had once the intention of coming back to India after completing his studies but, after 1946, he had changed his intention. In Ex. 23 letter written to Padmanabhan on January 6, 1932, Krishnan complains of the conduct of Padmanabhan in not sending him money for prosecuting his studies. In Ex. 24 letter dated March 16, 1933, again he reiterates his demand for money and says: "the ardent desire of you and people of your opinion is that I should not come back to the country... I want to come back to my country and that after passing all the examinations". Likewise, in Exs. 25 and 26 dated August 16, 1933 and August 22, 1933 respectively, he repeats his demand for money and his desire to come back, especially to see his sick mother. In Exs. 27 and 28 letters dated April 11, 1934 and April 27, 1934 respectively, he again presses his demand for money and ardent desire to come to Travancore to see his ailing mother. In Ex. 29 letter dated June 19, 1936, Krishnan blames Padmanabhan and the members of the family for their behavior in not sending him money which would have enabled him to come to Travancore and see his mother who had died in the meanwhile. We find a change of attitude in Krishnan from his letter written to his niece Chellamma on April 4, 1939 (Ex. 5) wherein he states that he has decided to stand on his own legs. He says in the letter: "When I have saved enough money to lead a respectable life at home 1 will come back." On October 23, 1939 (Ex. 7) Krishnan writes to Padmanabhan demanding the income from his share of properties. He asks "Where is my income ?"; he wants an account of the 'family jewels' and threatens legal proceedings in case his demand is not satisfied.' In that letter he addresses his brother for the first time as "dear sir". The same demand is repeated in Ex. 30 dated November 6, 1939. On November 16, 1939, Krishnan writes Ex. 6 letter to Chellamma saying that he will take revenge on Padmanabhan and that he will come back within 10 years. Mrs. Padmanabhan died in 1941. Govindan, the first defendant went to England in 1946. Exs. 8 and 10 written on the same day i.e. July 1, 1946, by the first defendant to Padmanabhan would indicate that Krishnan was making good income, that he would return to Travancore within 5 years. In Ex. 1 (a) letter "Krishnan states to Padmanabhan on July 1, 1946 that he is reluctant to give up his practice and waste his time in Trivandrum and that is the reason why he wants to stay in England but he

hopes to return and settle down in Trivandrum permanently. In Ex. 2 letter dated July 21, 1946, the first defendant informed Padmanabhan that Krishnan says that he is against the idea of coming to India and returning to England and that he is bitter to Padmanabhan for not sending him money when he was in need. This is in answer to ex. 46 letter sent by Padmanabhan to the first defendant stating whether Krishnan can be persuaded to come to Travancore and return to England. In Ex. 9 letter dated February 4, 1948 sent by the first defendant to Padmanabhan from Edinburgh, it is stated that Krishnan is willing to spend money for the first defendant's education but he is reluctant to send any money to Padmanabhan and that Kirshnan might be returning after 5 years as he is finding it difficult to leave Miss Hepworth. On March 11, 1948, Padmanabhan sent ex. 47 letter to the first defendant saying that Krishnan did not reply to his (Padmanabhan's) letters. In his letter dated August 3, 1948 (ex. 3) to Padmanabhan, Krishnan asks the question how much money Padmanabhan was holding in Krishnan's account and that his idea is to return within one year and to buy a plot and build a house in Trivandrum. In ex. 45 letter dated January 23, 1949 written to the first defendant, Padmanabhan asks the former to bring Krishnan with him as the family members are all anxious to see Krishnan. In ex. 4 letter dated February 10, 1949, the first defendant states that Krishnan is getting a decent income and he is not willing to give it up and come home, that he hopes to return after 5 more years for ever. To ex. 49 letter dated March 29. 1949 written to the first defendant, Padmanabhan says that even if Krishnan is employed, it is possible for him to come to Trivandrum and then return to England as they all desire to see him. In September, 1949. the first defendant returned to Travancore. Krishnan did not accompany him."

33. It would appear that till 1939, Krishnan had the intention to return to India. But when he acquired a comfortable practice and purchased a house in Sheffield, his intention changed. Although he was saying in some of his letters after 1939 that he would return and settle down in Travancore, that was with the predominant idea of getting from Padmanabhan his share of the income. If he had made it clear that he would not return, the chances of Padmanabhau accounting for the income he had been taking from his (Krishnan's) share of the properties were remote. Exhibits 12, 13, 14, 15, 16 and. 17, all written by Miss Hepworth after the death of Krishnan, make it abundantly clear that Krishnan had absolutely no intention of returning to India. In ex. 15 letter she says: "All I can say is that he (Krishnan) repeatedly said that I shall never go back to India". In ex. 17 letter she says that she suggested to Krishnan for a holiday in India, but he said never. As Cheshire has said See International Law, 8th Ed. 164.:

It is impossible to lay down any positive rule with respect to the evidence necessary to prove intention. All that can be said is that every conceivable event and incident in a man's life is a relevant and an admissible indication of his state of mind. It may be necessary to examine the history of his life with the most scrupulous care, and to resort even to hearsay evidence where the question concerns the domicile that a person, now deceased, possessed in his lifetime. Nothing must be overlooked that might possibly show the place which he regarded as his permanent home at the relevant time. No fact is too trifling to merit consideration.

Nothing can be neglected which can possibly indicate the bent of Krishnan's mind. His aspirations, whims, prejudices and financial expectation, all must be taken into account. Undue stress cannot be laid upon any single fact, however impressive it may appear when viewed out of its context, for its importance as a determining factor may well be minimised when considered in the light of other qualifying event. It is for this reason that it is impossible to formulate a rule specifying the weight to be given to particular evidence. All that can be gathered from the authorities in this respect is that more reliance is placed upon conduct than upon declaration of intention. "It is not by

naked assertion, but by deeds and acts that a domicile is established" See ***Me Mullen* v. *Wadsworth*** [1889] 14 A. C. 631 at 636.

34. We are of the view that the declaration by Krishnan in the letters written after 1939 that he would return to Travancore did not contain the real expression of his settled intention. These declarations cannot be taken at their face value. They are interested statements designed to extract from Padmanabhan the share of his income. They seem to us to represent nothing more than an expectation unlikely to be fulfilled. Although 10 years, 5 years, 1 year and then 5 years were fixed as the limit from time to time for his return, he did not take any active step in furtherance of his expressed intention. Lord Buckmaster has said See ***Ross* v. *Ross,*** [1930] A.C. 1 at P. 6.

Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.

35. We think that the declarations made by Krishnan to Miss Hepworth from time to time represented his true intention. His conduct and action were consistent with his declared intention to her. The statements made by Krishnan in the letters referred to were made from other considerations and circumstances and were not fortified and carried into effect by conduct or action consistent with the statements. As we said, the question of domicile is a mixed question of law and fact. The High Court did not deal with the question of domicile of Krishnan except that it said that some of the letters of Krishnan and Govindan show that Krishnan expressed his intention to return to Travancore and, therefore, for that reason also, ex. 56 order was obtained by fraud.

36. "The fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained" see Dicey and Morris on the Conflict on Laws, 8th Ed. 1009. It was the administrators who obtained ex. 56 order and by no stretch of imagination could it be said that they practised any fraud by adducing evidence which they knew was false or induced any person or witness to give false evidence or file any false affidavit. Nor could it be said that the English Court was misled by what the first defendant said about the domicile of Krishnan, as persons who were more competent to speak about the domicile of Krishnan had filed affidavits and tendered oral evidence to the effect that Krishnan died domiciled in England.

37. If that be so, the further question is whether the proceedings in which ex. 56 order was obtained were opposed to natural justice. It was contended that notices of the proceeding which culminated in ex. 56 order have been served on the minors through their natural guardians, that natural guardians were not appointed as guardians *ad litem* and therefore, the proceedings were opposed to principles of natural justice. In other words, the argument was, that, since the natural guardians on whom the notices of the proceedings were served were not appointed as guardians *ad litem* of the minors, they had no opportunity to contest the proceedings on behalf of the minors and so the proceedings were opposed to natural justice.

38. We do not think that there is any substance in this contention. It is extremely difficult to fix with precision the exact cases in which the contravention of any rule of procedure is sufficiently serious to justify a refusal of recognition or enforcement of a foreign judgment. It is difficult to trace the delicate gradations of injustice so as to reach a definite point at which it deserves to be called the negation of natural justice. The expression "Contrary to natural justice" has figured so prominently in judicial statements that it is essential to fix its exact scope and meaning. When applied to foreign judgments, it merely relates to the alleged irregularities in procedure adopted by the adjudicating court and has nothing to do with the merits of the case. If the proceedings be in accordance with the practice of the foreign court but that practice is not in accordance with natural justice, this Court will

not allow it to be concluded by them. In other words, the courts are vigilant to see that the defendant had not been deprived of an opportunity to present his side of the case see Cheshire's Private International Law, 8th Ed. p. 656. The wholesome maxim *audi alteram partem* is deemed to be universal, not merely of domestic application, and therefore, the only question is, whether the minors had an opportunity of contesting the proceeding in the English court. If notices of the proceedings were served on their natural guardians, but they did not appear on behalf of the minors although they put in appearance in the proceedings in their personal capacity, what could the foreign court do except to appoint a court guardian for the minors? Under Order 32 of the Civil Procedure Code, if the natural guardian is unwilling to act as guardian for a minor in a suit, the court can appoint an officer of the court to be such guardian. In effect, when the natural guardians were given notice of the proceedings on behalf of the minors, an opportunity was given to the minors through those guardians to contest the proceedings. All that is required by rules of natural justice is that minor should be given an opportunity to contest through their natural guardians. Even if there was any breach of the rule of procedure prevailing in the forum where the proceedings were conducted, that would not be material, as what we have to see is whether the proceedings have been conducted in substantial compliance with the prevailing notion of fairplay. And, when the natural guardians evinced their intention not to contest the proceedings by not putting any appearance on behalf of the minors, we think the requirement of natural justice was satisfied when the court appointed an officer of the court to be guardian *ad litem* of the minors in the proceedings.

39. Counsel for the respondents raised a new point not taken either before the trial court or High Court and that is that as the minors did not submit to the jurisdiction of the English Court, that court had no jurisdiction so far as they were concerned and the declaration in ex. 56 order would not operate as *res judicata* as respects them.

40. Now, it is a well established proposition in private international law that unless a foreign court has jurisdiction in the international sense, a judgment delivered by that court would not be recognized or enforceable in India. The guardians of the minors did not enter appearance on behalf of the minors and so it cannot be said that the minors through the guardians submitted to the jurisdiction of the English Court.

41. The practice illustrated by Order 11 of the English R.S.C., under which the courts of a country assume jurisdiction over absentees, raises the question whether a foreign judgment given in these circumstances will be recognized elsewere. The authorities, so far as they go, are against recognition. The question arose in ***Buchanan* v. *Rucker,*** (1808) 9 East 192 where it was disclosed that by the law of Tobago, service of process might be effected upon an absent defendant by nailing a copy of the summons on the door of the court house. It was held that a judgment given against an absentee after service in this manner was an international nullity having no extra-territorial effect. Indeed, the suggestion that it should be actionable in England prompted Lord Ellenborough to ask the question:

Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? (at p. 194).

In ***Schibsby* v. *Westenholz,*** (1870) L.R. 6 Q.B. 155 a judgment had been given by a French Court against Danish subjects resident in England. The question was:

The mode of citation adopted in accordance with French law was to serve the summons on the, Procureur Imperial, the rule being that if a defendant did not appear within one month after such service, judgment might be given against him. Although not required by the law, it was customary in the interests of fair dealing to forward the summons to the consulate of the country where the defendant resided, with instructions to deliver it to him if practicable. In the instant case, the

defendants were notified of the proceedings in this manner, but they failed to appear and judgment was given against them.

It was held that no action lay upon the judgment. From the non-appearance of a defendant who is not otherwise subject to the jurisdiction of the foreign court it is impossible to spell out any such duty.

The true basis of enforcement of a foreign judgment is that the judgment imposes an obligation upon the defendant and, therefore, there must be a connection between him and the forum sufficiently close to make it his duty to perform that obligation. If the principle upon which judgments are enforceable been comity, the Court of Queen's Bench in the above case said that, having regard to the English practice of service out of the jurisdiction, it would have reached a different conclusion.

42. It is not without significance, however, that in this general context, the Court of Appeal in ***Travers* v. *Holley,*** [1953] 2 All E.R. 794 acted on the basis of reciprocity and held that what entitles an English court to assume divorce jurisdiction is equally effective in the case of a foreign court. In a later case (Re Trepca Mines Ltd. [1690] 1 W.L.R. 1273, 1281-82; Hodson, LJ. observed that ***Travers* v. *Holley*** was "a decision limited to a judgment in rem in a matter affecting matrimonial status, and it has not been followed, so far as I am aware, in any case except a matrimonial case". See Cheshire's Private International Law, 8th ed., pp. 634-635.

43. The question was again considered in ***Societe Cooperative Siametal* v. *Titam International Ltd.,*** [1966] 1 Q.B. 828 The facts in the case were:

To, an English company, sold to a Belgian company, S., a quantity of steel and it was a term of the contract that T. would ship the steel to an Italian company, who had purchased it from S. The Italian company was 'not satisfied with the quality of the steel and brought proceedings in a Belgian court against S. S. joined T. to those proceedings and served notice of the proceedings on T. in England. T. look no part in the proceedings and did not submit to the jurisdiction of the Belgian Court. The Belgian court gave judgment for the Italian company against S: and for S. against T.S. registered that judgment under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, in the Queen's Bench Division, T. issued a summons to have the registration set aside on the ground that the Belgian court had no jurisdiction in the circum stances of the case within the meaning of Section 4 of the Act.

Widgery, J. said that the true reason on which a foreign judgment is enforced in England is that the judgment of a foreign court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which the judgment is given which the courts in the country are bound to. enforce and consequently anything which negatives that duty or forms a legal excuse for not performing it is a defence to an action. He observed:

It appears to me to have been recognised by the common law that the enforcement in this country by action of a judgment obtained abroad depended primarily upon whether the defendants had a duty to observe the terms of the foreign judgment.

The 'Court then considered the case of ***Trovers* v. *Holley*** (supra) and said, since the reason for enforcement of foreign judgment is not comity but the existence of jurisdiction over the person, a judgment obtained without jurisdiction in foreign court in circumstances in which English court would assume jurisdiction cannot be recognized.

44. With the growth of internationalism, a new approach to the question has been advocated by O. Kahn-Freund See "The Growth of Internationalism in English Private International Law", The Hebrew University of Jerusalem Lionel Cohen Lectures Sixth Series, January, 1960, pp. 29-30:

Underlying the first meaning, the one of ***Trovers* v. *Holley***, there is something like the moral principle: 'Do unto others as you would want others to do unto yourself, something, if you like, a little like Kant's Categorical Imperative. As I claim jurisdiction in these circumstances, I must acknowledge your right to do so as well, because I cannot deny that the principle underlying my course of action is a principle on which any other member of the community of nations ought to act. I am not saying that such lofty thoughts were necessarily present to the minds of the judges who decided the case. Perhaps they were more inspired by the horror *matrimonii claudicantis*, the need for preventing limping marriages of which I think English specialists in marriage law such as Hodson L.J. are very much aware.

45. Mr. Sarjoo Prasad for the appellant contended that a judgment or order declaring domicile of a person is a judgment *in rem* and in the proceedings to obtain such an order of judgment, notice need not be served upon all persons affected by the declaration or determination. A judgment *in rem* determines the status of a person or thing and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. A judgment *in rem* determines the "destiny of the *res* itself" and binds all persons claiming an interest in the res." Mr. Sarjoo. Prasad submitted Unit although domicile in the abstract is not *res* it savours of *res* like marriage and, therefore, a determination or declaration of the domicile of a person is a judgment which is binding on the whole world and any failure to serve the notices upon the minors or their failure to appear in court in pursuance to the notices is quite immaterial for adjudging the question of jurisdiction.

46. The difference between a judgment in personal and a judgment *in rem* was pointed out by Chief Justice Holmes in ***Tyler* v. *Judges of the Court of Registration,*** (1900) 175 Mass. 71 where he said:

If the technical object to the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is in personal, although it may concern the right to, or possession of, a tangible thing. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest the proceeding is *in rem*. All proceedings, like all rights, are really against persons. Whether they are proceedings or right *in rem* depends on the number of persons affected. Hence the *res* need not be personified and made, a party defendant, as happens with the ship in the Admiralty. It need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendant are mere symbols, not the essential matter.

Section 41 of the Evidence Act speaks only of a final judgment, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely. We are not quite sure whether judgments or orders rendered in the exercise of any other jurisdiction would have the effect of a judgment *in rem*. We were referred to no authority wherein it has been held that an order declaring the domicile of a person under Order 11 of R.S.C. of England is a judgment *in rem* and that persons affected need not submit to the jurisdiction of the foreign court which makes the declaration if otherwise they are not subject to its jurisdiction.

47. In this view, we do not think that the ex. 56 order was valid as against the minors. The position, therefore, is that so far as the major respondents in ex. 56 proceedings were concerned, the court had jurisdiction since they submitted to its jurisdiction and the decision of the court would operate as *res judicata*. But, so far as the minor respondents to those proceedings are concerned, we are of the view, on the evidence in this case which we have already discussed in detail, that Krishnan had no settled or definite intention to return to Travancore and that, as he was a resident in England and as his acts and conduct were consistent only with his intention to make it his permanent home, he died domiciled in England.

48. We think that the High Court was right in its conclusion that the sale proceeds of the house in Sheffield has to be distributed accordingly to the English law. To this extent we uphold the judgment of the High Court but set it aside in other respects.

49. In the result, we hold that the succession to the amount specified in Schedule-C minus the amount which represents the sale proceeds of the house property in Sheffield must also be governed by English law and that the amount must be distributed between the first and second defendants in equal shares. We allow the appeal but make no order as to costs.

Appeal Allowed.

Lalji Raja & Sons v. Hansraj Nathu Ram
AIR 1971 SC 974

SMS S1kri. C: G.K. Mitter: K.S. Hegde: P. Jagamohan Reddy And V. Bh. Argava. J.J.

The case stood out of the following circumstances. A decree was passed in favour of the appellants by the court at Bankura in West Bengal on December, 1949. This decree was transferred for execution on 23rd March, 1950 to the court at Morena, in the then state of Madhya Bharat which dismissed the execution petition on the ground that it was an *ex partae* foreign decree.

The than State of Madhya Bharat was governed by the Indian Civil Procedure Code as adopted by the Madhya Bharat Adaptation Order, 1948. It was only after 1st April 1951 that the Code of Civil Procedure was extended to Madhya Bharat and other places.

As against the order of dismissal of the Morena court, the appellant-decree-holders appealed to the High court of Madhya Pradesh which allowed the appeal.

On 15 February 1963. the decree holders instituted afresh another execution petition before the Bankura court. They again requested for the transfer of the decree to the Morena court, for execution. The judgement-debtors resisted the execution petition. interalia on the ground that the decree was not executable as it was a "foreign decree". The Morena court ordered for the execution of the decree. The High Court of Madhya Pradesh held that the decree was not executable as the court which passed the decree was a foreign court. The present case was brought an appeal under the special provisions of the Indian Constitution by the aggrieved decree-holders.

The relevant issue before the court, *interalia*, was -whether the decree under execution is not executable by courts sitting in the former state of Madhya Bharat.

It was contended by the judgement debtors *interalia*, that the decree under execution was a nullity qua the courts in the former state of Madhya Bharat and therefore the same was not executable, in other words the Bankura court had no jurisdiction over the judgement debtors and therefore, the decree passed being one pronounced In absentem was a nullity.

It was held the Supreme Court of India upon the facts and circumstances of the case that the decree in question was not a "foreign' decree and its transfer to the Morena court was in accordance with the provisions of the Code". The court said that 'foreign Court' is defined in section 2(5) of 'the Code' meant 'a court situated beyond the limits of British India which has no authority in British India and is not established or continued by the Code of Civil Procedure (Amendment) Act II of 1951. According to the new definition 'foreign court' meant 'a court situated outside India and not established or continued by the authority of the Central Government.' "Whether under the earlier or present definition", the court said, the Bankura Court cannot be considered as a

'foreign court', within the meaning of that expression in "the Code". Foreign Judgement was defined in code as the judgement of "a Foreign Court (Section 2(6) of 'the Code'). Hence the decree under execution was not considered as a foreign decree for the purpose of "the Code".

The Judgement debtors relied on the principle that an *expartae* decree in a *personam* action by a foreign court to the jurisdiction of which the defendant has not, in any way. submitted was an absolute nullity as laid down in the classical case of ***Sardar Gurdyal Singh v. The Rajah of Faridkot***, 21 I.A. 171. The judicial committee of the Privy Council observed in that case:

"In a *personam* action, to which none of these causes of jurisdiction apply. a decree pronounced in *absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity".

But the Privy Council qualified those observations by the following words:

"He is under no obligation of any kind to obey and it must be regarded as a mere nullity by the courts of every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced".

Having referred to the above dicta of the Privy Council the Supreme Court stated:

"The above remarks of the Privy Council;1) indicate that even a decree which is pronounced in a absentem by a foreign court is valid and executable in the country of the forum by which it was pronounced when authorised by special local legislation. A decree passed by a foreign Court to whose jurisdiction a judgement debtor had not submitted is an absolute nullity only if the local legislatiure had not conferred jurisdiction on the domestic courts over the foreigners either generally, or under specified circumstances. Section 20(c) of "the Code confers jurisdiction on a court in India over the foreigners if the cause of action arises within the jurisdiction of that Court. Hence the observation of the Board quoted in some of the decisions of the Courts in India including the decision of this Court in *Narsingh Rao Shitole v. Shri Shankar Saran & Ors.*, [1963] 2 S.C.R. 577 (AIR 1962 SC 1737) (Supra). That such a decree is an 'absolute nullity, may not be apposite. It may be mere appropriate to say that the decree in question is not executable in Courts outside this country. The board itself had noticed that this rule of Private International Law is subject to special local legislation. Clause (s) of Section 20 of "the Code" provided at the relevant time and still provides that subject to the limitations mentioned in the earlier sections of "the Code" a suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. There is no dispute in this case that the cause of action for the suit which led up to the decree under execution arose within the jurisdiction of Bankura court.

Hence, it must be held that the suit in question was a property instituted suit. From that it follows that the decree in question is a valid decree though it might not nave been executable at one stage in Courts in the former Indian States.

Appeal Allowed.

Marggarate Maria Pulparampil Nee Feldman v. Dr. Chacko Pulparampil
AIR 1970 Kerela1

Govindan Nair, J.

1. This is a petition by a German mother for the custody of her two children, the daughter Konstanze, aged about 41/2 years, and the son Thomas Markus who is nearing but haying not yet attained the age of 3. The petition is under Article 226 of the Constitution of India and the prayers are that a Writ of Habeas Corpus be issued to the respondents to produce the children before this Court and that a further direction be given to hand over the children to the custody of the mother. The father of the children is the 1st respondent, the 2nd respondent is the father of the 1st respondent, and the 3rd respondent is the wife of the 2nd respondent, the 2nd respondent having married again after the death of the 1st respondent's mother.

A Division Bench of this Court before which this petition came up along with C. M. P. 143 of 1968 for the issue of 3 mandatory injunction ordered on C. M. P. 143 of 1908 on 4-1-1968, that the respondents produce the children before this Court at 10-30 A. M- on 8-1-1908. By an order on C. M. P. 257 of 1908 dated 8-1-1968 the direction to produce the children on the 8th January, 1968, was altered and the direction issued that the children be produced on the 11th January. 1968. On that day, the children were produced before this court and the matter stood over to the 18th of January, 1968 for further consideration. On 18-1-1968, C. M. P- 694 of 68, a joint petition by the mother and the father was filed in Court and it was agreed by the father and the mother that pending disposal of this original petition, the children be entrusted to the St. Theresa's Convent, Ernakulam. Accordingly, Smt. P. K. Fatima Bee, an Assistant Registrar of this Court took charge of the children and entrusted them the same day with Sister Bernardine, Mother Superior, of the St. Theresa's Convent. Since then the children have been in the Convent under the protection and control of the Mother Superior with access to the father and the mother on the terms embodied in the joint petition referred to.

2. The question, by no means a simple or an easy one, with which we are faced Is whether we can, and if we can whether we should, grant the prayers in this petition and this has to be decided on the following facts.

3. The father, the 1st respondent, an Indian National, went to Germany in the year 195S to study medicine. There he met the petitioner who was also studying medicine in the same College which the 1st respondent attended and their mutual liking for each other developed into affection resulting in their marriage according to the Civil Law on the 20th of December 1963, and according to the ecclesiastical rites on the 29th of December that year. The daughter Konstanze was born on 15-7-1964. Before the second child, the son. Thomas Markus was born on 22-2-1966; the marriage which must have commenced with high hopes and dreams of an adventurous and enjoyable voyage through life ran into heavy weather and difficulties and all but foundered by early August, 1965. On the 6th August that year, the husband it is alleged by the wife, left the matrimonial home, never to return to it, and according to the husband he was forced to leave by the conduct of the petitioner's mother and particularly of her brother, a conduct which according to the husband was approved by, or at least acquiesced in by the petitioner. It is not very clear how matters came to a head on that fateful day in August 1965 but there are accusations and counter accusations which can be gleaned from proceedings before the German Courts to which parties very freely, soon after, took resort, as evidenced by certain orders produced before as.

The approach to the German Courts seems to have been almost simultaneous by the petitioner and her husband. The father asked for access to the children, who were with the mother, shortly

after the incident on 6-8-1965, and the mother sued for divorce by Ext. P-3 petition dated 9-11-1965. There was an agreement arrived at regarding access of the father to the children on the 11th of November 1965 which the father says in the affidavit before this Court dated 12-1-1968 was "formally engrafted in an order of a Court." The father was dissatisfied with the arrangement. He complained that the terms of the agreement were not honoured by his wife. So there was a modification of the agreement by consent. This new agreement also failed to give satisfaction to the father. According to him even this agreement was violated by the wife. So he petitioned the Court on the 22nd July 1966 (Ext. P-9) praying for an oral hearing regarding his access to the children and further claimed that "since the wife does not comply with the terms of this agreement an order must be made by the Guardianship Court." The parties thereafter agreed on new terms regarding access and this is seen from Ext. P-14 which was filed in the German Court and was "read and approved" by the Court and thus accepted by it.

In the meantime, the divorce petition was dismissed on 22-6-1966 by Ext. R-2 order on the ground that it has not been established that the husband by his fault "has disturbed married life so deeply that normal relations cannot be expected to be resumed again". The petitioner appealed from that order R-2 and while that appeal was pending, on the application of the mother the father was ordered on 18-10-1966 by Ext. P-7 to pay to the children maintenance at the rate of 130 German Marks for the months from May to September, 1966. Soon after, on the 27th of December. 1966, the father took out the children in terms of Ext. P-14 but instead of returning them to the mother before 18-00 hours that day, drove them in a taxi to the Dusseldorf Airport in the company and with the assistance of a nurse named Waltraud Rose, admittedly a friend of the father, and took a plane for India for the children. Konstanze was at that time less than 21/2 years old and Thomas Markus just over 10 months. The father did not inform the mother either about his departure nor did he cable her after reaching India.

After making frantic enquiries on the 27th of December, the mother moved a petition the next day before the Appellate Court where the divorce matter was pending and obtained an order Ext. P-1 dated 28-12-1966 by which it was ordered that the father hand over the custody of the children to the mother. Nothing happened pursuant to this order and the mother continued to make enquiries about the whereabouts of the children. On the 21st of April, 1967, by Ext- P-8 order, the appeal taken by the father from Ext. P-7 order directing maintenance to the children was dismissed. The mother has alleged that she came to know about the whereabouts of the husband and the children only from a letter which she received from the husband's step mother (3rd respondent) in November 1967 and that she could save adequate funds for her trip to India only by the end of that year. She came down to India in December, 1967, landing in Cochin on the 19th of that month and made attempts to get in touch with the children. She says she was not even permitted to see them. She therefore moved this Court by this petition.

4. The appeal from the divorce matter was allowed on 16-5-1968 by Ext. P-17 order holding that both parties were guilty of such conduct which was conducive to the disruption of marital relations but that the father was more to be blamed than the mother. It appears from Ext. P-17 order that the father also, at least alternatively, claimed divorce on the ground that the mother by her conduct had made marital relations impossible. The order Ext. P-17 holds that the father would have been entitled to apply for divorce on the conduct of the mother which had been established by the evidence in the case. The marriage was dissolved by the order Ext. P. 17. On the same day another order Ext. P-11 was passed by the Court exercising jurisdiction regarding the custody of the children. This order directed that the custody of the children be given to the mother. This order was apparently passed without knowledge of the order Ext. P-17 on the appeal in the divorce matter

passed the same day by the Appellate Court. The only other order that we need refer to is the order Ext. P-15 by the same Court that passed the order Ext. P-11 and this seems to be the final order regarding custody. This order dated 27-11-1968 confirmed the direction in Ext. P-11 order that the custody of the children be with the mother.

5. It is common ground that the nationality of the father is Indian and that of the mother, German, It is also agreed that both the father and the mother are Christians of the Roman Catholic persuasion and that the children have been baptized according to the rites of the Roman Catholic Church.

6. There can be no doubt that the domicile of origin of the father is Indian and that of the mother German. On the evidence on record it is a difficult question to decide whether the father acquired a German domicile of choice. It seems to us unnecessary to decide this question for the purpose of this case. It is no doubt true that according to the canons of Private International Law, the mother and the children in this case will have the father's domicile

7. Assuming without deciding -- we are not at all certain that the decision should be that way -- that the father had not acquired a German domicile of choice, and therefore the father, the mother, and the children were of Indian domicile, a competent German Court will have jurisdiction to pass a decree for divorce or custody of the children on the ground that the petitioning spouse had a real and substantial connection with the country of that Court or that the children were ordinarily resident in that country. This is a rule or principle that has been adopted by English Courts in very recent times and it seems to us that this trend manifests an important and necessary development of the law.

The case to which we shall first refer is the decision of the House of Lords in ***Indyka* v. *Indyka***, reported in 1967 (2) All ER 689. Three of the Law Lords who decided this case recognised a foreign decree for divorce on the ground that the petitioning spouse had a real and substantial connection with that foreign Court. We shall extract the relevant passages from their speeches. Lord Morris of Borth-Y-Gest said:--

'The first wife at the time when she presented her petition in Czechoslovakia undoubtedly had a real and substantial connexion with that country. I see no reason why the decree of the Czech court should not in these circumstances be recognised."

Lord Wilberforce expressed his opinion thus: --

"Recognition might be given to decrees given on a residence basis, either generally or in the particular case of wives living apart from their husbands where to subject them uniquely to the law of their husband's domicile would cause injustice, and where the jurisdiction of the court of the country of residence is appropriate."

"How far should this relaxation go ? in my opinion, it would be in accordance with the developments that I have mentioned and with the trend of legislation, mainly our own but also that of other countries with similar social systems to recognise divorce given to wives by the courts of their residence wherever a real and substantial connexion is shown between the petitioner and the country or territory, exercising jurisdiction." Lord Pearson in his speech, summed up the matter in these terms:--

"It seems to me that, subject to appropriate limitations, a divorce granted in another country on the basis of nationality or on the basis of domicile (whether according to English case law or according to a less exacting definition) should be recognised as valid in England. Also it the law of the other country concerned enables a wife living apart from her husband to retain or acquire a separate qualification of nationality or domicile for the purpose of suing for divorce, and the jurisdiction has been exercised on the basis of that qualification, that would not, normally at any rate, be a reason for refusing recognition-One obvious limitation is that a decree obtained by fraud

or involving grave injustice should not be recognised. In addition there is a limitation which can only be indicated in rather general terms, and I will gratefully borrow some phrases. In the words of my noble and learned friend, Lord Pearce, the court must be not "simply purveying divorce to foreigners who wish to buy it." In the words of Mr. Commissioner Lately, Q.C., the courts must not be used "for the convenience of birds of passage."

8. These observations were made in a case where the House of Lords had to decide whether they should recognise a foreign decree granting divorce and this case has been followed in England in subsequent decisions. We shall refer to the one in ***Angelo* v. *Angelo***, reported in 1967 (3) All ER 314 where justice Ormrod extracted the passages which we have read and recognised the divorce decree passed by a foreign Court. Counsel who contended before him that the foreign decree should be accepted, urged that the real *ratio decidendi* in 1967 2 All ER 689 probably is to be found in Lord Morris of Borth-y-Gest's speech, in which he speaks of it being necessary for the party obtaining the decree to have a "real and substantial connexion" with the country pronouncing the decree. This contention was accepted by the learned Judge.

9. We are in this case not seriously concerned with the validity of the divorce decree that has been passed by the German Court by order dated 16-5-1968, Ext. P-17. The arguments of counsel for the petitioner before us rested on a narrower compass. He relied on Ext. P-14, We shall not, at this stage, call that an order, for, it is urged by the 1st respondent that it is nothing more than an agreement. According to the petitioner, it is an order; an order, no doubt passed on an agreement but nevertheless an order of Court. And this was passed on the 9th of August, 1966, admittedly when the father and mother as well as the children were residing in Germany. They were certainly ordinarily residents in Germany at that time.

There is of course controversy as to whether the husband was permanently residing there at that time. According to him, he had no intention of settling down permanently in Germany at any time. He went there merely to study medicine He had, according to him, always ideas of getting back to his native land. According to the petitioner, at the time of the marriage the husband had promised that he would live with her and with their family for the rest of his life, in Germany. It is most difficult to fathom the mind of man. Hence the judicial assertion "that the Devil himself knoweth not the mind of man." Lord Bowen's dictum "that the state of a man's mind is as much a fact as the state of his digestion." has not simplified the process of ascertaining the mind of man. The state of a man's digestion is as much a mystery to a physician as the state of a man's mind to a Court called upon to ascertain it.

The facts available are that the father completed his medical studies by 1964, Rot employment in Germany in the same year and had married nearly an year before. Two children were born to him out of wedlock and they set up a matrimonial home however unsatisfactory according to the husband the environments were. And he lived in that home, though during the end of the period he stayed away from his wife by occupying the children's room instead of sharing their own with his wife, till 6-8 1965. On these facts, the question may arise whether the husband had acquired a domicile of choice in Germany. This may have to be determined as contended by counsel for the 1st respondent on the principles stated by the Supreme Court in the decision in ***Kedar Pandey* v. *Narain Bikram Sah***, reported in AIR 1966 SC160.

But we shall not, as we said, go into this question. It is however clear that there was such a residence of both spouses and the children in Germany at the lime Ext. P14 came into existence, namely, on 9-8-1966 and earlier when the Court was moved by the father (in the first instance and by Ext. P9) as would give the German Court jurisdiction and competence to pass an order binding on the father. This is so not only on the basis of 'real and substantial connection' with the country of

the Court, the principle which we have already referred to: but on the principle of residence emphasised by Lord Denning in his speech in Me P (G. E.) (an infant), reported in 1964 (3) All ER 977. Lord Denning expressed himself strongly on the limitations of the principle of domicile adopted by the Scottish Courts. These are his words:–

"I do not think that we should follow the Scottish courts in this matter. The tests of domicile art far too unsatisfactory. In order to find out a person's domicile, you have to apply a lot of archaic rules. They ought to have been done away with long ago. But they still survive. Particularly the rule that a wife takes the domicile of her husband. And the rule that a child takes the domicile of its father. If you were to ask what was the domicile of the child in this case, you would have a pretty problem. The child would take the domicile of the father. But what was the father's domicile? His domicile of origin was Palestine. His domicile of choice was England. But in Nov. 1962, he left England for Israel, taking the child with him. What was the father's domicile then? It all depends on his intention. Goodness knows how you are to find that out. His intention may at first have been to go to Israel for a short time. Later, when he found work there, he may have intended to make his home there permanently. When did his domicile change? Are you to take his word for it. If so, he could always defeat the jurisdiction of the court by saying that, from the very outset, he intended never to return to England, and abandoned his English domicile.

As an alternative to domicile, counsel for the mother invited us to apply the test of ordinary residence, and supported it by references to some cases where the word "residence" was used and also in a case in the State of New York, ***Descollenges* v. *Descollenges,*** 1959 183 NYS 943. I think that this is the right test. The fount of the jurisdiction of the Court of Chancery is the Crown which, as *parens patrie*, takes under its protection every infant child who is ordinarily resident within the realm, whether he is a British subject or an alien. As Lord Campbell said in ***Johnstone* v. *Beattie***, 1843-10CI and Fin42;

'I do not doubt the jurisdiction of the Court of Chancery on this subject, whether the infant be domiciled in England or not. The Lord Chancellor, representing the Sovereign as *parens patriae* has a clear right to interpose the authority of the court for the protection of the person and property of all infants resident in England..."

10. We have therefore to take it that if Ext. P14 is an order of Court, it was an order passed by a competent court having jurisdiction to grant the custody of the children to the mother and permitting only access to the father. Nothing said in the decisions of the Supreme Court in ***Raj Rajendra Sardar Moloji Nar Singh Rao* v. *Shankar Saran***, reported in AIR 1962 SC 1737 and in ***Viswanathan* v. *Rukn-ul-Mulk Syed Abdul Wajid***, reported in AIR 1963 SC 1 relied on by counsel for the 1st respondent militates against this view. In fact we do not find any question such as the one we are called upon to resolve being considered or decided in these decisions.

The circumstances under which Ext. P-14 came into existence, we have already referred to. We shall briefly recapitulate. The father was dissatisfied with the access to the children he was enjoying under two agreements made in succession, the earlier of which was according to the father, "engrafted in an order of Court". Hence he again approached the Court Ext. P9 in his petition before the Court. He claimed in that petition that "since the wife does not comply with the terms of this agreement, (apparently the second one) an order must be passed by the Guardianship Court". Thereafter the difference between the father and mother in this regard were resolved with the help of mutual friends and an agreement was reached. This was placed before the Court that was moved by the father. The Court found the terms of the agreement acceptable. It approved these terms, accepted then, and embodied them thus in an order of Court. This is clear from Ext. P14 itself. We may also refer to the fact that in Ext. P11, the German Court that passed it has referred to Ext. P14

as a decree of Court. We are satisfied that Ext. P14 cannot be treated merely as an agreement. It is an order of Court. This order, we consider is binding on the father.

After an anxious consideration of all the aspects we have come to the conclusion that we must entrust the children to the petitioner, the mother. This original Petition is ordered on the above terms. We make no direction regarding costs.

Surya Vadanan v. State of Tamil Nadu & Ors.
AIR 2015 SC 2243

Madan B. Lokur,J.

1. Leave granted.

2. The question before us relates to the refusal by the Madras High Court to issue a writ of habeas corpus for the production of the children of Surya Vadanan and Mayura Vadanan. The appellant sought their production to enable him to take the children with him to the U.K. since they were wards of the court in the U.K. to enable the foreign court to decide the issue of their custody.

3. In our opinion, the High Court was in error in declining to issue the writ of habeas corpus.
The facts

4. The appellant (hereafter referred to as Surya) and respondent No.3 (hereafter referred to as Mayura) were married in Chennai on 27th January, 2000. While both are of Indian origin, Surya is a resident and citizen of U.K. and at the time of marriage Mayura was a resident and citizen of India.

5. Soon after their marriage Mayura joined her husband Surya in U.K. sometime in March 2000. Later she acquired British citizenship and a British passport sometime in February 2004. As such, both Surya and Mayura are British citizens and were ordinarily resident in U.K. Both were also working for gain in the U.K.

6. On 23rd September, 2004, a girl child Sneha Lakshmi Vadanan was born to the couple in U.K. Sneha Lakshmi is a British citizen by birth. On 21st September, 2008 another girl child Kamini Lakshmi Vadanan was born to the couple in U.K. and she too is a British citizen by birth. The elder girl child is now a little over 10 years of age while the younger girl child is now a little over 6 years of age.

7. It appears that the couple was having some matrimonial problems and on 13th August, 2012 Mayura left U.K. and came to India along with her two daughters. Before leaving, she had purchased return tickets for herself and her two daughters for 2nd September, 2012. She says that the round-trip tickets were cheaper than one-way tickets and that is why she had purchased them. According to Surya, the reason for the purchase of roundtrip tickets was that the children's schools were reopening on 5th September, 2012 and she had intended to return to U.K. before the school reopening date.

8. Be that as it may, on her arrival in India, Mayura and her daughters went to her parents house in Coimbatore (Tamil Nadu) and have been staying there ever since.

9. On 21st August, 2012 Mayura prepared and signed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 seeking a divorce from Surya. The petition was filed In the Family

Court in Coimbatore on 23rd August, 2012. We are told that an application for the custody of the two daughters was also filed by Mayura but no orders seem to have been passed on that application one way or the other.

10. On or about 23rd August, 2012 Surya came to know that Mayura was intending to stay on in India along with their two daughters. Therefore, he came to Coimbatore on or about 27th August, 2012 with a view to amicably resolve all differences with Mayura. Interestingly while in Coimbatore, Surya lived in the same house as Mayura and their two daughters, that is, with Surya's in-laws. According to Surya, he was unaware that Mayura had already filed a petition to divorce him.

11. Since it appeared that the two daughters of the couple were not likely to return to U.K. in the immediate future and perhaps with a view that their education should not be disrupted, the children were admitted to a school in Coimbatore with Surya's consent.

12. Since Surya and Mayura were unable to amicably (or otherwise) resolve their differences, Surya returned to U.K. on or about 6th September, 2012. About a month later, on 16th October, 2012 he received a summons dated 6th October, 2012 from the Family Court in Coimbatore in the divorce petition filed by Mayura requiring him to enter appearance and present his case on 29th October, 2012.We are told that the divorce proceedings are still pending in the Family Court in Coimbatore and no substantial or effective orders have been passed therein.

Proceedings in the U.K.

13. Faced with this situation, Surya also seems to have decided to initiate legal action and on 8th November, 2012 he petitioned the High Court of Justice in U.K. (hereinafter referred to as 'the foreign court') for making the children as wards of the court. It seems that along with this petition, he also annexed documents to indicate (i) that he had paid the fees of the children for a private school in U.K. with the intention that the children would continue their studies in U.K. (ii) that the children had left the school without information that perhaps they would not be returning to continue their studies.

14. On 13th November, 2012 the High Court of Justice passed an order making the children wards of the court "during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court" and requiring Mayura to return the children to the jurisdiction of the foreign court. The relevant extract of the order passed by the foreign court on 13th November, 2012 reads as under:-

"*IT IS ORDERED THAT*:
1. The children SNEHA LAKSHMI VADANAN AND KAMINI LAKSHMI VADANAN shall be and remain wards of this Honourable Court during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court.
2. The Respondent mother shall :
a. By not later than 4 p.m. on 20th November 2012 inform the father, through his solicitors (Messrs Dawson Cornwell, 15 Red Lion Square, London, WC1R 4QT. Tel: 0207 242 2556 Ref: SJ/AMH), of the current care arrangements for the children;

b. By not later than 4 p.m. on 20th November 2012 inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;
c. Return the children to the jurisdiction of England and Wales by no later than 11.59 p.m. on 27th November2012;
d. Attend at the hearing listed pursuant to paragraph 3 herein, together with solicitors and/or counsel if so instructed. A penal notice is attached to this paragraph.
3. The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London on 29th November 2012 at 2 p.m. with a time estimate of 30 minutes.
4. The mother shall have leave, if so advised, to file and serve a statement in response to the statement of the Applicant father. Such statement to be filed and served by no later than 12 noon on 29th November2012.
5. Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the order of the court.
6. The solicitors for the Applicant shall have permission to serve these proceedings, together with this order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.
7. The Applicant father shall have leave to disclose this order to:
a. The Foreign and Commonwealth Office;
b. The British High Commission, New Delhi;
c. The Indian High Commission, London
d. Into any proceedings as the mother may have issued of India, including any divorce proceedings.
8. Costs reserved.
AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

15. In response to the petition filed by Surya, a written statement was filed by Mayura on 20th November, 2012. A rejoinder was filed by Surya on 13th December, 2012.

16. Apparently, after taking into consideration written statement, the foreign court passed another order on 29th November, 2012 virtually repeating its earlier order and renewing its request to the administrative authorities of the British Government in India and the judicial and administrative authorities in India for assistance for repatriation of the wards of the court to England and Wales, the country of their habitual residence. The relevant extract of the order dated 29th November, 2012 reads asunder:-
"*IT IS ORDERED THAT :*
1. The children SNEHA LAKSHMI VADANAN AND KAMINI VADANAN shall be and remain wards of this Hon'ble Court during their minority and until such time as this provision of this Order is varied or alternatively discharged by the further Order of the Court.

2. The 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal Grandmother shall:
a. Forthwith upon serve of this Order upon them inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;
b. Return the children to the jurisdiction of England and Wales forthwith upon service of this Order upon them; A penal notice is attached to this paragraph.
3. The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London within 72 hours of the return of the children or alternatively upon application to the Court for a further hearing.
4. The father shall have leave, if so advised, to file and serve a statement of the mother. Such statement to be filed and served by no later than 12 noon on 13th December 2012.
5. Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the Order of the Court.
6. The solicitors for the Applicant shall have permission to serve these proceedings, together with this Order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.
7. The Applicant father shall have leave to disclose this order to:
a. The Foreign and Commonwealth Office;
b. The British High Commission, New Delhi;
c. The Indian High Commission, London;
d. Into any proceedings as the mother may have issued in the jurisdiction of India, including any divorce proceedings.
8. The maternal grandparents Dr. Srinivasan Muralidharan and Mrs. Rajkumari Murlidharan shall be joined as Respondents to this application as the 2nd and 3rd Respondents respectively.
9. The mother shall make the children available for skype or alternatively telephone contact each Sunday and each Wednesday at 5.30 p.m. Indian time.
10. Liberty to the 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal grandmother to apply to vary and/or discharge this order (or any part of it) upon reasonable notice to the Court and to the solicitors for the father.
11. Costs reserved. AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

17. We are told that no further effective or substantial orders have been passed by the foreign court thereafter.

Proceedings in the High Court

18. Since Mayura was not complying with the orders passed by the foreign court, Surya filed a writ petition in the Madras High Court in February 2013 (being HCP No.522 of 2013) for a writ of

habeas corpus on the ground, inter alia, that Mayura had illegal custody of the two daughters of the couple that is Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan and that they may be produced in court and appropriate orders may be passed thereafter.

19. After completion of pleadings, the petition filed by Surya was heard by the Madras High Court and by a judgment and order dated 4th November, 2013 the writ petition was effectively dismissed.

20. The Madras High Court, in its decision, took the view that the welfare of the children (and not the legal right of either of the parties) was of paramount importance. On facts, the High Court was of opinion that since the children was in the custody of Mayura and she was their legal guardian, it could not be said that the custody was illegal in any manner. It was also noted that Surya was permitted to take custody of the children every Friday, Saturday and Sunday during the pendency of the proceedings in the Madras High Court; that the order passed by the foreign court had been duly complied with and that Surya had also returned to the U.K. On these facts and in view of the law, the Madras High Court "closed" the petition filed by Surya seeking a writ of habeas corpus.

21. Feeling aggrieved, Surya has preferred the present appeal on or about 9th April, 2014.

Important decisions of this court

22. There are five comparatively recent and significant judgments delivered by this court on the issue of child custody where a foreign country or foreign court is concerned on the one hand and India or an Indian court (or domestic court) is concerned on the other. These decisions are: (1) *Sarita Sharma v. Sushil Sharma* (2000) 3 SCC 14, *(2) Shilpa Aggarwal v. Aviral Mittal & Anr.* (2010) 1 SCC 591, *(3) V. Ravi Chandran v. Union of India* (2010) 1 SCC 174, *(4) Ruchi Majoo v. Sanjeev Majoo* (2011) 6 SCC 479, *and (5) Arathi Bandi v. Bandi Jagadrakshaka Rao* (2013) 15 SCC 790. These decisions were extensively read out to us and we propose to deal with them in seriatim.

(1) Sarita Sharma v. Sushil Sharma

23. As a result of matrimonial differences between Sarita Sharma and her husband Sushil Sharma an order was passed by a District Court in Texas, USA regarding the care and custody of their children (both American citizens) and their respective visiting rights. A subsequent order placed the children in the care of Sushil Sharma and only visiting rights were given to Sarita Sharma. Without informing the foreign court, Sarita Sharma brought the children to India on or about 7th May, 1997.

24. Subsequently on 12th June, 1997 Sushil Sharma obtained a divorce decree from the foreign court and also an order that the sole custody of the children shall be with him. Armed with this, he moved the Delhi High Court on 9th September, 1997 for a writ of habeas corpus seeking custody of the children. The High Court allowed the writ petition and ordered that the passports of the children be handed over to Sushil Sharma and it was declared that he could take the children to USA without any hindrance. Feeling aggrieved, Sarita Sharma preferred an appeal in this court.

25. This court noted that Sushil Sharma was an alcoholic and had used violence against Sarita Sharma. It also noted that Sarita Sharma's conduct was not "very satisfactory" but that before she came to India, she was in lawful custody of the children but "she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission."

26. This court noted the following principles regarding custody of the minor children of the couple:
(1) The modern theory of the conflict of laws recognizes or at least prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.(*Surinder Kaur Sandhu v. Harbax Singh Sandhu*, (1984) 3 SCC 698)
(2) Even though Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.
(3) The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.(*Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112 which in turn referred to *McKee v. McKee*, 1951 AC 352: (1951) 1 All ER 942 (PC)) On the merits of the case, this Court observed: "Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held."

27. Notwithstanding this, neither was the matter remanded to the High Court for issuing such a direction to Sushil Sharma to approach the appropriate court for conducting a "full and thorough" inquiry nor was such a direction issued by this court. The order of the Delhi High Court was simply set aside and the writ petition filed by Sushil Sharma was dismissed.

28. We may note that significantly, this court did not make any reference at all to the principle of comity of courts nor give any importance (apart from its mention) to the passage quoted from Surinder Kaur Sandhu to the effect that: "The modern theory of Conflict of Laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forums hopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage."

(2) Shilpa Aggarwal v. Aviral Mittal & Anr.
29. Shilpa Aggarwal and her husband Aviral Mittal were both British citizens of Indian origin. They had a minor child (also a foreign national) from their marriage. They had matrimonial differences and as a result, Shilpa Aggarwal came to India from the U.K. with their minor child. She was expected to return to the U.K. but cancelled their return tickets and chose to stay on in India. Aviral Mittal thereupon initiated proceedings before the High Court of Justice, Family Division, U.K. and on 26th November, 2008 the foreign court directed Shilpa Aggarwal, inter alia, to return the minor child to the jurisdiction of that foreign court. Incidentally, the order passed by the foreign court is strikingly similar to the order passed by the foreign court subject matter of the present appeal.

30. Soon thereafter, Shilpa Aggarwal's father filed a writ petition in the Delhi High Court seeking protection of the child and for a direction that the custody of the child be handed over to him. The High Court effectively dismissed the writ petition and granted time to Shilpa Aggarwal to take the child on her own to the U.K. and participate in the proceedings in the foreign court failing which the child be handed over to Aviral Mittal to be taken to the U.K. as a measure of interim custody, leaving it for the foreign court to determine which parent would be best suited to have the custody of the child.

31. Feeling aggrieved, Shilpa Aggarwal preferred an appeal before this court which noted and observed that the following principles were applicable for deciding a case of this nature: (1) There are two contrasting principles of law, namely, comity of courts and welfare of the child. (2) In matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child. (*Elizabeth Dinshaw v. Arvand M. Dinshaw*, (1987) 1 SCC 42. Even though this court used the word "sole", it is clear that it did not reject or intend to reject the principle of comity of courts.) Domestic courts cannot be guided entirely by the fact that one of the parents violated an order passed by a foreign court.

32. On these facts and applying the principles mentioned above, this court agreed with the view of the High Court that the order dated 26th November, 2008 passed by the foreign court did not intend to separate the child from Shilpa Aggarwal until a final decision was taken with regard to the custody of the child. The child was a foreign national; both parents had worked for gain in the U.K. and both had acquired permanent resident status in the U.K. Since the foreign court had the most intimate contact with the child and the parents, the principle of "comity of courts" required that the foreign court would be the most appropriate court to decide which parent would be best suited to have custody of the child.

(3) V. Ravi Chandran v. Union of India.

33. The mother (Vijayasree Voora) had removed her minor child (a foreign national) from the U.S.A. in violation of a custody order dated 18th June, 2007 passed by the Family Court of the State of New York. The custody order was passed with her consent and with the consent of the child's father (Ravi Chandran, also a foreign national).

34. On 8th August, 2007, Ravi Chandran applied for modification of the custody order and was granted, the same day, temporary sole legal and physical custody of the minor child and Vijayasree Voora was directed immediately turn over the minor child and his passport to Ravi Chandran and further, her custodial time with the child was suspended. The foreign court also ordered that the issue of custody of the child shall be heard by the jurisdictional Family Court in the USA.

35. On these broad facts, Ravi Chandran moved a petition for a writ of habeas corpus in this court for the production of the child and for his custody. The child was produced in this court and the question for consideration was: "What should be the order in the facts and circumstances keeping in mind the interest of the child and the orders of the courts of the country of which the child is a national."

36. This court referred to a large number of decisions and accepted the following observations, conclusions andprinciples:
(1) The comity of nations does not require a court to blindly follow an order made by a foreign court.14
(2) Due weight should be given to the views formed by the courtsof a foreign countryof whichthe child is a national. The comityof courtsdemands not the enforcement of an orderof a foreign court but its grave consideration. The weight and persuasive effect of a foreign judgment must depend on the factsand circumstancesof eachcase.
(3) The welfare of the child is the first and paramount consideration, whatever orders may have been passed by the foreign court. (In re. B. v. B.,1940 Ch 54: (1951) 1 All ER 949 and *McKee v. McKee*)
(4) The domestic court is bound to consider what is in the best interests of the child. Although the order of a foreign court will be attended to as one of the circumstances to be taken into account, it is not conclusive, one wayor the other. (*Kernot v. Kernot*, 1965 Ch 217: (1964) 3 WLR 1210: (1964) 3 AllER 339)
(5) One of the considerations that a domestic court must keep in mind is that there is no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country. (H. (Infants), In re, (1966) 1 WLR 381 (Ch & CA) : (1966) 1 AllER 886 (CA))
(6) While considering whether a child should be removed to the jurisdiction of the foreign court or not, the domestic court may either conduct a summary inquiryor an elaborate inquiry in this regard. In the event the domestic court conducts a summary inquiry, it would return the custodyof the child to the country from which the child was removed unless such return could be shown to be harmful to the child. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits as to where the permanent welfare of the child lay and ignore the order of the foreign court or treat the fact of removal of the child from another countryas onlyone of the circumstances. (L. (Minors), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)) An order that the child should be returned forthwithto the country from which he or she has been removed in the expectation that any dispute about his or her custodywill be satisfactorilyresolved in the courts of that countrymay well be regarded as being in the best interestsof the child.
(7) The modern theory of conflict of laws recognizes and, in any event, prefers the jurisdictionof the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custodyis in issue, is brought or for the time being lodged.

37. On the facts of the case, it was held that an elaborate inquirywas not required to be conducted. It was also observed that there was nothing on record which could remotely suggest that it would be harmful for the child to return to his native country. Consequently, this court directed the repatriation of the child to the jurisdiction of the foreign court subject to certain directions given in the judgment.
38. This court also quoted a passage from Sarita Sharma to the effect that a decree passed by a foreign court cannot override the consideration of welfare of a child.

(4) RuchiMajoov. SanjeevMajoo
39. Ruchi Majoo (wife) had come to India with her child consequent to matrimonial differences between her and her husband (Sanjeev Majoo). All three that is Ruchi Majoo, Sanjeev Majoo and their child wereforeignnationals.

40. Soon after Ruchi Majoo came to India, Sanjeev Majoo approached the Superior Court of California, County of Ventura in the USA seeking a divorce from Ruchi Majoo and obtained a protective custody warrant order on 9th September, 2008 which required Ruchi Majoo to appear before the foreign court. She did not obey the order of the foreign court perhaps because she had initiated proceedings before the Guardian Court at Delhi on 28th August, 2008. In any event, the Guardian Court passed an ex-parte ad interim order on 16th September, 2008 (after the protective custody warrant order passed by the foreign court) to the effect that Sanjeev Majoo shall not interfere with the custody of her minor child till the next date of hearing.

41. Aggrieved by this order, Rajiv Majoo challenged it through a petition under Article 227 of the Constitution filed in the Delhi High Court. The order of 16th September, 2008 was set aside by the High Court on the ground that the Guardian Court had no jurisdiction to entertain the proceedings since the child was not ordinarily resident in Delhi. It was also held that the issue of the child's custody ought to be decided by the foreign court for the reason that it had already passed the protective custody warrant order and also because the child and his parents were American citizens.

42. On these broad facts, this court framed three questions for determination. These questions are as follows:- (i) Whether the High Court was justified in dismissing the petition for custody of the child on the ground that the court at Delhi had no jurisdiction to entertain it; (ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of courts; and (iii) Whether the order granting interim custody of the child to Ruchi Majoo calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

43. We are not concerned with the first and the third question. As far as the second question is concerned, this court was of the view that there were four reasons for answering the question in the negative. Be that as it may, the following principles were accepted and adopted by this court: (1) The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement. (2) One of the factors to be considered whether domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry should be. (3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child. (4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed. (5) A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may

conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian Court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case. (6) Since the interest and welfare of the child is paramount, a domestic court "is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication."

44. On the facts of the case, this court held that "repatriation of the minor to the United States, on the principle of "comity of courts" does not appear to us to be an acceptable option worthy of being exercised at that stage." Accordingly, it was held that the "Interest of the minor shall be better served if he continued to be in the custody of his mother [Ruchi Majoo]."

(5) Arathi Bandi v. Bandi Jagadrakshaka Rao

45. The facts in this case are a little complicated and it is not necessary to advert to them in any detail. The sum and substance was that Arathi Bandi and her husband Bandi Rao were ordinarily residents of USA and they had a minor child. There were some matrimonial differences between the couple and proceedings in that regard were pending in a court in Seattle, USA.

46. In violation of an order passed by the foreign court, Arathi Bandi brought the child to India on 17th July, 2008. Since she did not return with the child to the jurisdiction of the foreign court bailable warrants were issued for her arrest by the foreign court.

47. On or about 20th November, 2009 Bandi Rao initiated proceedings in the Andhra Pradesh High Court for a writ of habeas corpus seeking production and custody of the child to enable him to take the child to USA. The Andhra Pradesh High Court passed quite a few material orders in the case but Arathi Bandi did not abide by some of them resulting in the High Court issuing non-bailable warrants on 25th January, 2011 for her arrest. This order and two earlier orders passed by the High Court were then challenged by her in this court.

48. This court observed that Arathi Bandi had come to India in defiance of the orders passed by the foreign court and that she also ignored the orders passed by the High Court. Consequently, this court was of the view that given her conduct, no relief could be granted to Arathi Bandi.

49. This court took into consideration various principles laid down from time to time in different decisions rendered by this court with regard to the custody of a minor child. It was held that: (1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing. (2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child. (3) 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. 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.

Discussion of the law

50. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may

be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very goodreasonsnot to do so.

51. From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood that this is the final goal or the final objective to be achieved –it is not the beginning of the exercise buttheend.

52. Therefore, we are concerned with two principles in a case such as the present. They are (i) The principle of comity of courts and (ii) The principle of the best interests and the welfare of the child. These principles have been referred to "contrasting principles of law" but they are not 'contrasting' in the sense of one being the opposite of the other but they are contrasting in the sense of being different principlesthat need to be applied in the facts of a given case.

53. What then are some of the key circumstances and factors to take into consideration for reaching this final goal or final objective? First, it must be appreciated that the "most intimate contact" doctrine and the "closest concern" doctrine of Surinder Kaur Sandhu are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind.

54. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutoryorder has been passed by a foreign court (as in the present case). In McKee which has been referred to in several decisions of this court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudicationby a foreign court – the principles for dealingwith a foreign judgment are laid down in Section 13 of the Code of Civil Procedure.. When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except— (a) where it has not been pronounced by a Court of competent jurisdiction; (b) where it has not been given on the meritsof the case; passing an interim or an interlocutoryorder, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so acceptedby this court, we must give due respect evento suchorders passedby a foreigncourt. The High Court misdirecteditselfby lookingat the issue as a matterof legalrights of

the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court.

55. If an interim or an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. No doubt we expect foreign courts to respect the orders passed by courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by foreign courts. This issue may be looked at from another perspective. If the reluctance to grant respect to an interim or an interlocutory order is extrapolated into the (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in India.
In domestic sphere, there may well be situations where a Family Court in one State declines to respect an interim or an interlocutory order of a Family Court in another State on the ground of best interests and welfare of the child. This may well happen in a case where a person ordinarily resident in one State gets married to another person ordinarily resident in another State and they reside with their child in a third State. In such a situation, the Family Court having the most intimate contact and the closest concern with the child (the court in the third State) may find its orders not being given due respect by a Family Court in the first or the second State. This would clearly be destructive of the equivalent of the principle of comity of courts even within the country and, what is worse, destructive of the rule of law.

56. What are the situations in which an interim or an interlocutory order of a foreign court may be ignored? There are very few such situations. It is of primary importance to determine, prima facie, that the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect. If the jurisdiction of the foreign court is not in doubt, the "first strike" principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic).

57. There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his or her favour before the first court. In such an event, due respect and weight ought to be given to the substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time. As mentioned above, this situation has arisen in the present appeal – Mayura had initiated divorce proceedings in India before the custody proceedings were initiated by Surya in the U.K. but the foreign court passed a substantive order on the custody issue before the domestic court. This situation also arose in Ruchi Majoo where Ruchi Majoo had invoked the jurisdiction of the domestic court before Rajiv Majoo but in fact Rajiv Majoo obtained a substantive order from the foreign court before the domestic court. While the substantive order of the foreign court in Ruchi Majoo was accorded due respect and weight but for reasons not related to the principle of comity of

courts and on merits, custody of the child was handed over to Ruchi Majoo, notwithstanding the first strike principle.

58. As has been held in Arathi Bandi a violation of an interim or an interlocutory order passed by a court of competent jurisdiction ought to be viewed strictly if the rule of law is to be maintained. No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect – that has to be judged by a superior court or by another court having jurisdiction to do so. It is in this context that the observations of this court in Sarita Sharma and Ruchi Majoo have to be appreciated. If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject matter may be ignored in the best interests and welfare of the child? We think not. An interim or an interlocutory is precisely what it is - interim or interlocutory– and is always subject to modification or vacation by the court that passes that interim or interlocutory order. There is no finality attached to an interim or an interlocutory order. We may add a word of caution here – merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result..

59. Finally, this court has accepted the view34 that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court.

60. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration: (a) The nature and effect of the interim or interlocutory order passed by the foreign court. (b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court. (c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent. (d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

Discussion on facts

61. The facts in this appeal reveal that Surya and Mayura are citizens of the U.K. and their children are also citizens of the U.K.; they (the parents) have been residents of the U.K. for several years and worked for gain over there; they also own immovable property (jointly) in the U.K.; their children were born and brought up in the U.K. in a social and cultural milieu different from that of India and they have grown up in that different milieu; their elder daughter was studying in a school in the U.K. until she was brought to India and the younger daughter had also joined a school in the U.K. meaning thereby that their exposure to the education system was different from the education system in India. The mere fact that the children were admitted to a school in India, with the consent of Surya is not conclusive of his consent to the permanent or long term residence of the children in India. It is possible, as explained by his learned counsel, that he did not want any disruption in the education of his children and that is why he consented to the admission of the children in a school in India. This is a possible explanation and cannot be rejected outright.

62. Mayura has not taken any steps to give up her foreign citizenship and to acquire Indian citizenship. She has taken no such steps even with respect to her children. Clearly, she is desirous of retaining her foreign citizenship at the cost of her Indian citizenship and would also like her children to continue with their foreign citizenship, rather than take Indian citizenship. That being the position, there is no reason why the courts in India should not encourage her and the children to submit to the jurisdiction of the foreign court which has the most intimate contact with them and closest concern apart from being located in the country of their citizenship. The fact that Mayura is of Indian origin cannot be an overwhelming factor.

63. Though Mayura filed proceedings for divorce in India way back in August 2012, she made no serious effort to obtain any interim order in her favour regarding the custody of the children, nor did she persuade the trial court for more than two years to pass an interim order for the custody of the children. On the other hand, the foreign court acted promptly on the asking of Surya and passed an interim order regarding the custody of the children, thereby making the first strike principle applicable.

64. It would have been another matter altogether if the Family Court had passed an effective or substantial order or direction prior to 13th November, 2012 then, in our view, the foreign court would have had to consider exercising self-restraint and abstaining from disregarding the direction or order of the Family Court by applying the principle of comity of courts. However, since the first effective order or direction was passed by the foreign court, in our opinion, principle of comity of courts would tilt the balance in favour of that court rather than the Family Court. We are assuming that the Family Court was a court of competent jurisdiction although we must mention that according to Surya, the Family Court has no jurisdiction over the matter of the custody of the two children of the couple since they are both British citizens and are ordinarily residents of the U.K. However, it is not necessary for us to go into this issue to decide this because even on first principles, we are of the view that the orders or directions passed by the foreign court must have primacy on the facts of the case, over the Family Court in Coimbatore. No specific or meaningful reason has been given to us to ignore or bypass the direction or order of the foreign court.

65. We have gone through the orders and directions passed by the foreign court and find that there is no final determination on the issue of custody and what the foreign court has required is for Mayura to present herself before it along with the two children who are wards of the foreign court

and to make her submissions. The foreign court has not taken any final decision on the custody of the children. It is quite possible that the foreign court may come to a conclusion, after hearing both parties that the custody of the children should be with Mayura and that they should be with her in India. The foreign court may also come to the conclusion that the best interests and welfare of the children requires that they may remain in the U.K. either under the custody of Surya or Mayura or their joint custody or as wards of the court during their minority. In other words, there are several options before the foreign court and we cannot jump the gun and conclude that the foreign court will not come to a just and equitable decision which would be in the best interests and welfare of the two children of the couple.

66. The orders passed by the foreign court are only interim and interlocutory and no finality is attached to them. Nothing prevents Mayura from contesting the correctness of the interim and interlocutory orders and to have them vacated or modified or even set aside. She has taken no such steps in this regard for over two years. Even the later order passed by the foreign court is not final and there is no reason to believe that the foreign court will not take all relevant factors and circumstances into consideration before taking a final view in the matter of the custody of the children. The foreign court may well be inclined, if the facts so warrant, to pass an order that the custody of the children should be with Mayura in India.

67. There is also nothing on the record to indicate that any prejudice will be caused to the children of Mayura and Surya if they are taken to the U.K. and subjected to the jurisdiction of the foreign court. There is nothing to suggest that they will be prejudiced in any manner either morally or physically or socially or culturally or psychologically if they continue as wards of the court until a final order is passed by the foreign court. There is nothing to suggest that the foreign court is either incompetent or incapable of taking a reasonable, just and fair decision in the best interests of the children and entirely for their welfare.

68. There is no doubt that the foreign court has the most intimate contact with Mayura and her children and also the closest concern with the well being of Mayura, Surya and their children. That being the position even though Mayura did not violate any order of the foreign court when she brought her children to India, her continued refusal to abide by the interim and interlocutory order of the foreign court is not justified and it would be certainly in the best interests and welfare of the children if the foreign court, in view of the above, takes a final decision on the custody of the children at the earliest. The foreign court undoubtedly has the capacity to do so.

69. We have considered the fact that the children have been in Coimbatore since August 2012 for over two years. The question that arose in our minds was whether the children had adjusted to life in India and had taken root in India and whether, under the circumstances, it would be appropriate to direct their repatriation to the U.K. instead of conducting an elaborate inquiry in India. It is always difficult to say whether any person has taken any root in a country other than that of his or her nationality and in a country other than where he or she was born and brought up. From the material on record, it cannot be said that life has changed so much for the children that it would be better for them to remain in India than to be repatriated to the U.K. The facts in this case do not suggest that because of their stay in India over the last two years the children are not capable of continuing with their life in the U.K. should that become necessary. However, this can more appropriately be decided by the foreign court after taking all factors into consideration.

70. It must be noted at this stage that efforts were made by this court to have the matter of custody settled in an amicable manner, including through mediation, as recorded in a couple of orders that have been passed by this court. Surya had also agreed to and did temporarily shift his residence to Coimbatore and apparently met the children. However, in spite of all efforts, it was not possible to amicably settle the issue and the mediation centre attached to this court gave a report that mediation between the parties had failed. This left us with no but to hear the appeal on merits.

71. Given these facts and the efforts made so far, in our opinion, there is no reason to hold any elaborate inquiry as postulated in L. (Minors) - this elaborate inquiry is best left to be conducted by the foreign court which has the most intimate contact and the closest concern with the children. We have also noted that Surya did not waste any time in moving the foreign court for the custody of the children. He moved the foreign court as soon as he became aware (prior to the efforts made by this court) that no amicable solution was possible with regard to the custody of the children.

72. We are conscious that it will not be financially easy for Mayura to contest the claim of her husband Surya for the custody of the children. Therefore, we are of the opinion that some directions need to be given in favour of Mayura to enable her to present an effective case before the foreign court.

73. Accordingly, we direct as follows:-

(1) Since the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan are presently studying in a school in Coimbatore and their summer vacations commence (we are told) in May, 2015 Mayura Vadanan will take the children to the U.K. during the summer vacations of the children and comply with the order dated 29th November, 2012 and participate (if she so wishes) in the proceedings pending in the High Court of Justice. Surya Vadanan will bear the cost of litigation expenses of Mayura Vadanan.

(2) Surya Vadanan will pay the air fare or purchase the tickets for the travel of Mayura Vadanan and the children to the U.K. and later, if necessary, for their return to India. He shall also make all arrangements for their comfortable stay in their matrimonial home, subject to further orders of the High Court of Justice.

(3) Surya Vadanan will pay maintenance to Mayura Vadanan and the children at a reasonable figure to be decided by the High Court of Justice or any other court having jurisdiction to take a decision in the matter. Until then, and to meet immediate out of pocket expenses, Surya Vadanan will give to Mayura Vadanan prior to her departure from India an amount equivalent to £1000 (Pounds one thousand only).

(4) Surya Vadanan shall ensure that all coercive processes that may result in penal consequences against Mayura Vadanan are dropped or are not pursued by him.

(5) In the event Mayura Vadanan does not comply with the directions given by us, Surya Vadanan will be entitled to take the children with him to the U.K. for further proceedings in the High Court of Justice. To enable this, Mayura Vadanan will deliver to Surya Vadanan the passports of the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan.

74. The appeal is disposed of on the above term.