

INTRODUCTION

The persisting division of 'private' versus 'public' spaces which views the entry of law in homes as "bull in the china shop" has been largely responsible for keeping the homes considerably insulated from the legal system, notwithstanding the fact that some of the grossest rights' violations happen within the 'sacrosanct' four-walls of the homes. This dilemma, coupled with the sensitive and delicate nature of matrimonial relationships per se, are largely responsible for making the entire gamut of matrimonial disputes one of the most challenging and complex areas for legal intervention within any system. What makes it further complex particularly in the Indian context is the fact that in the absence of uniform civil laws, the personal laws of each religious community continue to be different in this country, thus making the matrimonial disputes, especially in inter-religious marriages, even more difficult to deal with.



Dr. Girija Vyas, Chairperson, National Commission for women, addressing the regional workshop on problems relating to NRI Marriages held at Chandigarh

In this already complex scenario where matrimonial disputes are placed, the legal complications get multiplied manifold when a marriage steps out of the borders of a country and therefore the boundaries of the country's legal system, in a phenomenon that has come to be known as the "NRI marriages". These marriages have to then enter the domain – often called the 'maze' - of private international law that deals with the interplay and conflict of laws of different countries, which makes the issues therein that much more complex as will be explained later hereunder.

Even though this is a gender-neutral term, typically the 'NRI marriages', as generally understood, are between an Indian woman from India and an Indian man residing in another country (thus NRI – non-resident Indian), either as Indian citizen (when he would legally be an 'NRI') or as citizen of that other country (when he would legally be a PIO – person of Indian origin). With the characteristic Indians' penchant for migration to foreign countries, such alliances are seen as the most coveted ones in Indian society, promising greener pastures for not just the woman but her entire family.

In the eagerness not to let go of such, the families totally ignore even the common cautions that are observed in traditional matchmaking. They also ignore that in case of things going awry in an NRI marriage, the woman's recourse to justice is greatly constrained by the reason that such marriage are not governed any more by only the Indian legal system but by the far more complex private international laws involving the legal system of the other country too. They even ignore the plain and simple fact that just logistically for a woman to negotiate her way to justice across thousands of miles would be a thoroughly exasperating experience. The aggravated risks in such marriages, the woman being isolated far away from home in an alien land, inevitably facing constraints of language, communication, lack of knowledge of local criminal justice, police and legal system, lack of support network of friends and family to turn to, lack of immediate and readily available monetary support and a place to take shelter in, are issues that no one likes to talk or hear about at the time of marriage. It is therefore hardly surprising that there is growing evidence today that even as the number of NRI marriages is escalating by thousands every year, with the increasing Indian Diaspora, the number of matrimonial and related disputes in the NRI marriages have also risen proportionately, in fact at most places much more than proportionately.

COMMON ISSUES IN NRI MARRIAGES

Following are some of the typical instances of the issues that arise in NRI marriages that have been repeatedly shown up in the actual case studies from different states of the country:

- Woman married to NRI who was abandoned even before being taken by her husband to the foreign country of his residence – after a short honeymoon he had gone back, promising to soon send her ticket that never came. In many instances the woman would already have been pregnant when he left and so both she and the child (who was born later) were abandoned. The husband never called or wrote and never came back again. The in-laws who could still be in India would either plead helplessness or flatly refuse to help.
- Woman who went to her husband's home in the other country only to be brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill-treated by him in several other ways. She was therefore either forced to flee or was forcibly sent back. It could also be that she was not allowed to bring back her children along. In many cases, the children were abducted or forcibly taken away from the woman.
- Woman who was herself or whose parents were held to ransom for payment of huge sums of money as dowry, both before and after the marriage, her continued stay and safety in her husband's country of residence depending on that.
- Woman who reached the foreign country of her husband's residence and waited at the international airport there only to find that her husband would not turn up at all.
- Woman who was abandoned in the foreign country with absolutely no support or means of sustenance or escape and without even the legal permission to stay on in that country.
- Woman who learnt on reaching the country of her NRI husband's residence that he was already married in the other country to another woman, whom he continued to

live with. He may have married her due to pressure from his parents and to please them or sometimes even to use her like a domestic help.

- Woman who later learnt that her NRI husband had given false information on any or all of the following: his job, immigration status, earning, property, marital status and other material particulars, to con her into the marriage.
- Woman whose husband, taking advantage of more lenient divorce grounds in other legal systems, obtained ex-parte decree of divorce in the foreign country through fraudulent representations and/ or behind her back, without her knowledge, after she was sent back or forced to go back to India or even while she was still there.
- Woman who was denied maintenance in India on the pretext that the marriage had already been dissolved by the court in another country.
- Woman who approached the court, either in India or in the other country, for maintenance or divorce but repeatedly encountered technical legal obstacles related to jurisdiction of courts, service of notices or orders, or enforcement of orders or learnt of the husband commencing simultaneous retaliatory legal proceeding in the other country to make her legal action
- Woman who sought to use criminal law to punish her husband and in-laws for dowry demands and/ or, or matrimonial cruelty and found that the trial could not proceed as the husband would not come to India and submit to the trial or respond in any way to summons, or even warrant of arrest.
- Woman who was coaxed to travel to the foreign country of the man's residence and get married in that country, who later discovered that Indian courts have even more limited jurisdiction in such cases.
- Woman who had to fight nasty legal battles for custody of her children and for child support, and to bring them back with her after she was divorced or forced to leave, sometimes even facing charges of illegally abducting her own children.
- Many woman have also approached the Commission seeking redressal of their grievances having been deserted by their NRI Spouses.

WORKSHOPS ON NRI MARRIAGES

The National Commission for Women during the year 2005-2006, took up this issue as a priority area, requiring immediate intervention and solutions and conducted two workshops at Chandigarh and at Trivandrum, in June and September 2006, in collaboration with the Ministry of Overseas Indian Affairs, to discuss the possible solutions to the vexed issue.



Shri Bhupinder Singh Hooda Hon'ble Chief Minister Haryana addressing the delegates at the regional workshop at Chandigarh

On basis of the recommendations made during the workshops the Commission recommends the following measures which need to be adopted.



Dr Girija Vyas, Chairperson National Commission for Women, welcoming Hon'ble Minister of Overseas Indian Affairs at the regional workshop on problems relating to NRI Marriages Held in Trivandrum, Kerela

FINAL RECOMMENDATIONS

A. LEGAL INTERVENTIONS - INTERNATIONAL

1. The Hague Conventions, especially the following ones, which are related to the issue of NRI marriages, needs to be examined closely and the feasibility of signing the Hague conventions needs to be looked into.

- Convention On the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, 1965 ("Service Convention")
- Convention On the Recognition of Divorce and Legal Separations, 1970
- Convention on the Law Applicable to Maintenance Obligations, 1973
- Convention on Celebration and Recognition of Validity of Marriage, 1978
- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
- Convention on the Civil Aspects of International Child Abduction, 1980
- Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 1996

Note: **The United States of America is also a party to the following conventions**

- Convention On the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, 1965 ("Service Convention")
- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
- Convention on the Civil Aspects of International Child Abduction, 1980

And has signed the convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption Even Canada is a party to some of the Hague Conventions

2. Bilateral agreements need to be concluded with countries where Indian Diaspora is in large numbers. The existing legislation for bilateral agreements is available on the basis of reciprocity i.e. section 44A of CPC , Section 3 of Maintenance Orders enforcement Act 1921 and section 13 of CPC. These laws enable recognition and enforcement of foreign divorce decrees, maintenance orders, child custody, etc
3. Bilateral agreements on critical issues covered by the Conventions mentioned above, especially validity and recognition of divorce decrees, maintenance, child abduction and custody and service of orders and Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters.
4. Sign reciprocal bilateral treaties, with target states, i.e. countries with large presence of Indians, such bilateral agreements on critical issues may take into account issues such as
 - Grounds for non-recognition – being against public policy, judgment given in case where no due notice was served to the respondent in the proceedings, where a judgment given in a proceeding is irreconcilable and contrary to public policy/ law of the country, particularly relating to law of marriages and divorce, child custody, etc
 - the issue of commissions for witness examination in criminal trials
5. Jurisdiction has emerged as one of the significant aspects, particularly, in providing matrimonial relief for failed marriages involving non-resident Indians. The leading basis that have been considered are: domicile, nationality residence including habitual residence. The rule of habitual residence needs to be considered as a possible basis of matrimonial jurisdiction in any attempt of future legislation. The principal reason for this suggestion being, that the rule of habitual residence has struck a balance between domicile on the one hand and nationality on the other. Besides, this rule is also capable of providing a minimum common basic understanding amongst majority of the countries.
6. On the issue of recognition of foreign divorce/nullity decree, three lines of approach to be adopted to improve the present situation.
 - a) The contextual interpretation of the existing legal provisions as suggested in Narasimha Rao's case.

- b) Widening the scope for more bilateral agreements under Sec.44-A of CPC which is based on reciprocity. Particularly, the government should include those countries where the Indian Diaspora is in substantial in numbers and also those countries which have been already included for conferring dual citizenship.
7. On matters of child custody and abduction, It is recommended here that giving importance to best interest for child welfare must be a sine qua non to govern the issue relating to child custody. The Australian state practice provide important tips in determining the welfare of the child. Some of them are:
- (i) When children are progressing well in a reasonably secure environment, court will require good reasons for ordering a different placement (Curr vs. Curr 1979 FLR 90-611).
 - (ii) Siblings should not be separated.
 - (iii) Children's wishes should be respected. Family Law Act provides that the wishes of a child of fourteen years as to custody/access will prevail unless court thinks otherwise. (Family Law Act, & 64 (i)(b). Court may also give considerable weight to the wishes of the younger children who have certain degree of maturity and understanding of the situation (Schmidt vs. Schmidt, 1979 FLC 90-685).
 - (iv) Young children, especially girls are normally best placed in the care of their mother's.
 - (v) Generally speaking, access should be ordered as aspect of children's welfare and not as a "consolation prize" for the parents who loses custody unless, it poses some fairly demonstrable risk to the child.
8. Examining the feasibility of invoking the provisions of **Extradition Act, 1962**. Section 20 provides for return of any person accused of or convicted for an extradition offence, from the foreign country to India.

Section 20: Conveyance of accused or convicted person surrendered or returned: Any person accused or convicted of an extradition offence who is surrendered or returned by a foreign State may, under the warrant of arrest for his surrender or return issued in such State or country, be brought into India and delivered to the proper Authority to be dealt with according to law."

B. LEGAL INTERVENTIONS – DOMESTIC

1. **Compulsory Registration of Marriages** – Registration of marriages be made compulsory – the *Supreme Court in Transfer Petition(C) No 291 of 2005 – Smt Seema Vs Aswini Kumar, vide judgement dated 14th February 2006* has issued the directions that the central and State Governments shall take the following steps.
 - ❑ Marriages of all persons who are citizens of India belonging to various religions should be compulsorily be registered in their respective states.
 - ❑ The procedure for registration should be notified by the respective states within 3 months.
 - ❑ Thus it is now incumbent upon the states to provide for registration of marriages which needs to be implemented in case of NRI marriages taking place in India. Also marriage certificates for NRI marriages should be issued in duplicate copies and must carry social security number of the NRI spouse.
2. Enact special Indian enactments to address the various issues that arise in NRI marriages, incorporating progressive principles being evolved international on private international law, as well as through the Indian judgments, especially the issues of validity of the marriage itself and the choice of law of marriage and divorce that would be applicable in case of disputes in such marriages, the jurisdiction of courts, validity, recognition and enforceability of orders passed by foreign courts, particularly the ex parte divorces or orders of custody or maintenance, powers of Indian courts to restrain legal proceedings of the foreign court and/ or to pass contrary judgments in India in cross-actions; service of notices, orders passed by the Indian Courts, dealing with criminal acts committed by the husband and in-laws like dowry demands, battering and other forms of matrimonial cruelty, fraud or misrepresentation, adultery/ bigamy, forcibly taking away custody of or abduction of children – choice of law/ forum, subjecting offender to trial dealing with absconding, and enforcement of punishment, property rights of the deserted or ill-treated wife and children, especially in ancestral or in-laws' properties in India.
3. It is not uncommon that the parents tend to feign ignorance regarding the whereabouts of their son and disown the son, leaving the woman with no protection or shelter. Therefore it is strongly recommended that the Property laws be amended to allow the NRI wife to claim maintenance and share in parental properties expeditiously as

also to claim rights of residence in their properties even if the NRI son has no share in it legally, if the nexus between the parents and the NRI son can be shown and also to invalidate any alienation or change in ownership of family properties after case is filed by the NRI wife.

Provision of section 19 of the Hindu adoption and maintenance Act 1956 could also be looked into to in order to make it applicable in case of deserted daughter in laws.

4. Amend if necessary the Passport Act and add special provision for cancellation of passport of offending NRI spouse. Also include more detailed particulars of spouse in passports apart from attaching her photographs. Also add provisions for requirement of updating of passports of NRI men after marriage to include marital status, to make a stricter offence for fake/false passport
5. Formulate guidelines for the police and law enforcing agencies to deal with cases/ complaints arising out of NRI marriages including suppression of marital status by NRI Grooms, by using existing legal mechanisms and procedures such as initiating action under Section 3 and other relevant provisions of the IPC/CRPC such as Section 188 of Cr.P.C, Section 82: Proclamation for person absconding ,CRPC Attachment of properties (if any) in India (Section 83: Attachment of property of person absconding) initiating action against the parents and relatives who refuse to or feign ignorance on the whereabouts of their son, etc. Further in the event of initiation of any criminal proceedings against the accused NRI husband or his relatives the provisions of section 285(3) of the Criminal Procedure Code can be put into action.

The guidelines for initiating action may also include application of Section 18 Hindu Adoption & Maintenance Act, 1956 application for a stay on husband's property – whether in his name or ancestral properties and the right of the women to matrimonial home which includes the right to reside with her in laws.

6. Examine the feasibility to recognize “irretrievable breakdown of marriage “as a ground for divorce subject to safeguards

C. OTHER GOVERNMENTAL INTERVENTIONS

1. “Special Cells” be set up for NRI Marriages, at the state (where the problem is serious) as well at the Central level, having representation from professionals like lawyers and counselors and also having close cooperation with the National/State

Women's Commission , to facilitate flow, legal assistance, and other necessary action on prompt basis from a single window.

2. A **Special Cell** be set up with Indian embassies, especially in target countries, to provide crisis assistance, legal support and information as well as all other support to Indian women abroad as well as in India.
3. There should an online access to information on the laws and procedures and support services in other countries that an NRI wife may need to know. For this relevant laws of these countries will have to be compiled and if necessary translated into at least English, if not in important Indian languages, to begin with
4. Networking and tie-ups with agencies (including the Indian embassies, foreign Government bodies, police and support services) abroad to advice and aid to women who are stranded there or those who are facing legal actions by husbands there. Especially provide facilities like extended Residence Permits to the NRI wife who wishes to stay on for defending her case or any other valid reason, expeditiously issuing her visa for visiting the other country if served with summons or notice from the courts of that country in any legal action initiated by the NRI husband there.
5. Set up help lines to provide psychosocial counselling to wives and families who have suffered in NRI marriages.

D. SOCIAL AND AWARENESS DRIVES

1. At civil society and social level, take up community mobilization and capacity building, especially by taking rigorous steps towards three crucial aspects:
 - (a) Precautions
 - (b) Rights of wives in NRI marriages, under Indian Laws
 - (c) Rights of wives in NRI marriages, under Laws of the country where the husband is located

The awareness raising could be undertaken along the following lines:

- **Laying down Don'ts such as:**

- Do not take any decision in haste and do not get pressurized to do so for any reason whatsoever

- Do not finalize matters over long distances, on phone or through e-mails
- Do not blindly trust any bureau, agent, tout or middleman
- Do not ever agree to forge papers or enter into any fake transactions for any reason or on any pretext
- Do not fall for any schemes to be able to migrate to another country, or promises for green card, through marriage
- Do not finalize matters in secrecy – publishing the proposal among the near and dear ones, friends and close relatives could help you in getting vital information which you may not be able to collect otherwise
- Do not agree to having only a registered marriage or to getting the marriage solemnized in a far off place
- Do not agree on the marriage taking place in the foreign country
- ***Laying down the parameters for carrying out verifications on the NRI groom's personal information particulars such as:***
 - Marital status: if he is single, divorced, separated
 - Employment details: qualification and post, salary, address of office, employer and their credentials
 - Immigration status, type of visa, eligibility to take spouse to the other country
 - Financial status
 - Properties said to be owned by him in India, residence address
 - Criminal antecedents, if any
 - Family background
- ***Indicating the documents related to the NRI groom that could be checked for pre marital verification:***
 - Visa, passport
 - Voter or alien registration card
 - Social security number
 - Tax returns for the last 3 years

- Bank account papers
- Property papers
- ***Indicating the contacts that would be helpful such as:***
 - Indian embassy in the foreign country
 - Local Indian associations and network of Indian citizens
 - Local police and other support agencies
- ***Indicating the minimum formalities that must be observed such as:***
 - Compulsory registration of marriage along with social marriage
 - Carrying out all the paperwork for issue of visa and other required formalities at the wife's end and not at husband's end
 - Affidavit from the man stating his present marital status
 - Using Right to Information Act to access the Passport and visa information and status (this should accompany changes in the Passports Act to contain more information in passports)
- ***Laying down the other Dos such as:***
 - Have regular and meaningful communication with the man and his family over a period
 - Make sure that the two persons to be married meet personally and interact freely and frankly in comfortable atmosphere to make up their minds, as many times as they feel necessary
 - Publicize the marriage and have a social marriage ceremony
 - Whom to contact when in trouble
 - Try to arrange for an account for the woman in the foreign country for her to be able to withdraw money in emergency
 - Equip the woman to take help in emergencies by providing her with contact details like phone numbers and e-mail IDs of police and other state authorities, helplines and legal aid bodies in the foreign country as well as of the Indian embassy there, especially of the Indian welfare officers, if appointed there. It

would also help her to know the contact details of social support groups and networks

- Equip the woman with knowledge of the laws of the foreign country and the rights she enjoys there, especially against any form of abuse or neglect, including domestic violence and if she can get residence permit and other protections as a victim of domestic violence or abuse
 - Equip the woman with professional/ vocational qualifications and skills to be independent
 - Equip the woman with social skills to be able to develop associations with the neighborhood people and make friends on the foreign country
 - Sensitize, educate and involve media to publicize the issues of NRI marriages, the rights of the wives and children of NRI men, and to take forward the campaign at the social level.
2. Outside India, involve Indian embassies to provide crisis assistance and response as well as all other support through Welfare Officers appointed specifically for this in the embassies, especially in countries with large number of Indians. Make arrangements in the other countries for grant of permanent residence status or in crisis situation extended residence permits to wives in NRI marriages, providing monetary and shelter support, access to police protection to the wife and action against the NRI husband in case of cruelty, and for prompt grant of visa for the wife for defending herself in legal action initiated by NRI husband in the other country.
 3. Within India, provide legal advice and aid to wives in NRI marriages. Also explore tie-ups with agencies in other countries to provide legal advice and aid to women stranded there or while facing legal actions by husbands there.
 4. Submission of Affidavit prepared in the foreign country where the NRI resides by the potential NRI husband stating his economic status, marital status and citizenship status with respect to his host country. This would involve the legal system of the host country as well, if the deponent defaults and attract the proceedings under laws for 'perjury' in the host country.

RELEVANT DECISIONS OF THE COURTS IN INDIA

1. In **Harmeeta Singh v Rajat Taneja 102 (2003) DLT 822** the wife was deserted by her husband within 6 months of marriage as she was compelled to leave the matrimonial home within 3 months of joining her husband in the US. When she filed a suit for maintenance under the Hindu Adoptions and Maintenance Act in India, the High Court disposed of the interim application in the suit by passing an order of restraint against the husband from continuing with the proceedings in the US court in the divorce petition filed by the husband there and also asking him to place a copy of the order of the High Court before the US court.

The Court made some other observations while passing this order, mainly that even if the husband succeeded in obtaining a divorce decree in the US, that decree would be unlikely to receive recognition in India as the Indian court had jurisdiction in the matter and the jurisdiction of the US courts would have to be established under Section 13, CPC. The Court then said that till the US decree was recognized in India, he would be held guilty of committing bigamy in India and would be liable to face criminal action for that. The court also said that since the wife's stay in the US was very transient, temporary and casual, and she may not be financially capable of prosecuting the litigation in the US court, the Delhi courts would be the forum of convenience in the matter.

2. In **Vikas Aggarwal v Anubha (AIR 2002 SC 1796)**, the Supreme Court had been approached by the NRI husband whose defence had been struck off in a maintenance suit filed by the wife in the High Court as he had not appeared in the High Court despite the High Court's order directing him to personally appear and giving him several opportunities. The High court had directed him to personally appear to give clarifications to the court on the circumstances in which the US court had proceeded with and granted decree in a divorce petition filed by the husband in the US despite order of restraint having been issued by the Indian court against the proceedings in the US. The High Court had also rejected his application for exemption from personal appearance on the basis that he apprehended that he would be arrested in the case under Section 498 A, IPC filed by the wife.

The Supreme Court upheld the High Court's order and held that Order X of CPC is an enabling 'provision that gives powers to courts for certain purposes. The Delhi High Court was therefore justified in requiring the husband to personally appear before the Court for his clarification, especially since the affidavit of his counsel in America annexed with the affidavit filed in the trial court was not enough to clarify the position and his father, as found by the trial court, could not throw further light in the matter, having not been present during the proceedings in America. Also the inherent powers of the Court under Section 151 C.P.C. can always be exercised to advance interests of justice and it was open for the Court to pass a suitable consequential order under Section 151 CPC as may be necessary for ends of justice or to prevent the abuse of process of Court.

3. **Venkat Perumal v State of AP II(1998)DMC 523** is a judgment passed by the Andhra Pradesh High Court in an application filed by an NRI husband for quashing of the proceedings of the wife's complaint in Hyderabad under Section 498 A of the IPC against matrimonial cruelty meted out to her. She had alleged that she was subjected to harassment, humiliation and torture during her short stay at Madras as well as US and when she refused to accept the request of her husband to terminate her pregnancy, she was dropped penniless by her husband at Dallas Air Port in the US and she returned back to India with the assistance of her aunty and on account of the humiliation and mental agony she suffered miscarriage at Hyderabad.

The High Court held that the offence under Section 498-A of IPC is a continuing offence and the mental harassment on the wife had continued during the stay with her parents at Hyderabad. The court therefore rejected contention of the husband that sanction of the Central Government, as contemplated under Section 188 of the Code, is required to prosecute and held that even otherwise, it is not a condition precedent to initiate criminal proceedings and the same can be obtained, if need be, during trial and hence, it could not be said that the proceedings were liable to be quashed on that ground.

The Court also refused to influence its decision with the divorce decree from the US court produced by the husband since in any case the FIR had been lodged by the wife prior to the UC court's decree.

4. The judgment in **Neeraja Saraph v Jayant Saraph (1994) 6 SCC 461** was passed in the following facts: The appellant wife who got married to a software engineer employed in United States was still trying to get her visa to join her husband who had gone

back after the marriage, when she received the petition for annulment of marriage filed by her NRI husband in the US court. She filed a suit for damages in such circumstances as she had suffered not just emotionally and mentally but had also given up her job in anticipation of her departure to the US. The trial court passed a decree of Rs. 22 lakhs. The High Court in appeal stayed the operation of the decree pending final disposal on the condition of deposit of Rs. 1 Lakh with the court. On appeal by the wife the Supreme Court modified the High Court's order in favour of the wife by enhancing the deposit amount to Rs. 3 Lakh.

Even though the order was on a limited ground in an interim application, this case shows the feasibility of suit for damages by wife in such cases. It is also pertinent that the Court passed some obiter observations, which were as follows:

"Feasibility of a legislation safeguarding interests 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 44-A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court."

5. Rajiv Tayal v. Union of India & Ors. (124 (2005) DLT 502; 2005 (85) DRJ 146) is another judgment which shows that the wife also has an available remedy under Section 10 of the Passport Act for impounding and/or revocation of the passport of her NRI husband if he failed to respond to the summons by the Indian courts.

In this case the NRI husband had filed a writ petition seeking to quash the order passed by Consulate General of India, New York, USA, on the directions of the Ministry of External Affairs, Government of India, New Delhi, for impounding his passport. He also challenged the order of the Trial Court declaring him a 'proclaimed offender'. The NRI husband had filed the Petition even as he continued to refuse to join the proceedings pending before the Metropolitan Magistrate largely on the ground that he was residing in USA and subjecting him to the criminal process in India would be an unfair burden. The

petitioner also submitted in the same breath that he had not been served with the summons and that the investigation in his case ought to be conducted by sending him a questionnaire and he should not be asked to join the investigation in India.

The court held that acceptance of such a plea would give a premium to the accused husband just because he happened to be abroad. Merely by going abroad a person could not claim a status superior to that of a citizen of India. It would then be open to such an accused to misuse the process of law and to make a mockery of the Indian judicial system by asking for such a special procedure which is in any case totally opposed to the principles of the criminal jurisprudence. The court passed his judgment after also looking at the conduct of the accused husband since he had refused to join the proceedings even after being repeatedly assured by the court that he would be extended suitable protection against his arrest or any other penal consequences in respect of his passport, but he declined to do so and insisted that the summons must be served on him before he is required to answer it, thus taking a hypertechnical plea.

The court therefore held that there was no merit in the husband's plea as to the invalidity of Section 10(e) & (h) of the Passport Act being violative of Articles 14, 19 and 21 of the Constitution and the plea of constitutional validity of such provisions thus stood rejected.

6. *Margarate Pulparampil v Dr. Chacko Pulparampil (AIR 1970 Ker 1)*, is one of the earliest cases before an Indian court involving the issue of children's custody in NRI marriage. In this judgment the High Court of Kerala not only recognized the important principle of "real and substantial connection" to establish the court's jurisdiction to decide custody issue, but also recognized the availability of the remedy of writ of habeas corpus to claim custody of child who has been illegally removed by a parent. Here the court allowed the child to be moved back to the mother in Germany even though that meant allowing the child to be moved out of the Indian court's jurisdiction, as the court felt that the interests of the child were of paramount consideration and in this case made it necessary to give the custody to the mother in Germany. The court also laid down the safeguards for ensuring the parental rights of the father in India were not totally compromised in the process by passing a series of directions to balance the conflicting interests:

- (i) The petitioner will execute a bond to this Court to produce the children whenever ordered by this Court to do so.

2. An undertaking from the German Consulate Authority in Madras that they will render all assistance possible for the implementation of any order passed by this Court from time to time within the framework of the German Law will be produced by the petitioner.
 3. The petitioner will obtain and send a report from the Parish Priest within the Parish in which they propose to live every three months to this Court giving sufficient details about the children, their health and welfare and send a copy thereof to the father.
 4. The petitioner will inform the Registrar of this Court the address of her residence from time to time and any change of address will be immediately notified.
 5. She will not take the children outside West Germany without obtaining the previous orders of this Court excepting when they are brought to this country as directed in this order.
 6. Once in three years, she must bring the children to this country for a minimum period of one month at her own expense. At that time, the father will have access to the children on terms and conditions to be directed by this Court when the children have reached this country. The three years' period will be determined from the date on which the children are taken by the mother from this country. They will be brought to India earlier as directed by the Court at the instance of the father provided that it is not within a year from today, if the father is willing to meet the expenses for the trip from Germany to India and back for the mother and children.
 7. The father, if he is visiting Germany, will be allowed access to the children on terms and conditions as ordered by this Court on motion by the father intimating his desire to go and see the children and requesting for permission for access.
 8. When the children are brought to India at the end of 3 years the whole question of custody may be reviewed suo motu by this Court or at the instance of the father or mother and the present order maintained, modified, altered or cancelled."
7. In **Surinder Kaur Sandhu v. Harbax Singh Sandhu, AIR 1984 SC 1224** the Supreme Court had to decide the custody of the wife/mother in circumstances where while the wife was still in England, the husband had clandestinely taken away the children to India

to his parents place even as the English Court had already passed an order on the children's custody in England. The Court looked into all the relevant facts of the case to decide what was in the best interest of the children and ultimately on the basis of this consideration directed the custody of the children to be given to the mother.

8. **Elizabeth Dinshaw v. Arvand M. Dinshaw (MANU/SC/0312/1986)** while dealing with a child removed by the father from USA contrary to the custody orders of the US Court passed in favour of the mother, the Supreme Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts - which were independently considered - it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months

9. In **Kuldeep Sidhu v. Chanan Singh (AIR 1989 P&H 103)** the High Court of Punjab and Haryana also took the view that it was in the best interests of the children that the mother who was in Canada be allowed to take back the children from India to Canada where the mother continued to live as they were with their paternal grandparents in India, the father still being in Canada and as, in any case, the mother had been awarded their custody by a competent court in Canada.

10. **Dhanwanti Joshi v Madhav Unde (1998) 1 SCC 112** the NRI husband was already married to another woman and during the subsistence of the earlier marriage had married the second wife appellant Dhanwanti Joshi. Dhanwanti had a son from him and when the child was just 35 days old she left her husband and came back to India with her infant son. The Supreme Court had the occasion to decide the custody of the child when he was more than 12 years old and decided that eventhough the father may have obtained custody from the US court, the best interests of the child demanded that the child be allowed to continue to stay with the mother in India who had brought up the child single-handedly in India, subject to visitation rights of the father.

11. In **Sarita Sharma v Sushil Sharma ([2000] 1 SCR 915)**, the petitioner husband had filed a case for divorce in American Courts and while the legal battle for custody was still on, both the parties having been appointed as managing conservators of the children, the wife brought the children to India, allegedly without even informing the husband. It was alleged by the husband that the children were in illegal custody of Sarita Sharma and the High Court had allowed the petition and directed Sarita to restore the custody of two

children to the husband. The passports of the two children had also been ordered to be handed over to him. In appeal, the Supreme Court held that the decree passed by foreign Court may be a relevant factor but it cannot override the consideration of welfare of minor children and expressed doubt whether respondent husband would be in position to take proper care of children because of his bad habits and also because he lived with his aged mother in the US with no other family support. It further added that ordinarily the female child should be allowed to remain with mother so that she can be properly looked after and that it is not desirable to separate two children from each and that therefore custody of mother in India was not illegal custody.

Another important exposition of Section 13 came in the judgment of Supreme Court in **Narasimha Rao v Venkata Lakshmi [1991] 2 SCR 821**.

This case had very similar fact-situation: the decree of dissolution of marriage passed by the Circuit Court of St. Louis County, Missouri, USA was passed by the court by assuming jurisdiction over the divorce petition filed by the husband there, on the ground that the husband had been a resident of the State of Missouri for 90 days preceding the commencement of the action as the minimum requirement of residence. Secondly, the decree had been passed on the only ground that there remained no reasonable likelihood that the marriage between the parties could be preserved, and that the marriage had, therefore, "irretrievably broken". Thirdly, the respondent wife had not submitted to the jurisdiction of the foreign court.

Taking on from where it was left by Satya v. Teja, the Court explained the implications of each clause of Section 13 in this case. The relevant portion of the judgment is worth quoting:

Clause (a):

"15. 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 Act or 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 construed likewise."

Clause (b):

“16. Clause (b) of Section 13 states that if a foreign judgment 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 deemed inappropriate.”

Clause (c):

“17. 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 a 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 obviously be in breach of the matrimonial law in force in this country. ”

Clause (d):

“18. Clause (d) of Section 13 which makes a foreign judgment unenforceable on the 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 be 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 apply equally to the appellate proceedings if and when they are filed 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."

On the basis of the above interpretation, the Court then went on to lay down a golden rule that has been repeatedly followed and relied upon in subsequent cases:

"20. ... 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 only three exceptions to this rule were also laid down by the Court itself 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."

Bringing in the benefit of certainty and predictability of law, the Court said that "...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....”

According to the Court, the decree dissolving the marriage passed by the foreign court was without jurisdiction in this case as according to the HMA Act neither the marriage was celebrated nor the parties had last resided together nor the respondent resided within the jurisdiction of that court. The decree was also passed on a ground which was not available under the HMA Act which is applicable to the marriage. Further, the decree had been obtained by the husband by representing that he was the resident of the Missouri State when the record showed that he was only a “bird of passage”- He had, if at all, only technically satisfied the requirement of residence of 90 days with the only purpose of obtaining the divorce. The court reiterated that 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.

The final judgment therefore was that since with regard to the jurisdiction of the forum as well as the ground on which the foreign court had passed the decree in the case, were 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 could not be recognised by the courts in this country and was unenforceable.

The Court finally said: “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 cornerstones of our societal life.”

Veena Kalia v Jatinder N. Kalia AIR 1996 Del 54 was another case where the NRI husband obtained ex parte divorce decree in Canada on ground not available to him in India. The Delhi High Court held that not only did such divorce decree not bar divorce petition by wife in India as it could not act as res judicata, it also did not bar applications for maintenance filed by the wife in her divorce petition

The Court also looked into the circumstances in which the wife did not contest the husband's divorce petition in Canada - that she had no means to contest the proceedings there and the decree of divorce was passed as she was unable to appear and contest the proceedings as the prohibitive cost of going to Canada and other circumstances disabled her and her husband took full advantage of that handicap. Also, the only ground on which the husband sought divorce was that there had been a permanent breakdown of the marriage, which was not a ground of divorce recognised under the Indian law.

The Court also relied upon a judgment in **Maganbhai v. Maniben, AIR 1985 Guj 187** that a judgment of a foreign court creates estoppel or res judicata between the same parties provided such judgment is not subject to attack under any of the Clauses (a) to (f) of section 13 of the C.P. Code vide

Anubha v Vikas Aggarwal (100 (2002) DLT 682) was a case in which the issue was whether the decree of 'no fault divorce' obtained by the husband from a Court of the United States of America (USA) could be enforced on the wife when their marriage was solemnised as per the Hindu rites and the wife had not submitted to the jurisdiction of the Court in USA and had not consented to grant of divorce.

The facts of this case were that the plaintiff, the young wife, was seeking decree of declaration that she was entitled to live separately from her NRI husband, the defendant, and also for a decree for maintenance in her favour besides the pendente lite expenses as she had been deserted and abandoned by him very soon after the marriage, after being subjected to cruelty. During the pendency of the suit when the wife learnt of divorce petition having been filed by the husband in the USA, she also approached the court to restrain that action from proceeding in the USA whereupon the Court passed the order restraining the defendant from proceeding further in the Court in the State of Connecticut, USA for a period of thirty days. However, in spite of the order the husband proceeded with the "No Fault Divorce Petition" proceedings in the US. When this fact was brought to the notice of the Court in India, the Indian Court passed an order asking the defendant for recording of the statement under Order X of the CPC and on his failure to appear, his defence was struck off and contempt proceedings were initiated. After the husband obtained the decree of divorce despite all these, the question that arose foremost for determination was whether the decree of divorce obtained from the Court at Connecticut in the USA during the pendency of the proceedings of the case in India in the given facts and circumstances was enforceable in law or not.

The Court held that the ground on which the marriage of the defendant was dissolved is not available in the Hindu Marriage Act. The parties were Hindus, their marriage was solemnised according to the Hindu rites. Their matrimonial dispute or relationship was, therefore, governable by the provisions of Hindu Marriage Act. Since the plaintiff did not submit to the jurisdiction of the USA Court nor did she consent for the grant of divorce in the US Court the decree obtained by the defendant from the Connecticut Court of USA was held to be neither recognisable nor enforceable in India.

A recent judgment was passed by the Madras High Court in the case of **Balasubramaniam Guhan v T Hemapriya (Reported in Manupatra as MANU/TN/0165/2005)** also she applied section 13 to an NRI marriage. Here the wife had filed a suit for declaration to declare the decree of divorce passed by the Court at Scotland for divorce as ultra vires, unsustainable, illegal, unenforceable and without jurisdiction; and for a consequential injunction restraining the petitioner herein from enforcing the said decree or claim any rights under the said decree either by seeking to take a second wife or otherwise.

The High Court held in such facts that if the foreign judgment falls under any of the clauses of Section 13 CPC, it will cease to be conclusive as to any matter thereby adjudicated upon and will be open to collateral attack on the grounds mentioned in Section 13. As in the suit filed by the wife, the foreign judgment granted in favour of the husband was challenged on the ground that it was an ex_parte decree, the Court which passed the decree was held to have no jurisdiction as the decree was passed when the wife was in India.

The closely related issue of **jurisdiction of courts** has been specifically dealt with by the Indian courts in several judgments and in progressive manner, as will be clear from some of the following judgments.

One of the earliest judgments on this issue was rendered by the Supreme Court in **Jagir Kaur v Jaswant Singh (AIR 1963 SC 1521)**.

Jagir Kaur, the first wife of Jaswant Singh, was married to him in 1930. After about 7 years of the marriage, during which the respondent husband was away in Africa, he came to India on five months leave when the couple lived in his parental house in a village in Ludhiana. Thereafter he left for Africa but before going he married another wife and took her with him to Africa. After 5 or 6 years, he came back to India on leave and took the

first wife/ appellant also to Africa. There she gave birth to a daughter, the second appellant. As disputes arose between them, he sent her back to India, promising to send her money for her maintenance but did not do so. In the year 1960, he came back to India. When he was admittedly in India, the appellant filed a petition under Section 488 of the Code of Criminal Procedure in the Court of Ludhiana, within whose jurisdiction the respondent was staying at that time. The petition was filed by the first appellant on behalf of herself and also as lawful guardian of the second appellant, who was a minor, claiming maintenance for both of them on the ground that the respondent deserted them and did not maintain them.

The question in the appeal was whether the Magistrate of Ludhiana had jurisdiction to entertain the petition filed under Section 488 of the Code of Criminal Procedure. The question turned upon the interpretation of the relevant provisions of S. 488(8) of the Code, which demarcates the jurisdiction limits of a Court to entertain a petition under the said section. Section 488(8) of the Code reads: "Proceedings under this section may be taken against any person in any district *where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.*".

The crucial words of the sub-section are, "resides", "is" and "where he last resided with his wife". The court noted that under the old Code of 1882 only the court of the District where the husband or father, as the case may be, resided, had jurisdiction. Later the jurisdiction was deliberately made wider and it gave three alternative forums, obviously to enable a discarded wife or a helpless child to get the much needed and urgent relief in one or other of the three forums convenient to them. Also keeping in mind the fact that the proceedings under this section are in the nature of civil proceedings; the remedy is a summary one and the person seeking that remedy is ordinarily a helpless person, the Court felt that the words should be liberally construed without doing any violence to the language. Interpreting the three words, the court said that the juxtaposition of the words "is" and "last resided" in the sub-section also throws light on the meaning of the word "resides". The word "is" confers jurisdiction on a Court on the basis of a causal visit and the expression "last resided" indicates that the Legislature could not have intended to use the word "resides" in the technical sense of domicile. The word "resides" cannot be given a meaning different from the word "resided" in the expression "last resided" and, therefore, the wider meaning fits in the setting in which the word "resides" appears. The word "resides" implied something more than a brief visit but not of such continuity as to amount to a domicile though it implied something more than "stay" and implied some intention to

remain at a place and not merely to pay it a casual visit. The sole test, it was held, was whether a party had animus manendi, or an intention to stay for an indefinite period, at one place; and if he had such an intention, then alone could he be said to "reside" there. The Court also held that the words "where he last resided with his wife" could only mean his last residence with his wife in the territories of India. It could not obviously mean his residing with her in foreign country, for an Act cannot confer jurisdiction on a foreign court. It would, therefore, be a legitimate construction of the said expression to hold that the district where he last resided with his wife must be a district in India. The most useful interpretation was made for the word "is". The court said that the word "is" connotes in the context, the presence or the existence of the person in the district when the proceedings are taken. It is much wider than the word "resides": it is not limited by the animus manendi of the person or the duration or the nature of his stay. What matters is his physical presence at a particular point of time. This meaning accords with the object of the chapter wherein the concerned section appears. **It is intended to reach a person, who deserts a wife or child leaving her or it or both of them helpless in any particular district and goes to a distant place or even to a foreign country, but returns to that district or a neighbouring one on a casual or a flying visit. The wife can take advantage of his visit and file a petition in the district where he is, during his stay. Infact the Court went even further and said that, if the husband who deserts his wife, has no permanent residence, but is always on the move, the wife can even catch him at a convenient place and file a petition under Section 488 of the Code or she may accidentally meet him in a place where he happens to come by coincidence and take action against him before he leaves the said place.**

In the facts of the case the court held that here in any case the husband had "last resided" in India when he came to India and lived with his wife in his house in village in Ludhiana, as he had a clear intention to temporarily reside with his wife in that place. He did not go to that place as a casual visitor but went there with the definite purpose of living with his wife in his native place and he lived there for about 6 months with her. The second visit appeared to be only a flying visit to take her to Africa. In the circumstances it was held that he had last resided with her in a place within the jurisdiction of the court in Ludhiana. That apart, since it was admitted that he was in a place within the jurisdiction of the said Magistrate on the date when the appellant filed her application for maintenance against him, the court in any case had jurisdiction to entertain the petition, as the proceedings could

be taken against any person in any district where he "is". The court's jurisdiction was therefore upheld.

The other very progressive judgment on jurisdiction was delivered by the Kerala High Court in **Marggarate Pulparampil v Dr. Chacko Pulparampil (AIR 1970 Ker 1)** on the basis of principle of "real and substantial connection" of the wife with the place where she approaches a court, overruling that of wife and children following husband/father's domicile.

In this case the father, the 1st respondent, an Indian National, married as per the ecclesiastical rites, the appellant wife, a German, who he had met when he went to Germany to study medicine. Two children were born to them but then differences arose. 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 separation and the mother sued for divorce. So the husband petitioned the German Court for his access to the children. The parties thereafter agreed on new terms regarding access which were filed in the German Court.

In the meantime, the wife's divorce petition was dismissed by German Court. The petitioner wife appealed from that order and while that appeal was pending, on the application of the mother, the father was ordered by the German Court to pay to the children maintenance. Soon after, the father took out the children one day but instead of returning them to the mother in the evening, drove them in a taxi to the Airport and took a plane for India for the children. The children were two and half years and 10 months at that time. The father did not inform the mother either about his departure nor did he cable her after reaching India.

After making frantic enquiries the mother moved a petition the next day before the appellate court in Germany where the divorce matter was pending and obtained an order 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. Sometime later the appeal taken by the father from the order directing maintenance to the children was dismissed by a German court as also and the wife's appeal from the divorce matter was allowed and the marriage was dissolved in Germany. On the same day another order was passed by another German Court directing that the custody of the children be given to the mother. When the wife came to India and filed a habeas corpus petition in Indian court for the return of her

children, the High court was convinced that the domicile of origin of the father was Indian and that of the mother German. Eventhough according to the canons of Private International Law, the mother and the children in this case would have the father's domicile, and therefore the father, the mother, and the children were of Indian domicile and as per that rule Indian court would have jurisdiction, the Court held that a competent German Court will have jurisdiction to pass a decree for divorce or custody of the children on the ground that the petitioning wife had a **"real and substantial connection"** with the country of that Court and also the children were ordinarily resident in that country.

In another child custody case the Supreme Court in **Surinder Kaur Sandhu v. Harbax Singh Sandhu, AIR 1984 SC 1224**, observed that, **"the modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has 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 allows the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping."** In this case while the wife who was still in England, the husband had clandestinely taken away the children to India to his parents place and was questioning the English courts' jurisdiction in the matter of the children's custody which the Indian court did not allow him to do as the English Court had already passed an order on the children's custody in England which was the place where the matrimonial and children's home was located.

In **Dipak Bannerjee v Sudipta Bannerjee (AIR 1987 Cal 491)** the husband questioned the jurisdiction of Indian court to entertain and try proceedings initiated by wife under Section 125 for maintenance, contending that no Court in India had jurisdiction in international sense to try such proceeding as he claimed to be citizen of United States of America and his wife's domicile also followed his domicile. The Court held that where there is conflict of laws every case must be decided in accordance with Indian Law and the rules of private international law applied in other countries may not be adopted mechanically by Indian courts. The Court felt that keeping in view the object and social purpose of Sections 125 and 126, the objection raised by husband was not tenable and the jurisdiction of Indian Court was upheld as it was the court within whose jurisdiction she ordinarily resided.

In **Mrs. M v Mr. A I (1993) DMC 384** in an appeal filed in Bombay, the High Court the appellatant wife had prayed for a decree of nullity of her marriage solemnised at Huston,

U.S.A. Alternatively, she prayed for a decree of divorce on the ground of cruelty. The petition was originally filed before the Court at Bombay under the provisions of the Special Marriage Act, 1954, which applied to the parties by virtue of the provisions of Section 18 of the Foreign Marriage Act, 1969. The trial Judge dismissed the petition on the ground that the court was not vested with the requisite jurisdiction as it is a requirement of law that the petitioner should have been residing in India continuously for a period of 3 years immediately preceding the presentation of the petition. The High Court held that the section refers to a period of not less than 3 years immediately preceding the presentation of the petition and that the learned trial Judge was not justified in having grafted on the word "continuously". The difficulty that had arisen in this case centred around the fact that the petitioner had left India in December 1986 and returned in August 1987 and the petition was filed on April 1988. The court also took into account the fact that the petitioner had not emigrated from India which was established by the fact that she had gone out of the country only on a "tourist visit" and she did, in fact, return and has been permanently domiciled and resident in India all through. The court said that in matrimonial statutes in this country, the law confers local jurisdiction on a court if the party concerned is in fact resident there and not on the basis of casual short-term visits.

In *Indira Sonti v Suryanarayan Murty Sonti* (94 (2001) DLT 572) the plaintiff wife travelled all the way to, and got married in, USA to an NRI living there, but was deserted by him. After coming back to India she filed a suit for maintenance in Indian court under the Hindu Adoptions and Maintenance Act. Since the marriage had taken place in the US, the wife made averments in the plaint alleging that part of cause of action had arisen in Delhi where her father was approached by her father-in-law for her marriage with the defendant husband and discussion having taken place at New Delhi between the parties for marriage to be performed in USA. It was also stated by her that her father-in-law had phoned her father at New Delhi to inform that he was sending the plaintiff back to Delhi. The father in law also asked for giving consent for divorce proceedings on phone to her father at New Delhi.

The Court held that while it would be appropriate if the legislature steps in and enacts a specific provision relating to territorial jurisdiction in the matters of claiming maintenance under the Hindu Adoptions and Maintenance Act, in the Act itself, on the lines suggested by Section 126 of the Cr.P.C., as the provisions contained in Section 126 of the Cr.P.C. are more in tune with the needs of society, however in the absence of any provision

in the Hindu Adoptions and Maintenance Act, whether the principles contained in Section 20 of CPC or the principles contained in Section 126 of Cr.P.C. would govern was the moot question which court had to address itself at the appropriate stage but on which the court could adopt a purposive approach which advanced justice. While leaving this important question of law to be dealt with at an appropriate stage, the court held that in this particular case even if the provisions of Section 20 of CPC were applied, the case of the plaintiff was that part of action arose in Delhi and so the Delhi court had jurisdiction in the matter.

In **Sondur Rajini v Sondur Gopal (2005 (4) MhLj 688)**, the facts were as follows: The appellant wife's petition was filed inter-alia seeking judicial separation under Section 10 of Hindu Marriage Act, custody of minor children and maintenance. The NRI husband took the objection that the petition filed by the wife was not maintainable on the ground that the parties were citizens of Sweden and not domiciled in India and, therefore, the jurisdiction of the Family Court was barred by the provisions of Section 1(2) of Hindu Marriage Act. As against this, the case set up by the wife was that their domicile of origin was in India and that was never given up or abandoned though they had acquired citizenship of Sweden and then moved to Australia. The husband's application was also challenged by her on the ground that even if it was assumed that he acquired domicile in Sweden, she never changed her Indian domicile and continued her domicile in India. In the alternative, it was contended that even if it was assumed that she also had acquired domicile of Sweden, that was abandoned by both of the parties shifting to Australia and, therefore, their domicile of origin i.e. India, got revived. In short, the case of the wife was that she and the respondent both were domiciled in India and, therefore, the Family Court in Mumbai had jurisdiction to entertain her petition seeking a decree of judicial separation. She also submitted that once the Hindu Marriage Act applies, there is no provision in the said Act stating that it ceases to apply at any subsequent stage and the issue of domicile raised by the husband was therefore, totally irrelevant keeping in view the scheme of Act and that, acquisition of citizenship and domicile are independent of each other and in any case it could not be said that by acquiring citizenship of Sweden they also acquired domicile in that country. By making reference to Section 19 of Hindu Marriage Act she submitted that the parties must satisfy any one of the requirements of Section 19 to invest a Court with jurisdiction in a matrimonial petition and Section 19 does not speak of domicile at all. She further submitted that if the requirement of Indian domicile is held to be necessary for applicability of Hindu Marriage, it will lead to great hardship to Hindu wife who's required to go from place to

place wherever her husband takes her and that will also lead to very serious social problem. It was next submitted by her that even if the requirement of domicile were held to be necessary the relevant date for considering a domicile of the parties would be the date of marriage and not the date of filing of the petition. She also contended that the Marriage Laws (Amendment) Act, 2003 (Act No. 50 of 2003) invested the Family Court with effect from 23-12-2003, with the jurisdiction to entertain and try the petition of wife where she is residing on the date of presentation of the petition.

The Court substantially accepted the wife's pleas and held that the 2003 amendment was introduced to alleviate the hardship faced by Hindu wife as is evident from the statement of objects and reasons of Amendment Act No. 50 of 2003. The Legislature intended to confer right on the wife to present a petition seeking reliefs under the provisions contained in Act at the place where she is residing at the time of presentation of such petition what is common in all the clauses of Section 19 is the word 'residence' but a close look at the provisions of clauses (ii), (iii), (iiia) and (iv) would show that they do not specify a length and/or character of residence. This the court felt, would not mean a residence which is purely of a temporary nature without there being an intention to stay there permanently or for considerable length of time. A conjoint reading of Sections 1, 2 and 19 of Hindu Marriage Act would, thus, show that a residence alone is not sufficient to maintain a petition seeking reliefs under the Act, and residence coupled with domicile in India would be necessary to maintain such petition in the Courts in India. But the residence of a wife with her parents at the time of filing of a petition under the Hindu Marriage Act would be sufficient to attract the jurisdiction of Court where the residence of her parents situate. The court therefore held that under Sub-section (iiia) of Section 19 her petition would be maintainable in the Family Court, Mumbai.

The court then explored that since a domicile of India is a condition precedent for invoking the provisions of Hindu Marriage Act, what would be the relevant time, whether the date of marriage or of petition. In this case, admittedly, the marriage was solemnised by Hindu Vedic Rites and registered under Hindu Marriage Act and none of the provisions of Act lay down the time and condition under which it will cease to apply. The court therefore held that, once the Hindu Marriage Act applies, it would continue to apply as long as the marriage exists and even for dissolution of the marriage. The Hindu marriage gives rise to bundle of rights and obligations between the parties to the marriage and their progeny. Therefore, the system of law which should govern a marriage, should remain

constant and cannot change with vagaries or the whims of the parties to the marriage. It has also been universally recognised that questions affecting the personal status of a human being should be governed constantly by one and the same law, irrespective of where he may happen to be or of where the facts giving rise to the question may have occurred. If the position is taken that the time at which the domicile is to be determined is when the proceedings under Hindu Marriage Act are commenced, then every petition filed by the wife whose husband moves from one country to another for the purposes of job or for any purpose whatsoever, he would be able to frustrate a petition brought by the wife by changing his domicile even between the presentation of the petition and the hearing of the case. The rule therefore recognized by the court was "once competent, always competent" even if the party domiciled in India at the time of their marriage has since changed his domicile, disassociated himself from the determination of his status by the Court in India. The proposition of law canvassed, that the time at which the domicile is to be determined is when the proceedings are commenced, therefore, was not accepted, being against the public policy in this country and which may create a serious social problem. The court said that once the parties have selected Hindu Marriage Act as their personal law, they COULD not abdicate the same at their free will or as per exigencies of situation or according to their whims and fancies. As a natural corollary thereof, even if a party to the matrimonial petition establishes that after marriage he acquired domicile of some other country, it would not take away the jurisdiction of the Court in India if on the date of the marriage he were domiciled in India. It is unjust that a party to the marriage can change his entire system of personal law by his or her unilateral decision. If that were allowed it would make the position of a wife very miserable or helpless. The provisions of Hindu Marriage Act will continue to apply to the marriage of parties who were admittedly domiciled in India on the date of their marriage and they cannot be heard to make a grievance about it later or allowed to by-pass it by subterfuges.

The Court also stated that under both the Indian and English private international law there are four general rules in respect of domicile: No person can be without a domicile; No person can have simultaneously two domiciles; Domicile denotes the connection of a person with a territorial system of law; and the presumption is in favour of continuance of an existing domicile.

Report on Problems Relating to NRI Marriages

**LEGAL AND OTHER INTERVENTIONS
ON
NRI MARRIAGES**



**NATIONAL COMMISSION FOR WOMEN
NEW DELHI**

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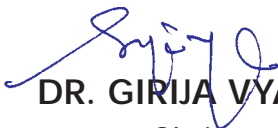
FOREWORD

Over the years the problem of Indian women trapped in fraudulent marriages with overseas Indians has assumed alarming proportions. This has underscored the urgent need to build safeguards to protect these women and make them aware of their rights and responsibilities on the one hand and about the safety nets and social defense mechanisms that are available and which could assist them. Though the problem has assumed serious proportions particularly in northern states such as Punjab, however in order to develop a consensual and a national approach to address the problem, it was felt to organize regional workshops so as to bring about a national consensus on the issue.



The problem is manifold and includes dowry and other kinds of harassment of married women in foreign countries, non-consummation of marriages, marriages of convenience, concealment of earlier existing marriage by the husband before marrying an Indian woman and lack of social security faced by an Indian woman on the foreign soil once the marriage is broken ex parte divorces etc. A most conspicuous disturbing trend, however, appears to be the easy dissolution of such marriages by the foreign courts even though their solemnization took place in India as per the Indian laws. Since there is no comprehensive and special law to govern such aspects and also in view of the jurisdictional issues to decide the matrimonial cases.

The recommendations and the line of action to be taken up have been spelt out very clearly in this report, involving the active support from the Ministry of Overseas Indian Affairs, the Ministry of External Affairs and experts in the field of international Law.


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