Madras High Court
David C. Arumainayagam vs Geetha C. Arumainayagam on 23 November, 1994
Equivalent citations: I (1995) DMC 418
Author: J Babu
Bench: J Babu
JUDGMENT Jayasimba Babu, J.

1. This application is for direction to the respondent to hand over and settle the immovable property of Plot No. 1151 First Block Lane 33, Anna Nagar, Madras measuring one ground and 975 sq,. ft. in the names of the two daughters of the applicant and the respondent--Sumangala born on 18.3.73 and Suganya born on 17.9.74,

2. "The Original Matrimonial Suiit No. 19/93 has been filed by the applicant herein against the respondent under Section 10 of the Indian Divorce Act for dissolution of his marriage with the respondent on the ground of adultery. Applicant is a Christian, Indian Citizen resident in India and is presently employed as Professor of Medicine at the Annamalai University at Chidambaram. Respondent who is also a Doctor was a Hindu and had converted to Christianity prior to her marriage with the petitioner which was solemnised at the St. Mathais Church, Vepery Madras on 20th May, 1971, has reverted to her original religion, and though still an Indian National is now stated to be domiciled in England,

3. It is not in dispute that the property which is a house was purchased by the respondent under a registered sale deed dated 6.8.80 for a sum of Rs. 1,00,000/- with the aid of funds borrowed by her from the Madras Port Trust while she was employed as a Doctor at the Madras port Trust Hospital. A sum of Rs. 70,000/-, towards the consideration was paid by the Port Trust as security for which the property had been mortgaged to the Madras Port Trust under a mortgage deed dated 9.10.80 which was discharged in 1987. The recitals in the sale deed show that the balance of consideration was paid by the respondent. It is the case of the respondent that the cost of constructing the first floor was met out of the amounts realised by her mother from the sale on 13.9.86 for a sum of Rs. 3 lakhs of a property of which her mother was a co-owner. The respondent has been paying the property taxes and the property stands in her name.

The applicant has contended that he has also contributed to the acquisition of this property. He has however failed to place any material before the Court to substantiate his claim.

4. The applicant however relying on Section 39 of the Indian Divorce Act, contends that the property belonging to the wife may be directed by the Court to be settled on the children of the marriage when a decree for dissolution of marriage is made on the ground of adultery of the wife, and therefore, even if the property is the exclusive property of the respondent, the Court can direct that the property be settled on the children of the marriage.

5. According to the applicant, the respondent has committed adultery with the co-respondent who is also a doctor and whom she has married during the pendency of these proceedings and therefore, the case of the applicant that the respondent has committed adultery is made out. The Original

Matrimonial Suit has not so far been tried by this Court on merits.

6. This Original Matrimonial Suit was filed in this Court by the applicant herein on 25.6.93 after the applicant bad received a notice from the County Court at Scunthrope in England, in matter 1993/B/719 which was a proceeding for divorce instituted by the respondent under the Matrimonial Causes Act, 1973, of U.K. on the ground that her marriage with the applicant had irretrievably broken down and the parties had lived apart for more than five years. The respondent has produced into Court the photo copies of the decree nisi passed by the Scunthrope County Court in England on 9.8.93, and the subsequent decree absolute passed by the same Court on 22.9.1993, by which the marriage between the applicant and the respondent was dissolved by the County Court at Scunthrope in England.

7. The effect of that decree on these proceedings is required to be considered at the outset in view of the submissions made for the respondent that the marriage between the applicant and the respondent has already been dissolved and therefore, this O.M.S. can no longer continue.

8. The applicant has contended that the decree made by the English Court is not a valid decree. It is submitted that the applicant had not submitted himself to the jurisdiction of the U.K. Court. Although the applicant contends that he sent his objections to the said proceedings to the Solicitor for the respondent at U.K. as also to the Country Court, the applicant has not produced any record to show that such objections had in fact reached either the Solicitor or the English Court. The respondent has produced a letter from her Solicitors in which it is stated that no objections were received from the respondent (applicant herein) either by the English Court or by the Solicitors. The decree made by the English Court is obviously an experte decree. The copy of the decree produced does not set out the evidence on the basis of which the reason for making the decree was made-It is however stated in the letter of the Solicitors that evidence had been recorded before that decree was passed.

9. Mrs. Ammu Balchandran, learned Counsel appearing for the applicant submitted that even if the decree made by the English Court is to be regarded as one made in accordance with the laws in force in England, nevertheless, suce a decree in a matrimonial proceedings cannot be recognised and enforced by the Courts in India and the decree passed by the English County Court would not constitute res judiaata and is in fact required to be ignored altogether for the purpose of determining the rights of the parties in these proceedings, as that decree has been made on a ground not recognised under the Indian Divorce Act and the applicant had not consented to such a decree being made by the English Court.

10. Learned Counsel for the applicant referred to and relied upon a judgment of the Supreme Court in the case of, in this connection we wish to republish and bring to the notice of our readers the following Editorial Note published by us while reporting the said judgment of the Supreme Court Y. Narsimha Rao & Ors. v. Y. Venkatalakshmi & Anr. at page 646 in 1991-2- L.W.

The judgment which is being reported below appears to us to be indeed an epoch-making one. The Supreme Court has, as it were, broken out of the cocoon into which it had got enmeshed all these

days, of following English Law (whenever it has some doubt) though on occasions it was asserting as independence (vide A.I.R. 1960 S.C. 737 at 743, Column 1, reading "Decisions of the English Courts are not binding on Courts of India,)", and it has given to Indian Private International Law a bold lead (Editor)" 'Y. Narasimha Rao and Ors. v. Y. Venkatalakshmi and Anr. , wherein the Court examined the effect of a decree of divorce made by a foreign Court in U.S.A. dissolving the marriage between two Indian Nationals and one of whom invoked the jurisdiction of the foreign Court, against the other party to the marriage, who was residing in India, and had not submitted herself to the jurisdiction of the Court in U.S.A.

11. The Supreme Court in that case examined the legal position on the assumption that the foreign Court by its rules of jurisdiction had rightly entertained the dispute and granted a valid decree of divorce, according to its laws, and addressed itself as to whether even in such cases the Courts in this country should recognise the foreign divorce decrees.

It is useful to set out rather extensively portions of that judgment as the law laid down therein, signifies a departure from the position that prevailed prior to that judgment, regarding the recognition and enforcement of a decree made by a foreign Court in their matrimonial jurisdiction and affecting the parties who are Indian Nationals and bad been married according to the laws inforce in India.

Para 11 : "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, Indian Succession Act, Indian Divorce Act, 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 rules 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 of 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 tranquility for the sake of uniformity of rules and comity of nations which considerations arc 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 Europe of 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.

Para 12 : We are in the present case concerned only with the matrimonial law and what the 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 rule 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 there was a void that they had stepped in by enactments such as 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 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 have been forced to fall back upon precedents which have taken 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.

Para 13: We cannot also lose sight of the fact that to-day more than ever in the past, the need for definite rules for recognition of foreign judgments in personal and family matters 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 heir 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 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. The migration, temporary or permanent has also given 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 to becoming the order of the day. A time has, therefore, come to ensure certainty in the recognition of the foreign judgments in these matters. The minimum rules of guidance for securing the certainty need not wait legislator initiative. This Court can assemption in 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 are aware that unaided and left solely to our resources the rules of guidance which we purpose 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 errors being left to be filled in and corrected by future judgments.

Para 14 : 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 the 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 social life.

Para 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 recognised 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.

Para 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 means, (a) that the decision of the foreign Court should be on 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 in the passing of the decree with or without appearance. A mere filing of the reply in 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.

Para 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 takes 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 indefience 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.

Para 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 compliance with the technical rules of procedure. If the rules 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 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 defendent is either demiciled 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. The jurisdictional principle is also recognised by the Judgments Convention of the European Community. If, therefore, the Courts in this country also insist as a matter of rule that foreign matrimonial judgment will be recognised only if it is of the Forum where the respondent is domiciled or habitually and permanently residents, the provisions of Clause (d) may be held to have been satisfied.

Para 19 : 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, it must be understood that the fraud need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts.

Para 20 : From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign country 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".

Para 21 : "The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does not do 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 has also an advantage of rescuing the institution of marriage from the uncertain make 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 adhoc, 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 belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicill follows that of her husband and that it is the husband's domiciliary law which determines the jurisdiction and judges the merits of the case."

12. Thus, the pre-requisites for recognition and enforcement of a decree in a matrimonial matter passed by a foreign Court is the voluntary and effective submission to the jurisdiction of the foreign Court by the respondent and the decree being made by that Court, either on the consent freely given by the respondent or on a ground which is recognised as a ground available to the parties under the matrimonial law in India under which, they were married.

13. In view of the law so laid down by the Supreme Court, the numerous authorities cited by the learned Counsel for the respondent Mr. M.K. Kabir in support of his submissions that the foreign judgment even if it be an Ex parte, is a judgment to be recognised and applied by the Courts in India; that the Foreign Court would have jurisdiction to entertain proceedings where the person invoking the jurisdiction was domiciled within that jurisdiction; and that the matrimonial judgment is a judgment in rem, are not of any assistance to the respondent to contend that the decree of divorce made by the English Court is a judgment in rent and that the same has to be recognised and enforced by the Courts in India.

14. Mr. M.K. Kabir referred to the decisions reported in Sankaran v. Lakshmi, ; Brijlal v. Govindan A.I.R. 1946 P.L. 192; A.I.R. 1950 P.C. 34=63 L.W. 34; Nataraj v. Subbaraya A.I.R. 1950 P.C. 34, and Vasanth Atmaram v. Dattoba Rajarani, in support of his contention that foreign judgments are binding on the Courts in India unless they fall under exceptions contemplated under Section 13(1)(b) of the Code of Civil Procedure. These judgments are not of any assistance to the respondent in view of the law laid down in the case of Y. Narasimha Rao and Ors. v. Y. Venkata-Lakshmi and Anr., . The decisions in S. Jayam. Sundar Rajaratnam v. K. Muthuswami Kangani, A.I.R. 1958 Mad. 203 = 71 L.W. 1., Trilakchand Choudhry v. Dayanidhi Patra, by Abdul Wazid v. Viswsnathan, cited and relied on by the learned Counsel for the respondent in support of his submission that the judgment rendered after the opposite party is served and after evidence is recorded, is valid and binding, is also of no assistance to the respondent as even though the decree made by the English Court may be valid in accordance with the provisions of the Matrimonial Cause Act, 1973 of U.K. that judgment cannot have any binding effect so far as the Courts in India are concerned, as the respondent herein had not submitted to the jurisdiction of the English Court and the ground on which that decree was made is not a ground for dissolution of the marriage, under the Indian Divorce Act.

15. The applicant and the respondent were married according to Christian rites at Madras. The respondent who was a Hindu converted to Christianity prior to her marriage with the applicant. The marriage was thus one which was solemnised under the provisions of Indian Christian Marriage Act. The law regulating Christian marriages in India is not to be found in a single enactment but is scattered over saveral enactments. The statutory provisions regarding the divorce in Christian Marriages are to be found in Indian Divorce Act, The law applicable to the applicant and the respondent in matrimonial matter is therefore the Indian Divoice Act and the marriage can only be

dessolved under the provisions of that Act in India, and even in case the parties submit to the juritdiction of a Foreign Court, the dissolution of the marriage can only be on a ground recognised under Indian Divorce Act, unless the parties to the marriage freely consent to the marriage being dissolved under the provisions of the law administered by the Foreign Court and on that basis, the foreign Court proceed to grant a decree for dissolution.

16. The decree of dissolution of the marriage by the Scunthrope Country Court was not made on the basis of any consent given by the respondent/husband who had only been served with notice of the petition for divorce. It is the case of the respondent that the decree for divorce was made ex parte as the husband did not participate in those proceedings. Such non-participation cannot be regarded as consent freely given for the divorce being made, The decree made by the U.K. Court was on the ground of irretrievable break down of the marriage, which is not a ground recognised by the Indian 'Divorce Act. A decree for dissolution of marriage made by an English Court on the ground of irretrievable breakdown of marriage cannot be regarded as one binding on the parties in India, as such a ground is not recognised under the Indian Divorce Act.

17. Learned Counsel for the respondent however submitted that by reason of Section 7 of the Indian Divorce Act, the decree made by the English Court should be recognised, as that Section makes the principles and rules applied by the English Courts of Divorce and Matrimonial Causes, applicable to proceedings under the Indian Divorce Act. subject to the provisions of that Act. The Supreme Court in the case of Reynold Rajamani and Anr. v. Union of India and Anr., , has held that mutual consent, which is not recognised as a ground under the Indian Divorce Act for dissolution of marriage cannot be regarded as a permissible ground for dissolution of the marriage by reason of Section 7 of the Indian Divorce Act. Section 7 is subject to the other provisions of the Act and does not make substantive provisions of the English Statute, part of the Indian Divorce Act.

18. The objection raised by the respondent to the maintainability of the Original Matrimonial Suit and the application on the ground that the marriage between the parties had already been dissolved by a valid decree passed by a Foreign Court has therefore to be rejected.

19. There is however yet another objection to the maintainability of the proceedings. The applicant, has in his petition, stated that "the respondent is domiciled in U.K. but is an Indian citizen and within the jurisdiction of this Honourable Court". The respondent has also claimed that he is domiciled in U.K. and in the petition filed before the Scunthrope County Court, she has stated in para 3 of that petition as follows:

"The petitioner is domiciled in England and Wales and by occupation Chemical Pathologist and resides at Nurses Home, Lewisham Hospiled Lewisham, London SE 13 6LH and the respondent is by occupation a Professor of Medicine and resides, at B10 Rani Seethai Achi Housing Complex, Kumara Raja Muthiah Avenue Annamalai Nagar, Chidambaram 608 002, India". The address given by the petitioner in this petitioner for service of notice on the respondent is "Nurses Home, Lewisham Hospital, Lewisham London SE 13 6LH'i. That is also the address at which the respondent served with notice of these proceedings.

20. The question of domicile of the respondent is of great significance for the purpose of deciding the maintainability of the Original Matrimonial Suit filed by the applicant herein as the jurisdiction of this Court to make a decree for dissolution of the marriage under Indian Divorce Act can be invoked only when both the parties to the marriage are domiciled in India at the time when the petition is presented. The relevant portions of Section 2 of that Act reads as under:

"Nothing hereinafter contained shall authorise any Court to grant any relief under the Act except where the petitioner or respondent professes the Christian religion, or to make a decree for dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented".

The requirement of Indian domicile of the parties was introduced by the Amending Act 55 of 1926. The Statement of Objects and Reasons appended to the Bill shows that as the English Courts had held that the power of the Courts in India to dissolve the marriage of the Christians resident in India do not extend to dissolving the marriage of persons domiciled in England, and the decree so made by the Indian Courts would not be regarded as binding in U.K,. it wat considered necessary to introduce the requirement of domicile of the parties being in India, at the time of the petition for dissolution is presented under the Indian Divorce Act. The requirement of domicile for maintaining a petition for dissolution is to be found only in the Indian Divorce Act and there is no such pre-condition under any of the other marriage laws in force in this country. "Domicile" in different from nationality. Though the parties to the proceedings may be citizens of India, it does not necessarily follow that they are domiciled in India. The domicile of the petitioner is undoubtedly in India as he resides and works in India. The domicile of the respondent though she is a citizen of India, is no longer in India, but is in U.K. as admitted by the petitioner/applicant and asserted by the respondent.

21. The Supreme Court in the case of D.P. Joshi v. State of Madhya Bharat and Anr., , has held.

"Citizenship and domicile represent two different conceptions. Citizenship has reference to political status of a person and domicile to his civil rights. 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".

22. As pointed out by Mr. G.G. Chesire in his Private International Law (7th Edition):

"It is a settled principle that nobody shall be without a domicile and in order to make this effect in the law assigns what is called a domicile of origin to every person at his birth, namely, to a legitimate child the domcile of the father, to an illegitimate child, the domicile of the mother, and to a founding the place where he is found. This prevails until a new domicile has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless, his domicile of origin adheres to him until the actually settles the requisite intention in some other country".

"A person cannot have two domiciles. Since the object of the law in insisting that no person shall be without a domicile is to establish a definite legal system by which certain of his rights and obligations may be governed, and since the facts and events of his life frequently impinge upon several countries, it is necessary on practical grounds to hold that he cannot possess more than one domicile at the same time".

23. As regards the burden of proving the change of domicile, as pointed in Chesire at page 151, "there is a presumption in favour of the continuance of an existing domicile. Therefore, the burden of proving a change lies in all cases upon those who allege that a change has occurred".

24. The well known requisites for acquisition of a domicile are residence and intention. Residence i n question of fact and intention may be inferred from residences Cheshire at page 152 of the book above referred to, has observed "this much is clear, however, that a person's residence in a country is prima facte evidence that he is domiciled there. There is presumption in favour of domicile which grows in strength with length of the residence. Indeed, a residence may be so long and so continuous, that despite declarations of a contrary intention, it will raise a presumption that is rebuttable only by actual removal to a new place..... On the other hand, time is not the sole criterion of domicile. Long residence does not constitute nor does brief residence negative domicile. Everything depends upon the attendant circumstances for, they alone disclose the nature of person's presence in a country. In short, the residence must answer a qualitative as well as a quantitative test...".

25. Domicile is thus mixed question of law and fact. As observed by the Supreme Court in the case of Sunkaran v. Lakshmi, "domicile is a mixed question of law and fact and there is perhaps no chapter in the law 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. 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 'reqisite intention. The relevant time varies with the nature of the inquiry. It may be past or present".

26. The traditional Private International Law assumes that the domicile of the wife is the domicile of the husband. In the case of Mrs. Rasatta Evelyn Attaullah v. Justin Attaullah and Anr., A.I.R. 1953 Cal. 531, it was held:

"In determining the domicile of the parties in a proceeding for dissolution of marriage ft 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. 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 Court to import considerations of personal difficulties or problems which may arise on applying the statutory provisions".

27. Similarly, in the case of A.I.R. 1936 Mad. 324 =43 L.W. 312 (F.B.); Agnes, Sumathi Ammal v. D. Paul it was held, "Domicile of the wife is the domicile of the husband and the nationality of the wife is the nationality of the husband".

28. The applicant in this case could have rightly contended that this petition for dissolution of marriage is maintainable in this Court, if the domicile of the respondent had been in India He could have also successfully maintained the petition if the traditional concept of International Law that the domicile of the wife follows that of the husband had remained the law enforced by the Courts in India. The law has changed, after the judgment of the Supreme Court in the case of Y. Narasimha Rao and Ors. v Y. Venkatalakshmi and Anr. , wherein the Court has held in para 21 of that judgment after formulating the rule enunciated at para 20 of the judgment, that the rule "above all, it gives protection to women, the most vulnerablr section of our society, whatever the strata to which they may belong. In particular, it frees them from the bondage of hyrannical and servile rule that wife's domicile follows that of her husband and that it is the husband's domiciliary law which determines the jurisdiction and ludges the merits of the case".

29. The domicile of the wife, therefore, can no longer be regarded as the domicile of the husband from the mere fact of subsistence of the marriage. It is possible for the wife to have a different domicile and if she has in fact changed her domicile, the same, must be recognised and given effect to.

30. It is the case of the applicant himself that the domicile of the respondent is no longer in India but is in U.K. Though the domicile is a mixed question of law and fact, it is always open to a person to make an admission which renders it unnecessary for the other party to prove the fact. Change of domicile is brought about by a combination of change of residence and intention to permanently reside in that country. As it is the common case of the applicant and the respondent that the respondent is domiciled in U.K. the Original Matrimonial Suit in which the applicant is filed is not maintainable and consequently the application also is not maintainable.

31. Mr. Kabir learned Counsel for the respondent further contended that the application as also the petition for dissolution should be dismissed on the ground of delay. The submission was that the alleged adultery having taken place while the parties to the marriage were residing in Malaysia more than six years prior to the presentation of this petition, the petitioner should not be granted any relief in this proceedings.

32. Learned Counsel relied upon the case of Mohinder Pal Singh v. Julwant Kaur, , Manohar Bapajl Ramble v. Chandrawati, A.I.R. 1936 Nag. 26; and G. Ammanna v. Mrs. Epsey Gidion Ammanna, A.I.R. 1949 Mad. 7=(1948) 61 L W. 492 (F.B.), for the prosition that long delay in instituting proceedings disentitles the petitioner from obtaining relief of dissolution. The delay in the case of Mohinder Pal Singh v. Julwant Kaur, was 21 years; in the case of Manohar Bapuji Kamble v. Chandrawati, A.I.R. 1936 Nag. 26 was 7 years and in the case of G. Ammanna v. Mrs. Epsey Gidion Ammanna, A.I.R. (36) 1949 Mad. 7 was 12 years. In the case of Manohar Bapuji Kamble and G. Ammanna the Special Benches of the Nagpur High Court and this Court emphasised that long delay must be satisfactorily explained by the petitioner.

33. The case pleaded by the applicant in this case is that during the stay of the couple in Malaysia the respondent/wife developed intimacy with the co-respondent. But the petitioner has not stated the year in which such relationship developed between the first respondent and the co-respondent. It has been further asserted by him in the affidavit subsequently filed in this proceedings that the first respondent has married the co-respondent some time in December 1993 The petitioner has filed a draft of Divorce petition which had been sent to him by the wife from Malaysia in the year 1990. The present petition for dissolution was filed in this Court in the year 1993. In the context of these facts, it cannot be said that the period of delay is so great as to lead to an inference of either connivance or condonation of the alleged matrimonial misconduct. The petition is not liable to be dismissed on the ground of delay.

34. Learned Counsel for the respondent contended that the separate property of the wife cannot be the subject matter of an application under Section 39 of the Indian Divorce Act, Section 39 reads as under :

"Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, it is made to appear to the Court that the wife is entitled to any property, the Court may, if it thinks fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both.

Any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation, shall be deemed valid notwithstanding the existence of the disability of coverture at the time of execution thereof.

The Court may direct that the whole or any part of the damages recovered under Section 34 shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife."

It is evident that the Section does not make any distinction between the separate property of the wife or the property which belonged jointly to the husband and wife. The Section on the other hand, specifically refers to the entitlement of the wife to any property. The section is applicable to all properties to which the wife is entitled. Exclusive property of the wife can be the subject matter of an order under Section 39 of the Act.

35. Section 39 of the Indian Divorce Act is a provision which stands apart from the provision contained in the several statutes in force in the country regulating the law of marriage and divorce. While a provision is made for alimony in all such statutes, it is only in the Divorce Act that the property of the wife can be made over to the children or the husband or on both in the event of the Court granting a decree of divorce on the ground of adultery on the part of the wife. The Section clearly is in the nature of penalty for matrimonial offence and must be strictly construed so as not to cause hardship or injustice to any of the parties to the marriage.

36. Similar provision in the English Matrimonial Causes as then existing, which was reproduced in this Act, 1869 has undergone changes in England and the property orders to be made by the Courts

in England after dissolution of the marriage by a decree of divorce, are no longer made by way of penalty for any matrimonial offence but to secure a Just and equitable distribution .of all the available assets of the parties to the marriage to the members of the family which is disrupted on account of the divorce. The provisions for such financial settlement are to be found now in Sections 23 to 25 of the English Matrimonial Causes Act, 1973. Section 39 of the Indian Divorce Act as also several other provisions of the Indian Divorce Act have remained frozen, for over a century and have failed to keep pace with the vastly changed social and economic conditions and has ignored the fact that marriage is now regarded as a partnership in which men as well women have equal rights and the rights of the wife are not in any way less valuable than that of her husband.

37. The order under Section 39 of the Indian Divorce Act can only be made at the time or subsequent to the pronouncement of the decree of the dissolution of the marriage or for judicial separation and only if such a decree is made, on the ground of adultery of the wife. Any order for settlement under that Section can only be made if the Court in its discretion considers it reasonable to effect settlement of the property belonging to the guilty wife, for the benefit of the children or the husband or on both. The Section does not spell out the considerations to be taken into account in making an order and a large discretion is vested in the Court in the matter of making an order of settlement.

38. Section 39 has to be applied with care and circumspection so as not to unjustly deprive the wife of her property. It is the case of the respondent that when the applicant returned to India from Malaysia he brought away 40 sovereigns of gold jewellery which belonged to her besides appropriating the amounts of fixed deposits which stood in the name of the respondent's mother and her daughter. The applicant/husband is employed as a Professor of Medicine. He had been employed in Malaysia for some years. The property acquired by the wife was acquired by her out of her funds as also the funds provided by her mother and the contribution of the acquisition of that property by the husband if any could only have been marginal. These facts as also the fact that the children of the marriage, both of whom are girls, are now over eighteen years of age and are now studying in Colleges, would have to be kept in view if the occasion arises for making an order under Section 39.

39. The present application besides having been made in a suit which is prima facie not maintainable is patently premature even if it is assumed that the suit is maintainable, as the occasion for making an order under Section 39 can arise only if, after trial is established that the wife is guilty of adultery and the marriage has to be dissolved on that ground.

40 It is the case of the respondent that this proceeding for divorce is only aimed at snatching away her property, even after she had been cruelly illtreated by the petitioner. Considering the fact that the petitioner instituted this proceeding only after he received notice of the divorce petition filed by the wife in the Country Court in U.K., the case pleaded by the wife that this petition is mainly directed at her property cannot be said to be without substance.

41 Though the petitioner and respondent have parted company, there is no reason to believe that the respondent as a mother is not interested in the welfare of her daughters. In fact, it is admitted that

one of the daughters in living in this house with the respondent's mother. Respondent is evidently interested in the welfare of her children and will no doubt keep their present and future needs in view and suitable provide for the same. The respondent is economically better placed than the applicant, on account of the fact that she has been working as a Doctor in England for some years. Respondent's aged mother is living in that house and the apprehension of the applicant that respondent would alienate the property and thus deprive her children does not appear to be justified.

42. The legal position in relation to this marriage, at the present time is most unenviable. The marriage has clearly broken down and neither party wishes to retain the marital tie. Both the parties have invoked the Courts--the wife in England and the husband in India for dissolution of marriage. Though the English Court has granted a divorce that decree cannot be recognised or enforced in India, as the husband had not submitted to the jurisdiction of the English Court, and the ground on which that divorce was granted is not a ground for dissolution under the Indian Divorce Act. The Court in India, though in normal circumstances the proper forum to entertain the petition for dissolution, cannot do so by reason of the domiciliary requirements, introduced into the Act during the colonial era, after the English Courts had ruled with reference to British nationals that dissolution of marriage granted under the Indian Divorce Act would not be recognised in England unless the parties to such marriage were domiciled in India.

43. The domicile of the respondent in U.K., while enabling her to invoke the jurisdiction of the Court in England, also constitutes the stumbling block for the applicant invoking the jurisdiction of the Court in India, resulting in a situation where the Court which can grant a decree which would be universally recognised as valid and effective of prevented from entertaining the petition. The requirement of domicile in the Indian Divorce Act has thus brought a wholly unintended stalemate.

44. While there is good reason to insist upon Indian domicile in respect of foreign nationals moving Indian Courts for dissolution of their marriage, to deprive Indian Courts of jurisdiction to grant the relief of dissolution to Indian Nationals married in India in accordance with Indian Laws solely on the ground of change of domicile by one of the parties to the marriage, does not stand to reason. However, in these proceedings the Court is not called upon to determine the constitutional validity of para 2 of Section 2 or Section 39 of the Indian Divorce Act. These provisions have to be applied as they are to the facts of the case before the Court, and the consequences flowing therefrom given effect to.

45. In the result, this application has to fail and is dismissed. The Original Matrimonial Suit will now be posted before Court for passing appropriate orders thereon.