Gujarat High Court
Usha Ratilal Dave vs Arun B. Dave on 8 July, 1983
Equivalent citations: (1984) 1 GLR 81
Author: V Bedarkar
Bench: V Bedarkar
JUDGMENT V.V. Bedarkar, J.

1. This appeal involves an important question of law - whether a decree of Legal Separation obtained in Illinois (U.S.A.) Court be availed of in Indian Court for dissolution of marriage by a decree of divorce under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act'), when both the spouses are Hindus by Personal Law and married in India according to Hindu rites?

2. The respondent-husband filed a petition, being H.M.P. No. 143 of 1980, in the City Civil Court, Ahmedabad, for obtaining divorce. The said petition was allowed and the marriage between the parties was dissolved by a decree of divorce dated 25-9-1981 passed by the learned Judge of the City Civil Court, 19th Court, Ahmedabad.

It is not in dispute that the parties had married at Ahmedabad on 17-5-1968. By this wed-lock they have two daughters Vaishali and Hetal. The husband filed a complaint for divorce in the Circuit Court of Cook County. Illinois County Department, Chancery Divorce Division (U.S.A.) alleging that the husband and wife (present appellant) stayed together at Ahmedabad till 30-12-1972, and thereafter the wife deserted the husband without any reason or cause and started living with her parents, and though several attempts were made there was no result. It is the case that the wife resisted the said complaint and made accusation against the husband. The learned Judge of County Court, Illinois, however, after the trial passed a decree for legal separation on 14-3-1979. It is the case that the husband was employed in the Austi Electric Company and he was to get Green Card for obtaining citizenship of U.S.A. But the wife wrote letters to the U.S.A. Government and Indian Authorities and the husband was forced to leave U.S.A. and thus the husband has been deprived of his lucrative job and a decent living. It is also an agreed fact that young daughter Hetal is with the wife, but it is an allegation that she left elder daughter Vaisbali with the husband. Then it is the case that the wife deserted the husband on 30-12-1972 and thereafter the parties have never resided together till 14-3-1979, the day on which the decree for legal separation was passed.

3. It should be noted that the husband has come out with a case that in his complaint for divorce decree for legal separation was passed, meaning thereby, in his favour. In his deposition also the tone is that he filed the suit for divorce but a decree for legal separation was granted. In fact, now it is proved on record that the said decree for legal separation was passed in favour of the wife who demanded maintenance and also claimed that the husband had deserted her and, therefore, the suit of the husband for divorce was negatived and the claim of the wife for legal separation was granted. Anyway, on the strength of that decree for legal separation, the husband filed the aforesaid Hindu Marriage Petition in the City Civil Court, Ahmedabad, for dissolution of marriage by a decree of divorce under Section 13(1-A) of the Act.

4. This petition was opposed by the wife by written statement Ex. 16, claiming that the petition is barred, being res judicata, and that the husband was found to be guilty of desertion by the Court in U.S.A., and the husband's plea for divorce was rejected by that Court. As the husband had not filed any appeal against that decree of the Court in U.S.A, this Indian Court would not sit in appeal. It is specifically mentioned in the written statement that both the parties have submitted together to the jurisdiction of the U.S.A. Court and the decree passed is not vitiated on any of the grounds (a) to (f) of Section 13 of the Code of Civil Procedure, 1908.

5. At this stage I would like to mention that though this is the clear averment on behalf of the wife, during the arguments of this first appeal a different stand is taken, claiming that the American Court had no jurisdiction to entertain the application and pass a decree and, therefore, that decree could not be a ground for getting a divorce in the Indian Court. That aspect shall be considered at an appropriate stage.

6. It is also stated in the written statement Ex. 16, that the husband is not entitled to take advantage of his own wrong. It is claimed that the husband was sponsored by the brother of the wife to go to U.S.A. for studies. The husband stayed there upto 1974 and studied in Chicago and got a job there. As the husband did not call the wife, somewhere in March 1976 the wife went to U.S.A. with her father at her own costs and went to Chicago with her younger daughter and met the husband. The husband, however, refused to keep them as he had illicit relations with one Miss Jullie. The wife has admitted that the husband had come to Ahmedabad in 1972 and the parties lived together, but denied that she deserted the husband on 30-12-1972 and failed to communicate about the normal day-to-day affairs or that the wife failed to carry out the marital obligations or that she told the husband that she was not prepared to live with him. It was further asserted that the County Court of Illinois held that the husband had deserted the wife and also held that the wife had conducted herself as a good, faithful and affectionate wife, and the decree passed by the said County Court for legal separation was on the basis of the counterclaim filed by the wife, and the claim of the husband for divorce was dismissed. It is specifically admitted that there was no cohabitation between the parties since 30-12-1972 till the date of filing of the Hindu Marriage Petition in the Ahmedabad Court. The wife has asserted that she is willing to go and stay with the husband when the husband abandons the company of Miss Jullie. It is also her case that she has already obtained Green Card and is prepared to call the husband to U.S.A. and is prepared to stay with him if he is prepared to give up his connection with Miss Jullie. It is also averred again that the decree for legal separation passed by the American Court is according to American law and the same is obtained by her (wife). It is also stated that the husband came to India and Miss Jullie had also come to India and stayed together in Ahmedabad and the husband intends to get divorce so as to enable him to marry said Miss Jullie. Then it is the contention that the husband is not entitled to get divorce because the legal separation has been obtained by the wife, and the husband cannot take advantage of his own wrong. It is further averred that the decree passed by the American Court is not the decree for judicial separation under the Act and, therefore, the husband is not entitled to get divorce under Section 13(1-A) of the Act.

7. On these averments the learned trial Judge framed seven issues. He held that the husband proved that he is entitled to a decree of divorce on the basis of a decree for legal separation passed on

14-3-1979 by the Court in U.S.A., but negatived the contention of the husband that the wife had deserted him without any reasonable cause since 30-12-1972. On the contrary, the learned trial Judge held that the wife proved that husband had deserted her without any reasonable cause. So far as issue regarding res judicata was concerned, the learned trial Judge held it partly in the affirmative, and further held that there is no legal impediment in granting the decree under Section 23 of the Act, and thus granted the relief of dissolution of marriage by a decree of divorce in favour of the husband.

8. The learned trial Judge considering the decree of legal separation as a decree of judicial separation in the terminology of the Act, observed that he called upon the learned Advocates of both sides to find out as and show what is the legal connotation of the words "legal separation" is being used and interpreted in the Courts in U.S.A., but he was sorry to state that none of the Advocates bothered to find out either from the Corpus Juris Secundum or from any other authorised publication the correct meaning and/or interpretation put on the words "legal separation" by the Courts in U.S.A. But thereafter the learned trial Judge considered the provisions of Section 10(2) of the Act and came to the conclusion that "judicial separation" as understood with reference to the Act would mean that under certain circumstances either party to a marriage will be entitled to a decree for judicial separation, and after obtaining the decree that party would no longer be under the obligation to cohabit with the opposite party. He, therefore, considered that the decree passed by the American Court was a decree for judicial separation and hence, under the scheme of Section 13(1-A) of the Act, decree for divorce can be passed. Against this judgment of the Ahmedabad City Civil Court, the wife has come in appeal.

9. The judgment of the trial Court is attacked by Mr. G.N. Desai, learned Advocate for the appellant-wife, on various grounds, some of which are as follows:

(1) The decree of Illinois Court (Ex. 40) is not a decree for judicial separation, as contemplated under Section 10 of the Act.

(2) The judgment (Ex. 40) pronounced is not by a Court having competent jurisdiction.

(3) The judgment (Ex. 40) is founded on incorrect view of International Law.

(4) The judgment (Ex. 40) is founded on refusal to recognise the Hindu Marriage Act applicable to the parties.

(5) The judgment (Ex. 40) is a foreign judgment and is founded on breach of Section 23 of the Act.

(6) The present decree of the Ahmedabad City Civil Court is passed in contravention of Section 23(1) of the Act.

(7) The decree of legal separation passed by the Illinois Court is not a decree which was sought by the wife, but she claimed mere maintenance, and still however, this said decree is passed by the Ahmedabad City Civil Court and, therefore, it is illegal.

10. Now, so far as the first ground is concerned, it is stated that it is not a decree (Ex. 40) for judicial separation as contemplated by Section 10 of the Act. In order to appreciate this ground it would be worthwhile to refer to the documents pertaining to the proceedings in Illinois Court produced during the trial.

11. Ex. 48 is Complaint for Divorce filed by the husband (Aran B. Dave) in the Circuit Court of Cook County, Illinois County Department, Chancery Divorce Division. In that it was claimed that plaintiff Arun B. Dave (the husband) was at that time and for more than one year, continuously and immediately preceding the filing of the said complaint, had been an actual resident of the State of Illinois. Then he has mentioned various grounds about the wife being guilty of extreme and mental cruelty without fault or provocation on the part of the husband, in that the wife refused to communicate with the husband regarding the normal day-to-day family affairs and obligations; she on numerous occasions stayed out late at night, and so many other grounds, and claimed divorce. This complaint for Divorce was filed on 23-3-1977.

12. Ex. 49 is Answer to Complaint for Divorce filed by the wife. It is averred therein that the husband was an illegal alien in the United States and was never accorded a residence status in Illinois or in any other part of the United States. Therein also it has been mentioned in paragraph 4 that the husband is living in an adulterous state with a woman named Jullie Proken. Then she has denied all the allegations made in the Complaint for Divorce by the husband, and requested that the said complaint be dismissed and the plaintiff (husband) be denied any other relief prayed for in his said Complaint for Divorce.

13. Exhibit 49/1 Counter Suit for Separate Maintenance filed by the wife claiming separate maintenance. Therein the reliefs claimed are for a judgment for separate maintenance including temporary and permanent custody and support and maintenance for herself and her minor children, attorney's fees, Court costs, and further reliefs as that Hon'ble Court may deem just. So, is this Counter Suit there is no mention of legal separation.

14. Exhibit 40 is the judgment and decree for legal separation passed by the Illinois Court. Therein it has been specifically mentioned:

This cause coming on to be beard upon the contested trial call on the petition for Dissolution of the Marriage of the Petitioner, ARUN B. DAVE, and the Response of the Respondent, Usha A. Dave, and this cause further coming on to be heard upon the petition for a Legal Separation filed by Usha A. Dave and the Response of the Counter-Respondent, Arun B. Dave, and the Court having heard sworn testimony....

It is therefore ordered, adjudged and decreed:

A. That the Counter-Petitioner's, Usha A. Dave, Counter-Petition for Legal Separation is granted and the parties are awarded a legal separation.

B. That the Counter-Petitioner, Usha A. Dave, is a fit and proper person to have the permanent care, custody, control and education of one minor child Hetal, age 5, born to the parties hereto; and that Arun B. Dave is awarded reasonable rights of visitation with the minor child, Hetal.

C. That the question of coustody of minor child, Vaishali, age, 7 is reserved for further consideration of this Court D. That the Counter-Respondent, Arun B. Dave, shall pay to Usha A. Dave as and for child support of the minor child, Hetal, twenty-five per cent. (25%) of his net income.

E. That the Counter-Respondent, Arun B. Dave, shall pay to the CounterPetitioner, Usha A. Dave, the sum of five per cent (5%) of his net income as and for maintenance.

F. That the petitioner's Arun B. Dave, Petition for Dissolution of Marriage is denied.

G. That the Court hereby retains jurisdiction over the parties hereto and the subject-matter hereof for the purpose of enforcing this judgment for Legal Separation and all of the terms and provisions set forth in said judgment for Legal Separation.

Both the parties have relied on this document Exhibit 40. Therefore, it is very clear that therein it has been specifically shown that the wife had filed a petition for legal separation. Normally the observations in the judgment should be considered to be true unless they are rebutted. The wife has not entered into the witness-box to show what application she had made and on what strength judgment Exhibit 40 for legal separation was passed. It is attempted to be shown that she had merely made a counter-statement for maintenance. But the tenor of the judgment clearly shows that she also filed an application for legal separation, because this is what is clearly mentioned in Exhibit 40. It should also be noted that in para 1 of the judgment Exhibit 40 for legal separation the Illinois Court has specifically observed:

That at the commencement of the within action the petitioner, Arun B. Dave, was domiciled in the State of Illinois, and has maintained his domicile for at least 90 days preceding the entry of the within judgment for Legal Separation.

It, therefore, means that according to the husband, residence of one year in U.S.A. was necessary for a right to file a complaint there and the Court considered that residence of 90 days was sufficient to get jurisdiction. This I am observing because it will cut short the arguments which are advanced very laboriously before me, on the point of domicile or jurisdiction of Illinois Court.

15. Now, it is true that Exhibit 40 is not a decree for judicial separation under Section 10 of the Act. It is, therefore, argued that we do not know under what circumstances a decree for legal separation would be available in American Court and, therefore, it cannot be said that that decree would be equivalent to a decree passed under Section 10 of the Act, and if that is so, that decree would not entitle the husband to file a petition for divorce in Indian Court.

16. Without entering into the details of the enactment it can be said that this is not a decree under Section 10 of the Act. It is, therefore, argued that if the proceedings would have proceeded under

Section 10 of the Act, then the American Court would have been required to consider the provisions of Section 23 of the Act, meaning thereby, where a person who has attempted to take a decree was guilty of his own wrong. This argument has absolutely no basis because that decree is not in favour of the husband, but it is precisely in favour of the wife and she has obtained legal separation.

17. Now, the amended provision, i.e. Section 13(1-A) of the Act provides:

Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties.

There is no dispute that a period of one year is over. There is also no dispute that there is no resumption of cohabitation between the parties after the passing of the decree. Therefore, this would clearly answer the argument of Mr. Desai. But an argument is advanced by Mr. Desai that the provisions of Section 13(1-A) of the Act would be applicable only when decree for judicial separation is passed under the Act. I am afraid, this argument does not seem to be correct. The legislature was conscious that judicial separation can be obtained under Section 10 of the Act and decree for restitution of conjugal rights can be obtained under Section 9 of the Act. I am referring to conjugal rights because Section 13(1-A) of the Act provides for such a decree for dissolution of marriage by a decree of divorce if there is no restitution of conjugal rights for one year or upwards after the passing of a decree for judicial separation in a proceedings to which they were parties. If the Legislature intended that this should be the decree under the Act, then it would have mentioned that it should be a decree under Section 10 of the Act. On the contrary, the Legislature has used the words "after the passing of a decree for judicial separation in a proceeding to which they were parties". So, what is necessary is that there should be a decree for judicial separation and that should be in a proceeding to which both were parties.

18. I am supporting this conclusion of mine by the comments made by the learned Author S.V. Gupta in his book on "Hindu Law", 3rd (1981) Edition, Volume 2, at page 791 in paragraph 160 under the caption "Failure to resume cohabitation" which is under Section 13(1-A)(i) of the Act. It is specifically stated therein that a decree for judicial separation may be granted under Section 10 of the Act on the grounds mentioned in Section 13 of the Act, but it would appear that a decree for judicial separation to which reference is made in this Sub-section (section 13 (1-A)) need not be one passed only under the provisions of this (emphasis supplied) Act. If the parties are Hindu within the meaning of this Act any decree for judicial separation between them would appear to be a ground for divorce. I completely agree with this statement of law and, therefore, this ground of attack by Mr. Desai would not be available to him. Therefore, it is not necessary that a decree of judicial separation or even restitution of conjugal rights must only be either under Section 10 or 9 of the Act so as to take recourse to Section 13(1-A)(i) or (ii) of the Act. Therefore, this disposed of grounds (1), (4) and (5) advanced by Mr. Desai.

19. Ground (4) is that judgment (Ex. 40) of Illinois Court is founded on refusal to recognise the Act (Hindu Marriage Act) applicable to the parties. Refiisal would arise only when the provisions of the Act are cited before the Court and the Court has refused to recognise the same. On the contrary, the wife was happy to get a decree for legal separation and she had not raised any objection. Therefore, this ground would not be available.

20. I am conscious that these grounds were advanced by Mr. Desai keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") which provides as to when a foreign judgment is not conclusive. It reads:

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) Where it has not been pronounced by a Court of competent jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where it appears on the face of proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

So far as Clause (a) of Section 13 of die Code is concerned, I am going to refer to the arguments advanced on the competency of the jurisdiction of Illinois Court to pass a decree, because that is one of the important grounds raised before me. It is not the case that the judgment is not given on merits of the case. On the contrary, it is the wife's case that on merits the husband's complaint for divorce was dismissed and on merits her petition for legal separation was granted. So far as Clause (c) is concerned, I have already referred to the argument that there was no question of refusal to recognise the law of India, and it is not shown as to how there is incorrect view of international law. There is also no case that the decision is opposed to rules of natural justice. But I shall consider one argument advanced on this point when I come to it. Clause (f) is not applicable.

21. Grounds (5) and (6) advanced by Mr. Desai, referred to above, also would go away because there is no question of applicability of Section 23 of the Act so far as decree of Illinois Court is concerned. It has been faintly argued that so far as the impugned decree of the trial Court is concerned, there is breach of Section 23(1) of the Act. Without waiting to answer that objection at a later stage, I would say that now Courts in India have specifically observed that so far as decree under Section 13(1-A) of the Act is concerned, provisions of Section 23 of the Act would not be applicable.

22. In Bai Mani v. Jayantilal Dahyabhai 21 Gujarat Law Reporter 66, a Division Bench of this Court has held that after the amendment in 1964 of the Act, even a defaulting party can ask for dissolution of marriage under Section 13(1-A) of the Act on satisfaction of the conditions prescribed therein. It is also observed that it cannot be a bone of contention between the parties that either of the spouses is under any obligation to resume cohabitation after the decree for judicial separation or restitution of conjugal rights is granted. The only pertinent question, which therefore, arises is whether the continuance on the part of the husband in adulterous course of life by staying with his mistress would amount to such a wrong as to disentitle him to a decree of divorce under Section 23(1)(a) of the Act. In that case a decree for judicial separation was granted in favour of the wife on the ground that the husband had kept a mistress. After the decree that ground continued and the husband filed a petition for dissolution of marriage by a decree of divorce. At that time the wife had taken a stand that the husband having continued to keep a mistress, he is taking advantage of his own wrong. This argument was negatived by the Division Bench of this Court. But Mr. Desai laid stress on some observations made in that decision - "if after the passing of the previous decree, 'any other facts or circumstances occurred', which, in view of Sub-section (1) of Section 23 of the Act, disentitled the spouse from obtaining the relief of dissolution of marriage by a decree of divorce under Section 13(1-A) of the Act, the same can be legitimately taken into consideration and can be given due effect to". Now, the Division Bench considered the decision of this Court in Anil Jayantilal Vyas v. Sudhaben A.I.R. 1979 Gujarat 74 20 Gujarat Law Reporter 556 wherein it was observed:

...The conduct which should weigh Section 23(1) cannot have reference to remitting the wrong which led to the decree for judicial separation or restitution of conjugal rights but it must be in the nature of subsequent conduct of the petitioner which may be so reprehensible or repulsive to the conscience of the Court that to grant a decree to such party committing such a wrong would be giving premium for such a wrong.

The Division Bench of this Court also relied on the observations of the Supreme Court in Dharmendra Kumari v. Usha Kumari , wherein it has been observed:

... In order to constitute a wrong within the meaning of Section 23(1)(a), the misconduct must be serious enough to justify denial or the relief to which the alleged wrong-doer is otherwise entitled to.

The Division Bench of this Court also quoted with approval the observations of the Division Bench of the Bombay High Court in Jethabhai Ratcmshi Lodaya v. Manabai Jethabhai Lodaya were to the following effect:

The ground on which that decree is 'granted, namely, desertion of cruelty, the matrimonial wrong exhausts itself, and it would not be open to the parties to fall back upon it after the Court has pronounced the judgment and determined about the guilt of one of the parties.

In view of this, Mr. Desai fairly conceded that he would not rely on anything that happened prior to granting of the decree for legal separation. But it is his case that in evidence it has been brought on record that the husband has admitted that Miss Jullie had come to India when the present H.M. Petition was in progress and had stayed in his house. It is, therefore, his contention that this is a

wrong which the husband wants to perpetuate, and as alleged, in order to get married with Miss Jullie he is trying to get divorce from the wife and, therefore, he should not be given benefit of Section 13(1-A)(i) of the Act. Apparently looking, this argument seems to be attractive. But it cannot be forgotten that the claim of the wife before the Illinois Court was also that the husband was believed to be living in adulterous state with a woman named Jullie. Now, on the facts on record here, whether it can be said that in Ahmedabad the husband remained in adulterous state with Miss Jullie merely because she stayed in the house of the husband in Ahmedabad? This would be a debatable matter. No proof is brought on record by the wife to show as to what were the relations of the husband and Miss Jullie here. It is stated at the Bar that at Ahmedabad the husband stays in a joint family and in that joint family even if the beloved of the husband comes and stays, that would not be adulterous relation unless it is shown that they had an occasion to stay separately in seclusion so that they can have relations of husband and wife or as paramours. At any rate, I am merely concerned as to whether this is subsequent wrong. If it is not, then the provisions of Section 23(1) of the Act cannot be brought into operation.

23. As considered earlier, it was the case of the wife that even prior to granting of decree for legal separation the husband lived an adulterous life. It is true that in the decree (Exhibit 40) for legal separation, that adulterous relation has not been mentioned, and grounds for grant of decree for legal separation are also not mentioned. In paragraph 6 of Exhibit 40, it is mentioned that the Counter-Respondent, Arun B. Dave, was guilty of desertion as charged in the Counter-Petition for legal separation without fault or provocation by the Counter-Petitioner, Usha A. Dave. Now, this Counter-Petition for legal separation is not before us. If the charge is to be considered from the counter-suit for maintenance, then the charge is that the husband is living in adulterous state with one woman named Jullie. Therefore, if that is the basis of the decree for legal separation, then that ground is exhausted and it cannot be a new ground now. Therefore, this ground also would not be available to Mr. Desai.

24. The most important aspect that requires consideration is that judgment (Exhibit 40) is not pronounced by a Court of competent jurisdiction. Now, so far as the competency is concerned, it is apparent from the judgment Exhibit 40 that the Court had jurisdiction. But the case is that the Illinois Court would not have jurisdiction because the husband who filed a petition for divorce or against whom a decree for legal separation was passed, was not a person domiciled in Illinois. It is not disputed that the husband was staying at Chicago, and now it has been fairly admitted by Mr. Desai that Chicago is in Illinois State and, therefore, at the time of the filing of the complaint for divorce in the Court at Illinois, the husband was ordinary resident of Chicago i.e. Ilinois State, i.e. Chicago. The husband in his deposition has specifically stated that in 1977 his father went to America and at that time he was staying in Chicago. In paragraph 6 he has stated that he filed an application for divorce in Chicago City in Circuit Court of Cook County, Chancery Division. It is true that in the course of his deposition he admitted that he had gone to America on a Student Visa, but that was in 1973. He also stated that when he filed an application for divorce in Illinois Court, he was staying in Chicago, Desplai, which is a county. Therefore, this aspect is not debatable.

25. The submission of Mr. Desai, however, is that that should be a domicile under the International Law or under the Indian Law it would be a private International Law. Therefore, merely because

domicile is considered according to Illinois Law, would not be sufficient to give jurisdiction to that Court. Now, on this aspect, there is one important difficulty in the way of Mr. Desai, that so far as the jurisdiction is concerned, both the parties have submitted to the jurisdiction of Illinois Court, and as considered earlier, it has been the assertion of the wife that decree for legal separation has been granted by a competent Court. But even otherwise, I shall be considering this argument on the strength of the rulings cited by Mr. Desai and Miss V.P. Shah, learned Advocates for the respondent-husband. But in order to consider that aspect of domicile it is submitted by Mr. Desai that mere residence would not be sufficient, but there should be qualitative and quantitative residence, meaning thereby, there should be a sufficient period and also animus. Now, so far as animus is concerned, I would make it very clear that it is the case of the husband that he wanted to obtain a Green Card in America, but the wife through her brother managed in such a way that he was deported from America to India. Therefore, from this, so far as animus is concerned, he made it clear that he wanted to stay in America. Whether at the relevant time he was domiciled with a particular country or not, will be considered hereafter, and also the effect of the judgment of Illinois Court.

26. It is the submission of Mr. Desai that even assuming for the sake of argument that the judgment of Illinois Court is for legal separation, it would not automatically be a legal separation as envisaged by the Indian law and, therefore, on that very count it is necessary for the husband to obtain judicial separation in India and for that the judgment of Illinois Court would be a relevant piece of evidence.

27. Now, Section 13 of the Code provides that except for six circumstances mentioned therein, a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between the parties under whom they or any of them claim litigating under the same title. It is the submission that under Section 44-A of the Code, only decrees passed by Courts in reciprocating territory can be executed in this country. It is stated at the Bar that Illinois or U.S.A. is not a reciprocating territory. Miss V.P. Shah raised a faint objection that there is nothing on record to show that it is not a reciprocating territory. But then it should have been shown to me that it is a reciprocating territory. So, it is to be assumed that it is not a reciprocating territory (country) and, therefore, that decree cannot be executed here. Therefore, in terms it is the submission of Mr. Desai that if a decree is passed in a country which is not a reciprocating country, then in order to get any right under that decree separate suit is required to be filed in Indian Court on the strength of that decree, otherwise that decree cannot be executed. It is also in terms his submission that because there is decree for legal separation passed by Illinois Court and even if it is considered for the time being, that it is a decree for judicial separation, then also by filling a suit here for divorce on the strength of that decree is nothing but to attempt to execute that decree. I am afraid, this argument cannot be accepted. In fact, on the strength of that decree this Hindu Marriage Petition is filed for dissolution of marriage relying on Indian law, i.e. Section 13(1-A) of the Act.

28. In order to support his argument, Mr. Desai relied on the decision of the Privy Council in Maqbul Fatima v. Amir Hasan AIR 1916 Privy Council 136. That decision pertained to a decree passed by a foreign Court (British Indian Court) declaring the title of a person to the properties of the deceased situate within the jurisdiction of that Court. Thereafter, another person instituted a suit against that person in a native State for recovery of possession of the properties of the deceased

situate within the Native State. At that time a suit was filed by the person who obtained earlier decree for a declaration that the judgment of the British Indian Court (Bareilly Court) would operate as res judicata in the Native State, viz. Rampur Court, and for a perpetual injunction against the person who filed the suit in Rampur Court from proceeding with the suit therein. The High Court held that as the Courts in British India were not competent to try suits with respect to property situate in Native State, the judgment of the Bareilly Court would not operate as res judicata. The judgment was confirmed by the Privy Council. That judgment of the Privy Council would not be of any help because it does not refer to proprietory right pertaining to properties in a territory which is beyond the jurisdiction of the Court passing the decree. In the instant case, so far as the Illinois Court is concerned, it had jurisdiction to pass a decree for legal separation because mat was on the strength of the grievance made by the wife herself and she got a decree in her favour, and now according to Indian law if advantage of that decree for legal separation can be taken by the husband also, then it cannot be said that this petition would not lie on the strength of that decree. The husband has filed a competent petition in the Indian Court relying on the conclusiveness of the decree of Illinois Court under Section 13(1-A) of the Act. So, even if the argument of Mr. Desai that a decree of a foreign Court would give a cause of action and suit can be filed on the strength of that cause of action in India is considered, then also it can be said that the decree for legal separation has given cause of action to the husband to file a petition for dissolution of marriage by a decree of divorce in the Indian Court and, therefore, he has rightly utilised that cause of action to file this Hindu Marriage Petition.

29. In Mallappa v. Raghavendra AIR 1938 Bombay 137, the Bombay High Court has held that the only Way in which a foreign judgment can be enforced in British India is by bringing an action upon it and/or by executing the foreign judgment in certain specified cases under Section 44 of the Code. It is further held that before a foreign judgment can be regarded as having extra-territorial validity at least one of the following conditions must be satisfied: (1) The defendant should be a subject of the foreign country, which involves an obligation to comply with the judgments of the Courts of that country (2) The defendant was resident in the foreign country at the time when the action was begun against him. (3) The defendant was served with process while temporarily present in the foreign country (4) The defendant in his character as plaintiff in the foreign action himself selected the forum where the judgment was given against him. (5) The defendant voluntarily appeared. (6) The defendant had contracted to submit to the jurisdiction of the foreign Court. In the instant case, all these aspects are available. The wife herself submitted to the jurisdiction of Illinois Court and obtained a decree for legal separation in her favour and against the husband. Not only that, but in her written statement Ex. 16 before the trial Court also she has very categorically affirmed that Illinois Court had the jurisdiction. To put it in her own Words, she has in para 2 thereof claimed that the petitioner (husband) is found to be guilty of desertion on trial by a competent Court in U.S.A. In that very para itself it is submitted that both the parties willingly submitted to the jurisdiction of the said U.S.A. Court, and (hat the said judgment of U.S. Court is not vitiated on any of the grounds (a) to (f) of Section 13 of the C.P. Code. Therefore, all the ingredients mentioned by the Bombay High Court in its aforesaid decision in Mellappa's case are specifically available in the instant case also and, therefore, this ground canvassed by Mr. Desai cannot be accepted.

30. Then reliance was placed on the decision of the Calcutta High Court in Ganguli Engineering Ltd. v. Smt. Sushila Bala Dasi . Therein it has been observed that the general principle of law is that any decision by a foreign Court or Tribunal or a foreign quasi-judicial functionary is not enforceable in a country unless such decree or decision is embodied in a decree of the Court of that country. Thus, ordinarily no decree or order of adjudication by a Pakistan authority would be binding in India unless such decree or order of adjudication is given additional force by a decree obtained in India by the interested party. In view of these observations, it has been attempted to be argued before me that the husband should have filed a decree for judicial separation first or should have got a decree for judicial separation in this petition and after one year only he can get a right to file a suit for divorce. Now, if this argument is accepted, then the provisions of Section 13 of the Act will be redundant and would be taking away the conclusiveness of the decree of a foreign Court having competent jurisdiction so far as the dispute before it was concerned. It is true that if there is a decree of a foreign Court and execution of that decree is attempted to be made in the Indian Court, then probably the Calcutta decision would have been applicable. But relying on the rights which a party has obtained on the strength of a foreign judgment a suit is filed here in furtherance of that judgment, and in that Court it cannot be said that such a suit would not lie and decree cannot be passed.

31. In Brijlal Ramjidas v. Govindram Gordhandas Seksaria AIR 1943 Bombay, it has been observed:

Under Section 13 judgment is not used in the sense of a statement of the Judge's reasons. A foreign judgment means an adjudication by a foreign Court upon the matter before it, and not a statement by a foreign Judge of the reasons for his order.... But in order to understand and interpret the decree or order, the Courts have to look at the pleadings of the parties and the reasons of the Judge. Those reasons would not be binding on any question of fact or law, except so far as they show what the judgment actually decides, and whether any of the exceptions to Section 13 applies.

I have again to repeat what I have observed earlier, because the aforesaid judgment of the Bombay High Court is cited before me to show that the claim made by the wife was only for maintenance and the decree for legal separation was passed. I have already considered that even though jurisdiction may be a point of law, and it can be agitated and considered in this first appeal also, if that jurisdictional aspect is based on a point of fact, then the submission or admission about the fact would certainly estop the party. I again repeat that there cannot be any estoppel so far as law is concerned, but there would be estoppel so far as fact is concerned. The wife has stated that she has obtained a decree for legal separation. So, now it cannot be said that Illinois Court granted what was not claimed, because that is not the case of the wife in her written statement Ex. 16. What was the pleading and what application was filed by the wife is a question of fact. There was no question put during the cross-examination of the husband that there was no application for legal separation filed by the wife. The wife did not step into the witness-box at all. No document or evidence is produced to show as to on what strength decree for legal separation was granted. Therefore, now it cannot be said that as a matter of fact the wife had not filed application for legal separation. That fact is not asserted nor proved during the trial and, therefore, the decree of legal separation granted to the wife by the Illinois Court shall have to be taken on its face value and it shall have to be understood that that was the prayer and decree was passed in consonance with that prayer. In case of Brijlal

Ramjidas (supra) it is specifically observed:

What a foreign tribunal has decided a question of fact necessary to determine that decision the jurisdiction of a particular foreign Court it is not open to a British Indian Court to go behind.

In the decree of Illinois Court, the Court has considered that it has jurisdiction and that the husband was within the jurisdiction of that Court, and this aspect cannot be gone into by the Indian Court now. Even otherwise, from the very aspect considered by me above, that the husband had an intention to get himself domiciled in America, but for his being deported on the strength of the applications made by the wife, animus would be there. I am referring to the word 'animus' because the Advocates of both the parties have relied on two important decisions of the Supreme Court.

32. The first decision of the Supreme Court in Vishwanathan v. Abdul Wajid A.I.R. 1963 Supreme Court I, relied on, on the contrary says:

In considering whether a judgment of a foreign Court is conclusive, the Courts in India will not inquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct, because the binding character of the judgment may be displaced only by establishing that the case falls within one or more of the six Clauses of Section 13 (of the C.P. Code), and not otherwise.

In that case, as per the majority judgment, a judgment of a foreign Court to be conclusive between the parties must be a judgment pronounced by a Court of competent jurisdiction; and competence contemplated by Section 13 of the Code is in an international sense, and not merely by the law of the foreign State in which the Court delivering judgment functions. Mr. Desai has relied on this aspect. But it should be noted that that judgment was given because there the question involved before the Supreme Court was about the immovable properties situated in a foreign country, and the Indian territory. By no stretch of imagination it can be said that a foreign Court can give a judgment pertaining to immoveable properties situated in Indian territory. The Supreme Court also observed:

Undoubtedly, a Court of a foreign country has jurisdiction to deliver a judgment in rem which may be enforced or recognised in an Indian Court, provided that the subject-matter of the action is property whether moveable or immoveable within the foreign country.

One thing is definite that so far as the dispute in the instant case is concerned, the judgment given by the Illinois Court is a judgment in personam because it has not given a final judgment pertaining to the status of the parties; that there is no declaration that they are husband and wife nor there is declaration that they have ceased to remain husband and wife, but there is interim order pertaining to legal separation, meaning thereby, it has decided the relationship between the parties so far as their marital liability is concerned, i.e. they are granted legal separation - no obligation to cohabit, and as will be considered from the terminology used by English and American Courts, separation only for bed and board. The aforesaid Supreme Court decision in case of Vishwanathcm (supra) refers merely to question pertaining to immoveable properties, and that is very clear from the further observations made by the Supreme Court to the following effect:

... A Court of a foreign country has no jurisdiction to deliver a judgment capable of enforcement or recognition in another country in any proceeding the subject-matter of which is title to immovable property outside that country. But there is no general rule of private international law that a Court can in no event exercise jurisdiction in relation to persons, matters or property outside jurisdiction.

Here is not a case of outside jurisdiction because the parties have submitted to the jurisdiction of Illinois Court. It is held by the Supreme Court:

An action in personam lies normally where the defendant is personally within the jurisdiction or submits to the jurisdiction or though outside the jurisdiction may be reached by an order of the Court.

That is exactly what has happened in the instant case. The wife had submitted to the jurisdiction of Illinois Court, and not only that, but also obtained a decree for legal separation in her favour and against the husband. It is further held by the Supreme Court:

A person who institutes a suit in a foreign Court and claims a decree in personam cannot after the judgment is pronounced against him, say that the Court had no jurisdiction which he invoked and which the Court exercised, for it is well recognised that a party who is present within or who had submitted to the jurisdiction cannot afterwards question it.

So, this clearly answers the argument advanced by Mr. Desai. The wife obtained a decree for legal separation and now she cannot say that the Court at Illinois had no jurisdiction to pass the decree for legal separation.

33. Another decision of the Supreme Court on which reliance is placed is in case of Smt. Satya v. Teja Singh . That judgment requires full consideration as both the parties have relied on it. The question posed before the Supreme Court, as mentioned in paragraph 1 of the judgment, was, "Are Indian Courts bound to give recognition to divorce decrees granted by foreign Courts?" Appreciation of facts of that case would be material. Wife's name was Satya. She was married to one Teja Singh according to Hindu rites in India. Teja Singh left for U.S.A. for higher studies on 23-1-1959. He stayed in Utah State (U.S.A.) for a number of years. On 21-1-1965 the wife moved an application under Section 483 of the Code of Criminal Procedure, 1898. In an answer to that, Teja Singh stated that his marriage with Bai Satya was dissolved on 30-12-1964 by a decree of divorce granted by the Second Judicial District Court of the State of Nevada (U.S.A.) and for the County of Washoe, U.S.A. That decree was passed ex-parte because wife-Bai Satya was in India. The Supreme Court held that the question whether a decree of divorce passed by a foreign Court (Nevada State Court in (U.S.A.) is entitled to recognition in India must depend principally on the rules of Private International Law as recognised in India. It was also observed that such a recognition is accorded not as an act of courtesy but on consideration of justice.

It is implicit in that process that the foreign law must not offend against our public policy. In that case, it was found on fact that respondent Teja Singh was not even an ordinary resident of Nevada. The facts found were that Teja Singh made a petition that for more than six weeks preceding the

commencement of that action he had been a bona fide resident and domiciled in the County of Washoe, State of Nevada, with the intent to make the State of Nevada his home for an indefinite period of time. This was found to be untrue on facts because he had not stayed in Nevada at all but had gone there for a short period only for the purpose of getting divorce. While considering the facts, in para 39 the Supreme Court made a categorical statement that the decree of divorce obtained by respondent Teja Singh from the Nevada Court was, prima facie, complete answer to appellant Bai Staya's claim for maintenance under Section 488 of the Code of Criminal Procedure. The Supreme Court further considered that if that decree of divorce was procured by fraud was it entitled to recognition here (in India)? That was considered to be the essence of the matter. While considering the facts, it was found that the Nevada Court assumed and exercised jurisdiction to pass the divorce decree on the basis that respondent Teja Singh was a bona fide resident of and was domiciled in Nevada. Domicile being a jurisdictional fact, the decree was open to the collateral attack that the respondent was not a bona fide resident of Nevada, much less was he domiciled in Nevada. The Supreme Court also considered that the recital in the judgment of the Nevada Court that respondent Teja Singh was a bona fide resident of and was domiciled in Nevada was not conclusive and could be contradicted by satisfactory proof. This is what is the collateral effect. The proof in that case was that Teja Singh left India for U.S.A. on 23-1-1959. He spent a year in a New York University. He then joined the Utah State University where he studied for his doctrine for 4 years, and in 1964, on the conclusion of his studies he secured a job in Utah. Then he filed a petition for divorce in the Nevada Court on 9-11-1964, and obtained a decree on 30-12-1964. This fact clearly proved that priorto the institution of the divorce proceedings respondent Teja Singh migth have stayed, but never lived in Nevada. He made a false representation to the Nevada Court that he was a bona fide resident of Nevada, and having secured the divorce decree, he left Nevada almost immediately thereafter rendering it false again that he had 'the intent to make the State of Nevada his home for an indefinite period of time'. Thereafter he went to Canada. Then while considering the question of domicile, the Supreme Court considered that the concept of domicile is not uniform throughout the world and just as long residence does not by itself establish domicile, brief residence may not negative it. But residence for a particular purpose fails to answer the qualitative test for the purpose of being accomplished the residence would cease. The residence must answer 'a qualitative as well as a quantitative' test, that is, the two elements of factum at animus must concur. In that case, respondent Teja Singh went to Nevada forum-hunting, found a convenient jurisdiction which would easily purvey a divorce to him and left it even before the ink on his domiciliary assertion was dry. It was, therefore, observed that a final judgment of a competent Court in the exercise of matrimonial jurisdiction is conclusive proof that the legal character which it confers or takes away accured or ceased at the time declared in the judgment for that purpose, but the judgment has to be of a 'competent Court', that is, a Court having jurisdiction over the parties and the subject-matter. Therefore, it was held that even a judgment in rem is open to attack on the ground that the Court which gave it had no jurisdiction to do so. While considering the decision in R. Vishwanathan v. Abdul Wajid AIR 1963 SC 1 at p. 14 (supra), to which I have already referred, the Supreme Court considered that a judgment of a foreign Court to be conclusive between the parties must be a judgment pronounced by a Court of competent jurisdiction and competence contemplated, by Section 13 of the Code is in an international sense and not merely by the law of foreign State in which the Court delivering judgment functions, and the party attacking the judgment is at liberty to show that the judgment which is relevant under Section 41 of the Evidence Act was delivered by a

Court not competent to deliver it, or was obtained by fraud or collusion. Therefore, if these aspects are considered, what is the effect of the judgment of Illinois Court on the facts of that case before the Supreme Court? As considered earlier, the husband in the instant case was a resident of Chicago for a number of years. That quantitative test is answered. The husband wanted to remain there, but for the order of deportation obtained by the wife or her relative. Therefore, the qualitative test at animus was there. So, this is not a case like the case before the Supreme Court where the husband (Teja Singh) had gone to Nevada only for the purpose of obtaining divorce, and left it immediately on getting the divorce.

34. Now, it has been submitted by Mr. Desai that the husband had gone to Illinois only for the purpose of studies and, therefore, it cannot be said to be an intention or animus to make Illinois his permanent place of abode, but as is considered earlier from his deposition and petition, it clearly transpires that he wanted to be an American citizen, but he was deported. The Supreme Court in case of Bai Satya (supra), also considered that even if the husband (respondent Teja Singh) had gone for studies, had he been resident of Nevada for a particular time required by the State of Nevada, then probably that would have been a good ground against the petition under Section 488 of me Code of Criminal Procedure. But on facts, it was found that the assertion of respondent Teja Singh about his being a resident and domicile of Nevada was fraudulent, and that residence was merely for the purpose of getting a decree for divorce. Therefore, the argument of Mr. Desai that in order to give jurisdiction to Illinois Court there should be animus also which is lacking in the instant case, has no basis.

35. In Narhari Shivram She! Narvekar v. Pannalal Umediram , the Supreme Court had an occasion to consider what is the effect of a decree of a foreign Court. In that case the decree passed by the Bombay High Court was considered to be a decree of a foreign Court when it was passed, and it was held that the said decree was not a nullity but was valid and executable decree as the defendant had voluntarily submitted to its jurisdiction by filing a written statement. Therefore, this argument about lack of animus or quantitative or qualitative tests would not be helpful to Mr. Desai.

36. Now, so far as the meaning of "legal separation" is concerned it has to be considered as to what it is, and whether it is akin to "judicial separation" in Indian Courts. In Corpus Juris Secundum, Volume 27-A, edited by Francis J. Ludes and Harold J. Gilbert, at page 16 it has been observed:

While an action for separate maintenance and a proceeding for divorce are similar in nature, in that the marriage relation constitutes the foundation of the action in each case, they are essentially different in that the latter is one for the dissolution of the marriage relation, while the former is in continuation and affirmance of it and to enforce its obligations.

Divorces are of two distinct types, absolute or a vinculo matrimonii, and limited or a mensa et thoro. An absolute divorce or divorce a vinculo matrimonii sometimes termed simply a divorce, terminates the marriage relation. A limited divorce or divorce a mensa et thoro, sometimes called a legal or judicial separation, suspends the marriage relation and modifies its duties and obligations, leaving the bond in full force.

Under the caption 'Judicial Divorces' it has been mentioned that a judicial divorce may be either absolute or limited. At page 16, under Note 18, there is mention about 'Action for divorce a mensa at thoro as under:

Action for divorce a mensa at thoro differs from an action for separate maintenance in that a decree of separation from bed and board sanctions and authorises the refusal of the wife to cohabit with the husband....

Same is the connotation of 'judicial separation' under Indian Law that either spouse can refuse to cohabit after a decree for judicial separation is passed. Therefore, from this reference to Corpus Juris Secundum it is very clear that the connotation "legal separation" is akin to "judicial separation" in our country and, therefore, it cannot be said that this is not a judicial separation as envisaged by Indian Law.

37. It has been strenuously submitted that apparently, looking to the facts of the case, it transpires that the husband in order to marry Miss Jullie insisted on divorce and if that is granted, probably it would be doing injustice to the wife who unfortunately could not remain present to give evidence during the trial. One cannot ignore the legislative intent in permitting either spouse, meaning thereby, even a defaulting spouse, to take advantage of the decree for judicial separation by filing a petition for divorce. Amended Section 13(1-A) of the Act recognises the modern trend that oven in Hindu Society which has always been somewhat conservative the time had come when it was unrealistic to insist on continuing the marriage which had failed and it would be more in the interest of society to dissolve such a marriage than to maintain the farce of a union which had broken down and in spite of the lapse of a certain period of time was beyond redemption. There is also recognition of the fact that the marriage having irretrievably failed it was immaterial to consider as to which of the two parties to the marriage was initially to be blamed. In view of this, any other construction of Section 13(1-A) of the Act would largely negative the beneficial aspects and the reform in the divorce law brought about by the Amendment Act of 1964. For instance, can it be said that a spouse against whom a decree for judicial separation or restitution of conjugal rights had been passed can never invoke Section 13(1-A) of the Act and apply for dissolution of the marriage unless he or she had made efforts for a reconciliation which he or she in all sincerity and truthfulness did not wish to do? If it was to be insisted upon that even after the marriage has practically broken down and an order for judicial separation has been made, or, for that matter, a decree for restitution of conjugal rights, then the petitioner would have to go throughout the pretence and mechanics of a purported reconciliation, otherwise the Court would not be able to bring to an end an unhappy and ill-starred union see: Jethabhai v. Nanabhai paras 106, 107 and 109 at page 105. The aforesaid observations are aptly applicable to the instant case wherein it has been argued that after coming to India, the husband never made any attempt to reconcile or call the wife even though she was ready and willing to come and stay with him.

38. Now, the learned trial Judge has held against the husband on various grounds. In view of what I am holding, i.e. the husband is entitled to a decree for divorce under Section 13(1-A)(1) of the Act, it is not necessary to consider other aspects. But because Mr. Desai insisted that the husband should get a decree for judicial separation first and then file another suit, Miss V.P. Shah, learned Advocate

for the respondent-husband submitted in the alternative that the husband has made out a case for judicial separation. Here the main insistence is on the evidence of the husband who has stated that the wife did not go to him right from 30-12-1972, and as the wife has not stepped into the witness-box, that should be considered to be a fact proved. I am afraid, merely on this ground the court should not ignore other factors which are brought on record. Allegation of the wife was that she went to America but the husband did not respond and she had to stay separately. Her application for maintenance and for legal separation was granted, showing the husband to be the defaulting party. So now when the husband relies on that decree for legal separation, he cannot say that ignoring that decree for judicial separation he should be considered to be a faithful husband and the wife should be considered to be an erring wife, and the decree for judicial separation should be passed. From the facts and circumstances of the case 1 am not prepared to concede to this case of the husband. Apparently it seems that he has no desire to continue the marital relations with the wife. He is keen in getting divorce, whether it is for marrying with Miss Jullie, as alleged by the wife, or for any other purpose, and for that he has made all attempts. Therefore, it cannot be said that the findings of the learned trial Judge against the husband are not justified.

39. In the result, however, I come to the conclusion that the order of dissolution of marriage by a decree of divorce passed by the learned trial Judge is quite justified. The appeal is, therefore, dismissed. Looking to the peculiar circumstances of the case, there shall be no order as to costs.

As the appeal is dismissed, Civil Application No. 3756 of 1981 filed by the wife does not survive, and the ad interim stay granted therein is vacated. Rule is discharged with no order as to costs.