Bombay High Court
Shiv Indersen Mirchandani Of ... vs Natasha Harish Advani Alias ... on 5 December, 2001
Equivalent citations: 2002 (2) BomCR 436, II (2002) DMC 89
Author: J Patil
Bench: J Patil
JUDGMENT J.A. PATIL, J.

1. "Marriages are settled in heaven and they are performed on earth."

Whether and where a marriage can be dissolved is a matter in the domain of the earthly law governing the spouses. But the matrimonial laws are not common everywhere in the world and they differ from country to country. The problem arises when the parties have their domicile in one country and one of them obtains matrimonial relief in a foreign country. The moot question posed in this Notice of Motion is whether the decree passed by a Swedish Court can be recognised by this Court, as being conclusive, or not.

2. This is a case where a Hindu domiciled in India got married in civil form in New York to a Swedish woman of Christian religion, who lived with him after the marriage for about six years and bore two children to him. Thereafter, she separated from him and went back alongwith her two children to Sweden. Six years after the separation, the man went to Sweden where both of them by mutual consent obtained a decree of divorce. The man then returned back to India and got married to a Hindu woman in Vedic form of marriage from whom he has a son. The children of the first marriage now raise a dispute about the validity of the divorce of their mother and also the validity of the second marriage of their father. They have taken out the present Notice of Motion praying for trying the following issues as preliminary issues---

(a)(i) Whether the plaintiff No. 2 has any locus to file the above suit or to file a caveat to challenge the Will of the deceased?

(ii) Whether the plaintiff No. 1 has any right to any part of the properties of HUF to which the deceased was entitled?

(iii) Whether plaintiff No. 1 is entitled to any reliefs against defendant Nos. 9 or 10?

They have further prayed that the order dated 29-3-1984 in Notice of Motion No. 1471/1983 be suitably modified and/or varied to exclude payment of the income from the HUF of the deceased to the plaintiffs. Shri Setalwad, the learned Counsel for defendant Nos. 1(a), 1(b) and 3 submitted that he is pressing for findings on issue Nos. (i) & (ii) above and also for the second relief. For proper appreciation, the relevant facts may be stated briefly as under:

The Facts

3. The deceased Indrasen Tolaram Mirchandani, was an industrialist and had a large business interest in several companies including defendant Nos. 9 and 10. He was the Karta and manager of

Indrasen Tolaram Mirchandani HUF. He was an Indian national having Indian domicile. On 13-9-1952 he contacted Civil marriage with defendant No. 8 Barbro Baeck, a Christian woman of Sweden in New York. After the marriage both of them lived together first in New York for some time and then in India till May 1958 and were blessed with two children, a son Rajiv (defendant No. 2) and a daughter Kavita (defendant No. 3). It appears that there were some serious differences between the deceased and defendant No. 8 who alongwith both the children went back to Sweden to live there permanently. Four years thereafter, i.e. on 15-6-1962 she obtained a decree of judicial separation from the District Court Vasterbegslags, Sweden and two years thereafter i.e. 23-4-1964, the deceased and defendant No. 8 obtained from the same Court a decree of divorce by mutual consent. The deceased thereafter, returned to India married for the second time to Chandra (plaintiff No. 2) as per Hindu Vedic rites on 30-8-1964. The couple got a son-Shiv (plaintiff No. 1) on 13-11-1967.

4. According to the plaintiffs on 30-3-1976 the deceased effected a partial partition in respect of 195 equity shares of a company belonging to the HUF. The deceased died on 30-7-1982. Since before his death he was seriously ill as a result of which his mental condition was not sound. After the death of the deceased, defendant Nos. 4 to 7 set up his Will dated 28-5-1982, claiming themselves to be the executors under the said Will. But according to the plaintiffs the said Will appears to have been brought about by machinations by the interested parties. The plaintiffs filed the present suit on 14-6-1983, praying inter alia for declarations that the deceased died intestate, that the HUF consisted of the deceased and the plaintiffs and that defendant Nos. 2 and 3 do not have any share in the properties, belonging to the HUF and for partition of the said properties.

5. In their written statements defendant Nos. 1(a), 1(b) and defendant No. 2 have contended inter alia that the domicile of both the deceased and defendant No. 8 was India at the relevant date and therefore, the Swedish Court did not have any jurisdiction to pass a decree of divorce in their matter and it is not a valid decree. It is further contended that consequently the purported marriage between the deceased and plaintiff No. 2 is null and void and the suit filed by plaintiff No. 2 is not maintainable.

6. Defendant Nos. 4 to 7 have pointed out in their written statements that the deceased left a Will dated 28-5-1982 under which they are appointed as the executors. They have stated that on the basis of the said Will they have filed Petition No. 304/1983 for probate but the present plaintiff No. 2, having filed a caveat, opposing the grant of probate, the said petition is converted into Testamentory Suit No. 12/1984.

The Arguments

7. I have heard the learned Counsel Shri Setalwad for defendant Nos. 1(a), 1(b) and 3, Shri D.V. Merchant for defendant Nos. 4 to 7 and Shri E.S. Kotwal for the plaintiffs, at length. Shri Setalwad made the following submissions: (i) that the domicile of the deceased was India. (ii) that as per the private international law the domicile of the wife follows that of the husband and therefore, the domicile of defendant No. 8 must, at the relevant time, be held to be India and not Sweden though she was residing there for quite some time. (iii) that the parties are governed by the law of their

matrimonial domicile. (iv) that domicile of parties is necessary to confer jurisdiction upon the foreign Court. (v) that under section 13 of the Civil Procedure Code, the judgment of the Swedish Court is not conclusive as to the divorce of the deceased and defendant No. 8. Since it does not fulfil the conditions contemplated by Clauses (a), (b), (c) and (f) of that section. (vi) that the marriage between the deceased and defendant No. 8 thus not having been dissolved by a valid decree passed by a Court of competent jurisdiction; it continued to subsist on 30-8-1964 when plaintiff No. 2 claims to have married the deceased. (vii) that the marriage between the deceased and plaintiff No. 2 being incontravention of the provisions of section 5 of the Hindu Marriage Act, 1955 is null and void under section 11 of that Act, and consequently she has no right to claim anything in the HUF properties or the properties of the deceased. (viii) As regards plaintiff No. 1, he gets legitimacy in view of section 16 of the Hindu Marriage Act, but he cannot get any share in the joint family property. At the most he may get a share in the self acquired property of the deceased.

8. Shri Merchant who represents the executors under the Will for the deceased submitted that as executors, it is their duty to see that the property goes to the right persons. He further submitted that right to file a caveat arises from a statute which gives a person a right to claim on intestacy. He also argued that in order to fall within Schedule I of the Hindu Succession Act, plaintiff No. 2 must establish that she was legally wedded wife of the deceased. As regards the divorce between the deceased and defendant No. 8, the submission of Shri Merchant is that their marriage was governed by the Indian Divorce Act, 1869 and there is no provision in the said Act to obtain divorce by mutual consent and therefore, the decree of divorce passed by the Swedish Court is in breach of the law in force in India at the relevant time.

9. Shri Kotwal for the plaintiffs made the following submissions: (i) Plaintiff No. 2 has been treated as the wife of the deceased for about 18 years and it is only after his death that the validity of his marriage with plaintiff No. 2 is disputed. (ii) Defendant Nos. 2 and 3 have taken benefits of the divorce decree to obtain maintenance for a number of years and now they are contending that there was no valid divorce between their mother (defendant No. 8) and the deceased. (iii) Defendant No. 8 does not appear to contend that the marriage of plaintiff No. 2 with the deceased is null and void nor does she deny the validity of the divorce decree passed by the Swedish Court. (iv) The concept that wife's domicile depends upon the domicile of her husband is absurd, rigid and discriminatory to the wife. It is no longer a good law after 1960 and that a wife is capable of having distinct domicile from that of her husband. Modern theory recognises the law of habitual residence which has a real and substantial connection with the place of the forum Court. (v) The question of jurisdiction has to be understood in the sense of Swedish Court and it cannot be ascertained as per the municipal law i.e. Indian Law. (vi) Once the question of jurisdiction is decided by a foreign Court, this Court cannot go behind it and allow it to be challenged. International comity requires recognition of foreign judgments. (vii) Where the municipal law is silent, the common law will prevail and common law includes International Conventions. (viii) Everything which law does not permit to do is not necessarily against the public policy. The public policy should be to prevent limping marriages and avoid hardships.

When a foreign judgment is not conclusive

10. The entire edifice of the contentions of both Shri Setalwad and Shri Merchant is based on the question of conclusiveness of the divorce decree passed by the Swedish Court. Section 13 of the Civil Procedure Code states when a foreign judgment is not conclusive. It reads:---

"13. When foreign judgment not conclusive.---A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except---

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

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

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

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

(e) where it has been obtained by fraud;

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

It will thus be seen that in order to make a foreign judgment conclusive in India, it must be shown that it complies with all the abovementioned six conditions. If there is no compliance of any one of these conditions, the foreign judgment will not be conclusive and consequently not legally effective and binding. A decree of a foreign Court is normally recognized by a Court in another jurisdiction as a matter of comity and public policy. But no country is bound to recognize and give effect to a decree of a foreign Court if it is repugnant to its own laws and public policy. So far as India is concerned, a judgment of a foreign Court creates estoppel or res judicata between the same parties provided such judgment is not subject to attack under any of the Clauses (a) to (f) of section 13 of the C.P. Code vide Maganbhai v. Maniben, . The first and foremost attack in the instant case is on the ground that the Swedish Court which passed the decree of divorce was not a Court of competent jurisdiction. The question of jurisdiction of a foreign Court in a divorce proceeding is generally dependent upon the domicile of the parties. In Satya v. Teja Singh, , it was observed:

"But if a decree of divorce is to be accorded full faith and credit in the courts of another jurisdiction, it is necessary that the Court granting the decree has jurisdiction over the proceedings. A decree of divorce is thus treated as a conclusive adjudication of all matters in controversy except the jurisdictional facts on which it is founded. Domicile is such a jurisdictional fact. A foreign divorce decree is therefore, subject to collateral attack for lack of jurisdiction even where the decree contains the findings of recital of jurisdictional facts".

It will therefore, be necessary to see as to what was the domicile of the deceased and defendant No. 8 when they approached the Swedish Court.

Concept of Domicile

11. There is no dispute of the fact that the domicile of the deceased Indersen was Indian and it continued to be so till last. There is also no dispute of the fact that defendant No. 8 separated from him sometime in 1958 and went to Sweden and that at the time of the commencement of the divorce proceeding she alongwith her two children (defendant Nos. 2 and 3) was residing in Sweden. The question is: What was the domicile of defendant No. 8 at the relevant time and whether her residence in Sweden had real and substantial connection with the jurisdictional compentancy of the Swedish Court.

12. The plain dictionary meaning of the term 'domicile' is one's legally recognized place of residence. Such residence must be coupled with the intention to make it a permanent home. A mere sojourn or temporary residence does not constitute domicile. As observed by Lord Westbury in Udny v. Udny, 1869 L.R. 1 H.L. Sc. & Dn. 441. "Domicile is the condition in virtue whereof is ascribed to an individual the character of a citizen of some particular country .....on the basis of which the personal rights of the party that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy must depend." The object of ascertaining domicile is to determine which municipal law is applicable for regulating the rights and obligations of the parties. Thus domicile signifies connection with a single system of territorial law. There are some general rules regarding domicile and they are that-(i) nobody is without domicile, (ii) a person cannot have two domiciles, (iii) there is a presumption in favour of continuance of an existing domicile. There are two main classes of domicile; the domicile of origin which is communicated by operation of law to each person by birth i.e. domicile of his father or mother and domicile of choice which every person of full age is free to acquire in substitution for that which he at present possesses. The domicile of origin is received by operation of law at birth and for acquisition of a domicile of choice one of the necessary conditions is the intention to remain there permanently. The domicile of origin is retained and cannot be divested until the acquisition of the domicile of choice. By merely leaving his country, even permanently, one will not, in the eye of law, lose one's (his) domicile until he acquires a new one. Vide Louis De Readt v. Union of India, . So far married woman is concerned, the domicile of her husband is communicated to her immediately on marriage and it is necessarily and inevitably retained by her for the duration of her marriage. This means that she is incapable of acquiring a domicile of her choice during the subsistence of her marriage and that her domicile follows that of her husband's domicile. It is thus a domicile of dependence or a matrimonial domicile. Thus domicile is a test for determining personal law.

General Rule-wife's domicile follows the domicile of the husband.

13. The contention of Shri Setalwad is that although defendant No. 8 separated from the deceased and went to reside in Sweden, she did not acquire Swedish domicile and her domicile continued to be the same as that of the deceased viz. India at the time when the divorce proceeding were taken in Swedish Court. He therefore, submitted that the Swedish Court did not have jurisdiction to dissolve the marriage. In support of his submissions. Shri Setalwad relied upon some English decisions which in substance lay down that under the British Law the jurisdiction to decree divorce depends on domicile and that the domicile of the husband decides the domicile of the wife. This appears to be

based on the principle of unity of marriage. If the husband and wife were to have separate domiciles, then the proceedings for dissolving the marriage might be filed in two courts of different jurisdiction and in that event there might be different results. In Harvey v. Farnie, 1882(VIII) H.L. (S.C.)43, the contention was that a marriage solemnized in England between an English woman and a Scotchman, being an "English marriage" no foreign Court had jurisdiction to dissolve the same. The House of Lords rejected this contention and held that on marriage the wife took the domicile of her husband and became subject to his laws. The decree of divorce passed by the Scottish Court was therefore, recognised as valid decision of a Court of competent jurisdiction. In Lord Advocate v. Jaffrey, 1920 H.L. (S.C.)146, the facts were that one Isabella married one Robert, a scotch and lived with him in Scotland. Thereafter, Robert left for Queensland (Australia) where he married another woman and lived with her there till his death. In the meantime, Isabella filed an action against Robert for divorce on the grounds of desertion and adultery but that action failed in consequence of her death. Thereafter, a question about legacy duty in respect of her property arose and it became necessary to decide as to what was her domicile. While affirming the general rule that the domicile of the husband is the domicile of the wife, it was held that Robert had abandoned his Scottish domicile and acquired a domicile in Queensland and that in the absence of decree for judicial separation in favour of Isabella, her domicile followed that of Robert. This case affirms that the rule laid down in Le Mesurier's, 1895 A.C. 517, that the matrimonial status is governed by the law of domicile of the parties and that the wife's domicile follows the domicile of her husband.

14. In H. v. H., 1928 Probate Division 206, the parties were married in England and had their domicile there. The wife thereafter obtained a decree of judicial separation on the ground of desertion. After that the husband went to reside in France. The wife filed a petition for divorce which was resisted by the husband on the ground that he was domiciled in France and therefore, the English Court had no jurisdiction to entertain the petition. In reply it was contended on behalf of the wife that the husband who had deserted the wife was estopped from asserting that he had acquired domicile elsewhere. It was also argued that wife so deserted was entitled to determine the forum for her action. It was held that the competent jurisdiction to dissolve a marriage is that of the husband's domicile and the defendant must be domiciled in that jurisdiction at the commencement of the proceedings. As regards the effect of the decree of judicial separation it was observed that it does not from its date fix matrimonial domicile or render it incapable of alteration without the consent of the wife. In Attorney General for Alberta v. Reata E. Cook, 1926 J.C. 444, it was held that the well-established rule that the domicile of a wife is that of her husband is an incident of marriage. It was further held that a decree for judicial separation does not enable the wife to acquire a domicile different from that of her husband and thereby entitle her to sue for divorce in a Court other than that of the husband's domicile. In Herd v. Herd, 1935 Probate Division 205, the parties were married and domiciled in England. Later on the husband left the wife in England and went to U.S.A. where he started living with another woman and had no intention to return to England. The wife then filed a petition for divorce in an English Court on the ground of the husband's adultery. The husband did not enter his appearances. The petition was however, not admitted and it was held that since the decisions of the House of Lords in, Lord Advocate v. Jaffrey and of Privy Council in Attorney General for Alberta v. Cook that there can only be a single matrimonial domicile of the husband and wife in which proceedings can be maintained to dissolve the married status, no exception to the general rule can be admitted in the case of a wife deserted by her husband in the

original matrimonial domicile. It was observed that under such circumstances the wife cannot be allowed to assert for the purpose of maintaining proceedings that the original domicile of the husband is still subsisting and that the English Court retains jurisdiction to dissolve the marriage when the husband has acquired a domicile of choice elsewhere.

15. The aforesaid decisions thus in substance lay down that the effect of marriage is to give the spouses a common domicile, which is the domicile of the husband within the jurisdiction of which the matrimonial claims of the spouses ought to be determined. A judicially separated wife residing in a different country does not acquire a new domicile of her own choice and for sustaining a claim of divorce she has to necessarily bring it in the Court of that country where her husband is domiciled. She may discard her husband for all purposes but she cannot discard her derivative domicile acquired on marriage and it remains with her inseparable like a shadow so long as the marriage is not dissolved by a decree of divorce.

16. Shri Setalwad also referred to two Indian decisions: the first of which is Mrs. Rosetta Attaullah v. Justin Attaullah, . There the wife had filed a petition for divorce under section 10 of the Divorce Act, 1869 in the Court at Alipore, contending that the parties were domiciled in India. The husband did not appear before the trial Court with the result that a decree nisi was passed ex parte. But when it came before the High Court for confirmation the husband put in his appearance and contended that the Alipore Court had no jurisdiction to entertain the petition. It was found that at the time of the filing of the petition the parties were domiciled in Pakistan. The High Court set aside the decree nisi and observed:

"In determining the domicile of the parties in a proceeding for dissolution of marriage, it is the domicile of the husband alone which is to be considered inasmuch as a wife taken 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 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."

In Prakash v. Mst. Shahni, A.I.R. 1965 Jammu & Kashmir 83, the High Court went a step further and observed that even on the death of her husband, a widow retains her husband's domicile until she changes it by her own act e.g. by marriage.

Indyka v. Indyka- A Departure from the General Rule.

17. Shri Kotwal on the other hand come out with Indyka v. Indyka, 1967(2) All.E.R. 689: 1969(1) A.C. Page 33, which appears to be the corner stone which changes the concept that the wife's domicile follows that of the husband within which jurisdiction alone an action for matrimonial relief can be brought and that decree passed by the Court of domicile only can be recognized. By this decision the House of Lords accepted as correct the earlier decision in Travers v. Holley, 1953(2) All.E.R. 794, which was based on the provisions of the Law Reform (Miscellaneous Provisions) Act, 1949 and which gave the English Courts jurisdiction to entertain proceedings for divorce by a wife even if the husband was not domiciled in England, provided that the wife had resided in England for

a period of three years immediately preceding the commencement of the proceedings. In the said case, the Court of appeal accepted as valid a decree of divorce granted to the wife by an Australian Court though the husband was domiciled in England at the time of the filing of the wife's petition. In Manning v. Manning, 1958(1) All.E.R. 291, the English Court applied the rule in Travers v. Holley and gave recognition to a divorce decree granted to a wife by a Court in Norway on the grounds- (i) that though she had no domicile in that country she had been continuously residing there for at least three years preceding the commencement of the proceeding and (ii) even though the ground of divorce was not one recognized by the English Law, it did not offend against natural justice.

18. In Indyka v. Indyka, the departure from the established doctrine laid down in Le Mesurier's case was justified mainly on the ground that rule operated as tyrannical unjust unrealistic and inconsistent with the modern trend and international comity. Besides it creates the problem of "limping marriages" in the modern times where there are more marriage between persons of different nationalities than there used to be perviously. In the said case the first marriage was between two Czech nationals in Czechoslovakia. The husband later on acquired English domicile in 1946 but the wife continued to reside in Czechoslovakia where she obtained a decree of divorce in 1949. Thereafter, the husband married his second wife in England who also filed a petition for divorce. The husband filed a cross petition for nullity of the second marriage on the ground that the decree passed by the Czech Court in favour of the first wife would not be recognized in England since England being his domicile, the Czech Court had no jurisdiction to pass the decree. The House of Lords, however, upheld the validity of the Czech decree. In the words of Lord Wilberforce who was one of the five Judges who rendered separate judgements.

In my opinion, it would be in accordance with developments and with the trend of legislation to recognize divorces given to wives by courts of their residence wherever a real and substantial connection is shown between the petitioner and the country or territory exercising jurisdiction. I use these expressions so as to enable the courts who must decide each case, to consider both the length and quality of the residence and to take into account such other factors as nationality which may reinforce the connection.

19. The dictum in Indyka's case was applied by the English Courts in their subsequent decisions. Angelo v. Angelo, 1967(3) All.E.R. 314; Mayfield v. Mayfield, 1969(2) All.E.R. 219; Mather v. Mahoney, 1968(3) All.E.R. 223 and Brown v. Brown, 1968(2) All.E.R. 11, are illustrative of the fact that decrees passed by foreign Courts were recognised on the ground of real and substantial connection of either of the parties to the respective foreign country.

20. The rule in Indyka's case was also followed in Nesina v. Smith, 1971(2) All.E.R. 1046, wherein the Nevada Court decree of divorce was recognized by the English Court though the parties in the strict sense, had English domicile. The wife was residing in U.S. for six years. It was held that the wife had a sufficient connection with the Court granting decree and that if Nevada Court decree was accepted as valid by the other States in America, there was no justification for the English Courts to deny recognition to that decree.

Teja Singh's case

21. It is necessary to bear in mind that the decisions in Mrs. Rosetta Attaullah v. Justin Attaullah and Prakash v. Mst. Shahni (supra) upon which Shri Setalwad has placed reliance were rendered before the Indyka was decided. Shri Setalwad however, referred to Smt. Satya v. Teja Singh, to point out that a decree of divorce passed by the Nevada Court in U.S. was not recognized by the Supreme Court. I think that it would be rather appropriate to have a look into the facts of that case rather than to merely go by the outward result of the case. That is a case where both the husband and wife were married in 1955 according to Hindu rites and were domiciled in India. In 1959 the husband went to U.S.A. for higher studies and stayed there for about 6 years, during which period he made no provision for the maintenance of his wife and two children. In 1965, the wife therefore, filed an application under section 488 of the Cri.P. Code against him and claimed maintenance for herself and her two minor children. The husband appeared through his Counsel and contended that he was no longer liable to maintain his wife since in December 1964 he obtained a decree of divorce from the Nevada Court. The Judicial Magistrate. F.C. Jullander, however, refused to recognise that decree observing that the husband had not permanently settled in Nevada and the marriage could be dissolved only under the Hindu Marriage Act, 1955. In this view of the matter the Magistrate passed an order of maintenance in favour of the wife, which was also confirmed by the Additional Sessions Judge in revision. The High Court of Punjab & Haryana however, set aside that order holding that since the husband was domiciled in Nevada, so was the wife and therefore, Nevada Court had jurisdiction to pass a decree of divorce. The High Court obviously relied on the doctrine laid down in Le Mesurier's case. The question which arose before the Supreme Court was whether the decree of divorce passed by the Nevada Court (U.S.A.) was entitled to recognition in India. It is true that the Supreme Court did hold in para 45, "Thus the decree of the Nevada Court lacks jurisdiction. It can receive no recognition in our courts". But the reasons for arriving at such a conclusion are very relevant and material. The Supreme Court found that the husband was residing in Utah from 1960 to 1964 and since 1965 he was in Canada. He made a false representation to the Nevada Court that he was a bona fide resident of Nevada but he had gone there as a bird of passage for forum hunting and "found a convenient jurisdiction which would easily purvey a divorce to him and left it even before the ink on his domicilary assertion was dry". The facts on record showed that Nevada was not and could not be his home. The husband was thus found to have committed fraud as to the jurisdiction of Nevada Court and under section 13(3) of the C.P. Code a decree of a foreign Court obtained by fraud cannot be treated as conclusive. The Supreme Court observed:-

"To confer jurisdiction on the ground of plaintiff's residence and entitle the decree to extraterritorial recognition, the residence must be actual and genuine and accompanied by an intent to make the State his home. A mere sojourn or temporary residence as distinguished from legal domicile is not sufficient."

Referring to the decision in Indyka's case, the Supreme Court emphasized that residence must answer a qualitative as well as quantitative test that is the two elements of factum and animus must concur. It was held that residence for a particular purpose fails to answer the qualitative test for, the purpose being accomplished the residence would cease. It will thus be seen that the rule in Indyka's case has been implicitly acknowledged in Teja Singh's case.

Theory of Real and substantial connection.

22. Reference may also be made to the Full Bench decision of the Kerala High Court in Marggarate v. Dr. Chaoko, , wherein the validity of an order of a German Court granting custody of the minor children to German mother was upheld and respected. In that case the respondent father was an Indian national having Indian domicile who had gone to Germany where he married the petitioner-a German girl and lived with her there for about seven years during which period the couple got two children. It appears that the relations between them got strained and the petitioner filed a petition for divorce in a German Court. Pending that petition, the Court passed an order based on agreement regarding the custody of the children as per which the petitioner was allowed to retain them subject to giving access to the respondent to the children. On one occasion the respondent took the children under the pretext of taking access with them and straightway brought them to India. In the meantime, the petition for divorce was dismissed but the Appellate Court allowed it and directed that the custody of the children be given to the petitioner-mother. The petitioner thereafter, came to India to take the children in her custody. The husband appears to have taken exception to the order passed by the German Court on the ground that since the domicile of the parties was India, the German Court had no jurisdiction. The Kerala High Court held that the question of the custody of children does not depend upon the legal rights of the parties but the interest and welfare of the children. The Court declined to go into the question of domicile of the parties and referring to Indyka's case (supra) inter alia made the following observations:

"Assuming without deciding .....that the father had not a acquired a German domicile and therefore, the father, the mother and the children were of Indian domicile, a competent German Court will have jurisdiction to pass a decree of divorce or custody of the children on the ground that the petitioning spouse had a real and substantial connection with the country of that Court or that the children were ordinarily, residents in that country."

The theory of real and substantial connection was acknowledged by the Supreme Court in Surinder Kaur v. Harbax Singh, 1984 S.C.C. 698 in connection with a similar case of custody of a minor child by observing that the modern theory of conflicts of laws recognizes and in any event prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. It was further observed that in matters relating to matrimony and custody the law of that place must govern which has the closest concern with the well being of the spouses and the welfare of the offsprings of marriage. The Supreme Court further emphasised that it is the Court's duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England.

23. The rule of "real and substantial connection" laid down in Indyka's case in 1967 received statutory recognition in 1971 when the Recognition of Divorces and Legal Separations Act, 1971 came to be enacted by the British Parliament. Section 3(1) of the said Act provides as under:

"The validity of an overseas divorce or legal separation shall be recognized if at the date of the institution of the proceedings in the country in which it was obtained-(a) either spouse was habitually resident in that country....."

In Cruse v. Chittum, 1974 All.E.R. 940, the English Court gave recognition to a decree of divorce passed by the Court in Mississipi (U.S.A.) where the wife was residing for a period of more than one year immediately preceding the filing of divorce petition by her. The Court at Mississipi had held that she had been actual bona fide resident of that State. While explaining the term "habitually resident", the English Court observed that it indicates the quality of the residence rather than its duration. It denotes a regular physical presence which has to endure for some time.

International conventions-whether binding.

24. Shri Kotwal further made a reference to the Hague Convention on the Recognition of Divorces and Legal Separation 1970 which applies to "the recognition in one contracting State of divorces and legal separations obtained in another contracting State which follow judicial or other proceeding officially recognized in that State and which are legally effective there "(Article 1) Articles 2 & 3 read as under:---

Article 2:

Such divorces and legal separations shall be recognized in all other Contracting States, subject to the remaining terms of this convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called "the State of origin")-

(1) the respondent had his habitual residence there; or (2) the petitioner had his habitual residence there and one of the following further condition was fulfilled-

(a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings.

(b) the spouses last habitually resided there together; or (3) both spouses were nationals of that State; or (4) the petitioner was a national of that State and one of the following further conditions was fulfilled-

(a) the petitioner had his habitual residence there; or

(b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or (5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled-

(a) the petitioner was present in that State at the date of institution of the proceedings and

(b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

Article 3 Where the State of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression "habitual residence" in Article 2 shall be deemed to

include domicile as the term is used in that State.

Nevertheless, the preceding paragraph shall not apply to the domicile of dependence of a wife.

India is not a signatory or Contracting State to the Hague Convention. But Shri Kotwal submitted that there is no bar for applying the same by the Indian Courts, as long as it is not inconsistent with the municipal law. In support of his submission Shri Kotwal relied upon M.V. Elisabeth v. Harwan Investment & Trading Pvt. Ltd., Goa, , which is a landmark judgment on the question of admiralty jurisdiction. There also the question of the application of the principles of certain international conventions to which India was not signatory, relating to admiralty matters was involved. In para 77, the Supreme Court observed thus:

"It is true that Indian statutes lag behind the development of international law in comparision to contemporaneous statutes in England and other maritime countries. .....India has not adopted the International Convention relating to the Arrest of Sea-going Ships, Brussels Convention of 1952 on Civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessity of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships."

In para 85, the Supreme Court went on observing:

".....the provisions of these convention are the result of international unification and development of the maritime laws of the world, and can therefore, be regarded as the international common law or transitional law rooted in and evolved out of the general principles of national laws, which in the absence of specific statutory provisions can be adopted and adopted by courts to supplement national status on the subject....."

In M.V. Mariner IV v. V.S.N.L., , a Division Bench of this Court held in an admiralty case that in case of a conflict between the Municipal Law and the international law or conventions, the Court will have to apply the municipal law. However, when there is no conflict between the two then all just principles of international law or conventions could be legitimately applied unless either they are in conflict with any statute or are prohibited by any municipal law.

25. Shri Kotwal also cited the decision in Gramophone Company of India Ltd. v. Birendra Bahadur Pandey, . Under a treaty and by International Convention India is allowing Nepal, which is a land-lock country, a right of innocent passage in order to facilitate her international trade. The question which arose was whether this right covers the transit of goods (pirated cassettes), whose importation is prohibited in India but not in Nepal. The learned Single judge of the Calcutta High Court allowed the petitioner company to take inspection of the alleged pirated cassettes which allegedly violated its copy rights. The Division Bench however, set aside that order but the Supreme

Court restored it. Chinnappa Reddy, J., speaking for the Bench observed:

"There can be no question that nations must march with the international community and the municipal law must respect Rules of International law even as nations respect international opinion. The comity of nations requires that Rules of International law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with the Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external Rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the Rules of International law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of Nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of International law. National Courts will endorse International law but not if it conflicts with national law. National Courts being organs of the National State and not organs of the international law, must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid confrontation with the Comity of Nations or the well established principles of International law. But if conflict is inevitable the letter must yield."

26. In Vishakha v. State of Rajasthan, , the Supreme Court while dealing with a case of sexual harassment of working women felt the necessity and urgency to safeguard them by an alternative mechanism, in the absence of legislative measures. Relying upon the enabling provision of Article 51(c) of the Constitution, the Supreme Court drew assistance from the International Conventions and laid down certain guidelines to protect the working women from sexual harassment and to enable them to work with dignity. The directions are to be binding and enforceable in law until suitable legislation is enacted to occupy the field. Verma C.J.I. observed:

"It is now an accepted rule of judicial construction that regard must be had to International Conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein."

27. To sum up the dictum laid down by the aforementioned four cases viz. M.V. Elizabeth, M.V. Mariner, Gramophone Company of India and Vishakha (supra), it can be said that the courts in India can rely on the provisions of International Conventions even though India may not be signatories to them. The only important limitation for doing so is that there should be no inconsistency or conflict between the provisions of the International Convention and the Municipal Law. In case of conflict between the two the Municipal Law will prevail. If the Municipal Law is silent, then the doctrine of incorporation can be pressed into service to rely upon the provisions at

the International Convention. But such a course again subject to the condition, as laid down in Teja Singh's case (supra) that it is on considerations of justice and it does not offend our public policy.

Public Policy and Private International Law

28. Here a brief diversion may be made to understand the often used concept of "public policy". The term is used in section 23 of the Indian Contract Act in the context of what considerations and objects are lawful and what not. But nowhere the definition of "public policy" is given. They are generally understood to mean the principles and matters which the legislature and the courts broadly regard as being of fundamental concern to the State and the whole society. In Central Water Transport Corporation v. Brajo Nath Ganguly, , it is stated to be a concept of what is for the public good and public interest. It is pointed out that the concept of what is for the public good or the public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. Therefore, the principles governing public policy must be on proper occasion, capable of expansion or modification. It is further pointed out that the practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. Madon, J. observed in para 92:---

"If there is no head of public policy which covers a case, then the Court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution."

Shri Kotwal rightly said that everything that law does not permit to do is not necessarily against the public policy. Therefore, whether a thing is against or contrary to public policy has to be tested with reference to the interest or good of the public. As regards the application of the rule of public policy in the field of private international law, it was held in Renusagar Power Co. Ltd. v. General Electric Co., , that the courts refuse to apply a rule of foreign law or recognize a foreign judgment or a foreign arbitral Award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked or enforced.

Y. Narsimhrao's case-A Trend setting judgment:

29. The last of the cases upon which reliance is placed by Shri Kotwal is Y. Narsimhrao v. Y. Venkat Laxmi, in which the parties were married at Tirupati in 1975 as per the Hindu Law but they separated in 1978 and the husband filed a petition of Divorce in Tirupati, averring inter alia that he was a resident of New Orleans, Louisina, U.S.A. and that he and his wife had last resided together at New Orleans. Pending that petition he filed another petition for divorce in 1980 in the Circuit Court at St. Louis, Missouri, U.S.A. contending that he had been a resident of Missouri State for 90 days or more immediately preceding the filing of the petition and that the wife had deserted him. The wife filed her reply without prejudice to the contention that she was not submitting to the jurisdiction of a foreign Court. The Court at St. Louis however assumed jurisdiction on the ground that the

husband had been a resident of the State of Missouri for 90 days next preceding the filing of the petition. In February, 1980 the Court at St. Louis, in the absence of the wife, passed a decree of dissolution of marriage on the ground that the marriage was irretrievably broken. The petition in Tirupati Court was thereafter dismissed as not pressed by the husband. In 1981, the husband married a second wife. The first wife then filed a complaint against the husband and second wife for bigamy. The husband and the second wife filed an application for discharge on the ground that the first marriage was already dissolved. The Magistrate however, discharged them on the ground that the complainant wife had failed to make out a case. In revision, the High Court set aside the order on the ground that the photostat copy of the judgment of the Court at St. Louise was not admissible in evidence to prove dissolution of the marriage. In appeal, the Supreme Court found that the husband had technically satisfied the requirement of residence of 90 days with the only purpose of obtaining the divorce and that he was neither domiciled nor had he an intention to make his home. It was also found that he had made a false averment that the (first) wife had refused to stay with him in the State of Missouri where she had never been. Relying on the decision in Teja Singh's case it was possible for the Supreme Court to dispose of the case on the ground of fraud. But the Supreme Court declined to do so and thought it proper to deal with a larger question. In para 10, it is observed:-

"We refrain from adopting that course in the present case because there is nothing on record to assure us that the Court of St. Louis does not assume jurisdiction only on the basis on a mere temporary residence of the appellant for 90 days even if such residence is for the purpose of obtaining divorce. We would, therefore, presume that the foreign Court by its own rules of jurisdiction had rightly entertained the dispute and granted a valid decree of divorce according to its law. The larger question that we would like to address ourselves to is whether even in such cases, the courts in this country should recognise the foreign divorce decrees."

In result, the Supreme Court set aside the High Court order holding that the photostat copy of the decree has not per se inadmissible in evidence.

30. Like in Teja Singh's case, the Supreme Court in this case also refused to recognize decree of a foreign Court on the ground of fraud. The facts of both the cases, show that the husbands therein committed fraud with respect to the domicilary fact which affected the jurisdiction of the concerned Court. "Teja Singh" refused to recognize the Nevada Court decree on the ground of fraud and stopped there only sounding a caution to the Indian courts that the principles of American and English law are not to be adopted blindly and that "our notions of a genuine divorce and of substantial justice and the distinctive principles of our public policy must determine the rules of our private international Law". But "Narsimharao" goes a step beyond and affords answer to the question whether an Indian Court should recognize a foreign divorce decree assuming that the foreign Court had rightly entertained the dispute according to its own law. 'Teja Singh' no doubt emphasizes the legislative need to "find a solution to such a schizoid situation" and recommends that the Hague Convention of 1970, which "contains a comprehensive scheme for relieving the confusion caused by differing systems of conflict of laws may serve as a model". Narsimhrao also laments the situation that "In spite of more than 43 years of independence, we find that the legislature has not thought it fit to enact Rules of Private International Law in this area and in the

absence of such initiative from the legislature the courts in this country have been forced to fall back upon precedents which have taken inspiration as stated above, from the English rules". Referring to the advancement in communication and transportation has made the migration and immigration easier the Supreme Court has pointed out the growth in the cases where the citizens of this country have been contracting marriages either in this country or abroad with foreign nationals. It is further pointed out that a large number of foreign decrees in matrimonials cases is becoming the order of the day and therefore, a time has come to ensure certainty in the recognition of the foreign judgments in these matters. In the absence of any legislation, the Supreme Court has taken initiative and ventured to lay down the minimum rules of guidance for securing the certainty in the matters of recognition of foreign judgments as according to it beginning has to be made as best as one can. The Supreme Court has therefore, observed:-

"We believe that the relevant provisions of section 13 of the Code are capable of being interpreted to secure the required certainty in the sphere of this branch of law in conformity with public policy, justice, equity and good conscience, and the rules so evolved will protect the sancity of the institution of marriage and the unity of family which are the cornerstones of our societal life."

31. In Narsimhrao's case, the Supreme Court has laid down certain guidelines for the interpretation of section 13 of the C.P. Code. Before turning to them it would be proper to deal with the submissions made by Shri Setalwad in connection with the said decision. According to Shri Setalwad, the judgment in Narsimhrao reiterates what is stated in Teja Singh's case. This submission is true but not completely. As discussed in the preceding para, the Supreme Court has gone a step forward in Narsimhrao's case. The second submission of Shri Setalwad is that on facts, the Supreme Court refused to recognize the decree of divorce passed by the Court at St. Louis, Missouri. The comparision need not stop here for what is laid down is of more concern and importance which I shall point out shortly. The third submission of Shri Setalwad is that the Supreme Court has sought to legislate and confer jurisdiction upon a Court which does not have jurisdiction. This submission is however, not tenable as the Supreme Court itself made it clear that it "can accomplish the modest job within the framework of the present statutory provisions if they are rationally interpreted and extended to achieve the purpose." The fourth and last submission of Shri Setalwad in this respect is that the guidelines given are prospective and they cannot be applied retrospectively to the cases which are concluded prior to 1991. I do not see any logic or reason in this submission. It is true that the Swedish Court passed the decree of divorce way back in 1964 but the question of its validity and conclusiveness has been raised for the first time in 1985 when defendant No. 2 filed his written statement. The said question is more specifically raised in this Notice of Motion filed in 2001. There is therefore, no reason why the ratio of Narsimhrao's case should not apply to this case.

Guidelines for Interpretation of section 13 C.P. Code

32. Turning to the guidelines laid down by the Supreme Court, it may be noted that Clause (a) of section 13 of the C.P. Code states that a foreign judgment shall not be recognized if it has not been pronounced by a Court of competent jurisdiction. In the instant case the decree in question was passed by the Swedish Court and the domicile of the deceased husband was India. The general and

well established rule of private international law is that the wife's domicile follows the domicile of the husband. Therefore, it must be held that at the relevant time viz. in 1964 the domicile of the deceased and defendant No. 8 was India. Shri Kotwal however, stated that the domicile of defendant No. 8 was Sweden and not India as she separated from the deceased in 1958 and went with her two children to reside permanently in Sweden. He also pointed out that in 1962 defendant No. 8 obtained a decree of judicial separation from the Swedish Court. It is not possible to accept the argument of Shri Kotwal for more than one reason. In the first instance it is not the plea of defendant No. 8 that she had acquired Swedish domicile. Till 1964 she was required to apply for her re-entry in Sweden. Secondly, so long as the marriage is subsisting, the domicile of the wife remains the same as that of her husband and nothing short of a decree of divorce, not even a decree of judicial separation, is sufficient to change her domicile. She can acquire a domicile of choice only after the dissolution of her marriage. Till then the husband's domicile is inseparable from her like a shadow.

33. The competency of the Court is to be decided with reference to the question of jurisdiction. If the Court has no jurisdiction then obviously it is not a competent Court to pass a decree. The submission of Shri Setalwad that only the Court of that country where the parties are domiciled is based on the old common law to which I have already referred. It held good till 1949 until the Law Reforms (Miscellaneous Provisions) Act, 1949 on the basis of which provisions Travers v. Holley and Indyka v. Indyka (supra), were decided in 1953 and 1967 respectively. Thereafter, the old concept has undergone a basic change and the domicilary theory which was obviously partial to the husband and tyrannical to the wife has been gradually substituted by the new theory of the defendant's real and substantial connection with the country of the forum Court and it has been statutority recognized in England by the Recognition of Divorces and Legal Separations Act, 1971. The said theory though not incorporated in any statute in India, has been acknowledged by the Apex Court in Marggarate v. Dr. Chacko and Surinder Kaur v. Harbex Singh (supra) in the matters of custody of minors. It may well be said that in such type of cases the paramount consideration being the welfare of the children, there is no strict adherance to the rule of jurisdiction. But at the same time it cannot be ignored that the courts have assumed jurisdiction on the basis of the persons to whom custody is given, having real and substantial connection with the country of the forum courts. It is true that in both Teja Singh and Narsimhrao (supra) the Supreme Court refused to recognize divorce decrees passed by Foreign Courts but such refusal was on the ground of fraud in connection with jurisdictional fact. In the latter case the guideline with regard to the interpretation of Clause (a) of section 13 is that it 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 recognizes as a Court of competent jurisdiction to entertain the matrimonial jurisdiction. 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. In the instant case, the deceased was a Hindu and defendant No. 8 is a Christian. They were married not under the Hindu Law in India but in civil form in New York, USA in 1952. It is not brought on record as to what was the law in 1952 prevailing in New York governing civil form of marriages. But it is clear that both the deceased and defendant No. 8 voluntarily and unconditionally submitted to the jurisdiction of the Swedish Court. Therefore, applying the aforesaid interpretation of Clause (a) of section 13, the Swedish Court will have to be held as a Court of competent jurisdiction. Shri Setalwad however, relied on Waman v. Ratilal, and

Chiranjilal v. Jasijit Singh, , to contend that it is not permissible to any party to rely upon a contract the making of which the law prohibits or would defeat the provisions of any law. He further contended that even by consent the parties cannot confer jurisdiction upon a Court by divesting the jurisdiction of a Court which really has the same. This is the normal rule which is acknowledged in Narsimhrao's case also but with three exceptions. In para 20, of the judgment it is observed:

"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 Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of parties."

In para 21, the Supreme Court has given justifications for these exceptions in the following words:

"The aforesaid Rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case. The Rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the Rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, nationality, residence-permanent or temporary or ad hoc, forum, proper law etc. and ensuring certainty in the most vital field of national life and conformity with public policy. The rule further takes account of the needs of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband and that it is the husband's domiciliary law which determines the jurisdiction and judges the merits of the case."

Therefore, when the deceased and defendant No. 8 voluntarily submitted to the jurisdiction of the Swedish Court, there is no reason why the Swedish Court should not be regarded as the Court of competent jurisdiction.

34. Turning to Clause (b) of section 13, it states that if a foreign judgments is not given on merits of the case, the courts in this country will not be conclusive. Consequently, the question of recognizing such a judgment does not arise. But the Supreme Court stated that it should be interpreted to mean:

"(a) that the decision of the foreign Court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the

parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the Court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the Court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court, should not be considered as a decision on the merits of the case."

In the instant case, both the parties have filed ordinary xerox copies of the translation of the judgment dated 23-4-1964 given by the Swedish Court. The translation filed by the plaintiffs is unofficial while that filed by defendants 1(a), 1(b) and 3 purports to be official. Both are uncertified photostat copies of English translation and strictly speaking both are not admissible under the Evidence Act. However, there is no dispute about certain basic facts and Shri Kotwal has no objection to go by the translation furnished by the defendants. It is admitted before me that the said petition was filed by the deceased Indrasen as the plaintiff against present defendant No. 8, as the defendant on the ground that after passing of the decree of judicial separation there was no resumption of cohabitation between the parties. It is also not disputed that the prayer for grant of divorce made by the deceased was consented to by defendant No. 8 and that accordingly the Swedish Court passed a decree of dissolution of marriage on consent of the parties. So far as the first condition is concerned, there is nothing on record to show that the aforesaid ground was available to the said parties under the law under which they were married civil form in New York in 1952. In fact we do not know as to what was the law then prevalent in New York for civil marriages. Under these circumstances, the first condition cannot be said to have been complied with. As regards the second condition, the contention of Shri Setalwad is that obtaining order by filing consent is no adjudication for the purpose of Clause (b) of section 13. This submission cannot be accepted since the Supreme Court has clarified that the second requirement is fulfilled when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the Court even by agreeing to the passing of the decree with or without appearance.

35. Clause (c) of section 13 states that the foreign judgment shall not be conclusive where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable. As regards the second part of the clause, the Supreme Court states:

"The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and no other law. When, therefore, a foreign judgment is founded on a jurisdiction or on a ground not recognised by such law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country. For the same reason, such a judgment will also be unenforceable under Clause (f) of section 13, since such a judgment would obviously be in breach of the matrimonial law in force in this country."

In this respect the contention of both Shri Setalwad and Shri Merchant is common. It was pointed out by them that the Hindu Marriage Act as it was in 1964 did not provide for a divorce by mutual

consent. The provisions of section 13-B regarding divorce by mutual consent came to be inserted in the Act in 1976. It is necessary to bear in mind that the Hindu Marriage Act came in force in 1955 whereas the marriage between the deceased and defendant No. 8 was solemnized in 1952. Secondly it was not performed in India and thirdly, it was not a marriage between two Hindus since defendant No. 8 is a Christian. It is nobody's case that before or at the time of her marriage, defendant No. 8 got converted to Hinduism. Nevertheless her marriage with the deceased who was a Hindu was valid and for the purpose of dissolution, it was governed by the Indian Divorce Act, 1869 as section 2 thereof authorizes the Court to grant relief only when the petitioner or respondent professes Christian religion and the parties are domiciled in India at the time when the petition is presented. Section 10 provides only one ground to the husband and that is adultery of the wife after the marriage. As against this, the wife can seek divorce on the grounds of conversion of the husband from Christianity, adultery, bigamy with adultery, adultery with cruelty etc. But the said Act does not provide for divorce by mutual consent. It is, therefore, contended before me that the divorce granted by the Swedish Court is contrary to or in refusal to recognise the provisions of the Indian Divorce Act which was applicable. This contention cannot be accepted because the Supreme Court has made it clear that the only law applicable to the matrimonial disputes is the law under which the parties are married and no other law. The Indian Divorce Act does not lay down any condition precedent to the marriage nor does it deal with the performance of marriages. Its object as evident from its preamble is to amend the law relating to divorce of persons professing the Christian religion and to confer upon certain courts jurisdiction in matrimonial matters. It is not a Marriage Act but a Divorce Act. Hence, there is no question of the deceased and defendant No. 8 being married under the provisions thereof. They were married in civil form in New York in 1952. Therefore, in view of the aforesaid interpretation and guideline given by the Supreme Court, the question of dissolution of their marriage will have to be decided with reference to that law under which they got married in New York. Since it is defendant Nos. 1(a), 1(b), 2 and 3 who are challenging the validity of the divorce decree or its conclusiveness, the burden lies on them to show how the dissolution of marriage between the deceased and defendant No. 8 is not in accordance with the law under which the marriage took place in New York in 1952. These defendants must show that the law under which the marriage was performed did not provide in 1964 separation between the spouses for two years and their failure to resume cohibitation, a ground for divorce. The defendants have failed to discharge this burden.

36. Clause (d) of section 13 states that a foreign judgment will not be conclusive where the proceedings in which judgment was obtained are opposed to natural justice. The Supreme Court has observed that this clause states no more than an elementary principle on which any civilised system of justice rests and that in matters of matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. It is observed in para 18 as under:-

"If the rule of audi alteram partem has any meaning with reference to the proceedings in a foreign Court, for the purposes of the rule it should not be deemed sufficient that the respondent has been duly served with the process of the Court. It is necessary to ascertain whether the respondent was in a position to present or represent himself/herself and contest effectively the said proceedings. This requirement should apply equally to the appellate proceedings if and when they are filed by either

party. If the foreign Court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the costs of travel, residence and litigation where necessary it should be held that the proceedings are in breach of principles of natural justice."

In the present case, the petition for divorce was filed by the deceased in the Swedish Court, and the wife i.e. defendant No. 8 was residing in Sweden for about six years. She put in her appearance in that case and gave her consent for divorce. Thus there was compliance of the condition contemplated by Clause (d).

37. Coming to Clause (e) of section 13 it states that a foreign judgment will not be conclusive if the same is obtained by fraud. Such fraud may be in relation to the merits of the matter or jurisdictional facts. It was contended before me that the said divorce petition was filed deliberately in Swedish Court circumvent the provisions of Indian Law which at the relevant time did not provide for divorce by mutual consent. The truth of this submission cannot be wholly denied. But it cannot be said that there was fraud in obtaining the divorce decree. Defendant No. 8 was residing in Sweden for about six years after separating from the deceased. She had therefore, a real and substantial connection with the place of the Court which passed the divorce decree. Thus two fora were available to the deceased; one in India and other in Sweden. The Court in the former would not have granted decree of divorce except on the grounds stated in the Indian Divorce Act. But factually none of those grounds was available to him. The ground on which he wanted divorce was permissible in Sweden. Therefore, there is nothing wrong or illegal if he chose to have recourse to Swedish Court. This cannot be termed as fraud but permissible convenience.

38. As regards Clause (f) of section 13, the discussion in regard to Clause (c) made in para above already covers it. Hence the same need not be repeated.

CONCLUSIONS

39. To sum up the foregoing discussion, I may formulate my conclusions as follows:- (i) Where in a matrimonial dispute judgment is passed by a foreign Court, its jurisdictional competency is ordinarily dependent upon the domicile of the parties: (ii) The domicile of the wife follows the domicile of her husband. Therefore, ordinarily it is the Court of that country where the husband has his domicile, which has the jurisdiction to pass a judgment in the matrimonial dispute; (iii) The above rule of common law operates very harshly against the wife who has for one reason or the other, to reside habitually or permanently in a country other than the country of her husband's domicile. The stringency of this rule is done away with by the modern theory which acknowledges the right of a wife to file a matrimonial proceeding in that country to which she has real and substantial connection by her habitual or permanent residence. This theory now finds place in the statutory law of England and has also been acknowledged by the Hague Convention on Private International Law, 1970. In the absence of any legislation to the contrary, the rules of International Convention can be followed in India. The said theory is accepted and followed by the Supreme Court in Narsimhrao's case (supra); (iv) The question of grant or rejection of matrimonial relief must however, be decided with reference to the law under which the parties got married; (v) The present

case falls under the third exception of the rule laid down in Narshimrao's case inasmuch as the deceased husband Indrasen Mirchandani and the wife Barbro Baeck (defendant No. 8) voluntarily submitted to the jurisdiction of the Swedish Court and consented to the relief of divorce. Therefore, the judgment of the Swedish Court has to be regarded as a judgment of the Court of competent jurisdiction within the meaning of section 13(a) of the C.P. Code, (vi) The said judgment does not violate the other conditions also stated in section 13 of the C.P. Code. Hence, for all purposes it has to be regarded as a conclusive judgment. As laid down in Vishwanath v. Abdul Wajid, , the courts in India will not inquire whether the conclusions recorded in the foreign judgment are supported by evidence or otherwise correct, because the binding character of such a judgment may be displaced only by establishing that the case falls within one or more of the Six Clauses of section 13 and not otherwise.

40. In view of the above conclusions the judgment/decree dated 23-4-1964 passed by the Swedish Court dissolving the marriage of deceased Indrasen and defendant No. 8 Barbro Baeck is held to be a judgment/decree passed by a Court of competent jurisdiction and it is conclusive and binding. Consequently, the subsequent marriage of deceased Indrasen with plaintiff No. 2 Chandra solemnized on 30-8-1964 as per Hindu Vedic rites is perfectly legal and valid under section 5 of the Hindu Marriage Act, 1955. Plaintiff No. 1 Shiv who was born on 13-11-1967 out of this lawful wedlook is therefore, the legitimate son of deceased Indrasen. Plaintiff No. 2 Chandra being the legally wedded wife of deceased Indrasen has locus and right to file the present suit for partition and declarations she has also locus and right to challenge the Will purporting to be of her husband as set up by the defendants and for that purpose she is entitled to file a caveat. Plaintiff No. 1 Shiv being the legitimate, son of deceased Indrasen will have a right to the properties of the HUF to which the deceased was entitled. I, therefore, record my findings on issues a(i) and (ii) as mentioned in the Notice of Motion accordingly. Issue No. a(iii) is not pressed before me. As regards the prayer (b) in the Notice of Motion there is no need to modify the order dated 29-3-1984 passed in Notice of Motion No. 1471/1983 under which the plaintiffs have been receiving income from the HUF properties.

41. In the result, the Notice of Motion is disposed of in the above terms with no order as to costs.

Certified copy expedited. A copy of this order duly authenticated by the P.A. Court stenographer is allowed.