

IN THE HIGH COURT OF BOMBAY AT GOA.

LETTERS PATENT APPEAL NO. 31 OF 1998.

Monica Variato, r/o
H.No. 7/83, Sinquerim,
Bardez Goa. ... Appellant.

Versus

Thomas Variato, son of
D.J.J. Furtado e Souza,
r/o H.No. E/8/7,
Candolim, Bardez Goa. ... Respondent.

Shri M.S. Usgaonkar, Senior Advocate with Shri Valmiki
Menezes, Advocate for the Appellant.

Shri S.D. Lotlikar, Amicus Curiae for the Respondent.

Coram: F.I. REBELLO &
V.C. DAGA, JJ.

Date: 19th June 2000.

JUDGMENT (PER REBELLO, J.)

Appellant and respondent were married on 4th October 1975 under the Special Marriage Act at Mumbai. They presented a petition for divorce by mutual consent under Section 36 of the Law of Divorce as applicable in the State of Goa. They also applied for provisional divorce. The petition was filed on 13th October 1988 both by the appellant and the respondent. The matter was taken up by the Civil Judge, Senior Division, Mapusa on the very same day. On 13th October 1988 there was an Order granting provisional divorce for a period of one year in terms of Article 39 of the Law of Divorce.

2. On 30th May 1990 the appellant herein filed an application. In that application it was averred that one year had lapsed from the date of the provisional

divorce. It was further contended that the appellant herein still maintained her decision of seeking divorce as relations between the appellant and respondent had broken down irretrievably. Appellant therefore sought decree of final divorce. Respondent, on receiving a copy of the application set out that the respondent was married at Mumbai where the petitioner no.1 was permanently residing. The appellant was German national at the time of their marriage and continued to be so. The marriage, therefore, it was contended, having been solemnized under the provisions of the Special Marriage Act, their rights and obligations are governed by that Act. The Law of Divorce as applied in the State of Goa, therefore, it is contended, would not apply. It was further contended that the signature of the respondent was obtained by the appellant on the joint application by deception. The respondent averred that when he signed the petition he was fully drunk and not in his proper senses. He also contended that even otherwise he was withdrawing his consent.

In a rejoinder the appellant set out that at least for 10 years previous to the filing of the joint application, the appellant and the respondent were domiciled in Goa. The respondent, therefore, could not turn around and challenge the jurisdiction of the Court.

3. The trial Court by its Decree dated 23rd April 1996 dismissed the application for divorce by mutual consent. While so holding the Court held that the marriage was not transcribed before the Civil Registrar's Office. The Court held that there was no marriage between the appellant and respondent under the law of the land. In these circumstances, the Court held that the parties were not eligible for divorce under laws in force in Goa. The Court then held that as the parties had married under the Special Marriage Act, the proper course was to apply for divorce under the Special Marriage Act in the Court having jurisdiction.

4. Against the said Order the appellant herein preferred an appeal before this Court. The same was numbered as First Appeal No. 77 of 1996. Before the learned Single Judge it had been contended that a Portuguese male and a foreigner contracting a marriage in a foreign country would still be governed by the provisions of the Portuguese Civil Code pertaining to marriages. Merely because the marriage was not registered in Goa, it is contended, that would not cease to be a valid marriage. On behalf of the respondent herein, it was contended that Article 1107 of the Portuguese Civil Code would not apply. The marriage, it was contended, was performed under the Special Marriage Act, 1954. The remedy of the party, therefore, would be

to apply under Section 31 of the said Act before the District Court. The Act, it is contended, has not been extended to the State of Goa as when the Act was enacted, Goa was not a part of India.

By Judgment dated 5th November 1997, a learned Single Judge of this Court dismissed the appeal. While so holding, the learned Single Judge held that the petition filed under Chapter III of the Law of Divorce as applicable in this State was not maintainable. The reason for so holding was that the appellant and respondent had married under the Special Marriage Act, 1954. The Court further held that the proper course for the parties was to apply for divorce under Section 28 of the Special Marriage Act, 1954 in the Court having jurisdiction.

5. With the above background we may now deal with the issues that arise before us and which have been argued. Shri M.S. Usgaonkar, senior counsel appearing for the appellant firstly contended as under:

(1). Even if the Special Marriage Act applied to the parties, the forum for filing the petition for divorce was the competent Court of civil jurisdiction in Goa having territorial jurisdiction and jurisdiction as to subject matter. The Special Marriage Act having not

been extended to the State of Goa, the District Court would have no jurisdiction;

(2)(a). Even if the marriage was solemnized in Mumbai under the Special Marriage Act, the parties immediately after the marriage shifted their residence to Goa. The respondent was governed by the Family Laws of Goa. They have been residing in Goa since 1977. Their domicile is Goa. The laws applicable would be the laws pertaining to divorce in Goa. The joint petition as filed, therefore, it is contended, would be competent to be heard and decided by the Court before which it was filed;

(2)(b). The respondent, it is contended, was of Goan origin. The law applicable to him would be the Law of Divorce as applicable to Goa.

(3). The petition for divorce, it is contended, would be governed by Articles 1472, 1473, 1474, 1475 and 1476. A co-joint reading of the said Articles would show that once there was a preliminary decree on the petition for divorce by mutual consent, the jurisdiction of the Civil Court, when parties were present before it, was only to find out if there could be reconciliation. If reconciliation was not possible, the provisional decree had to be made final. Reliance

for that purpose was placed on the Commentary of Divorce and Separation by Mutual Consent by Professor Alberto Dos Reis in his book "Processo Volume 2".

6. Shri Lotlikar, learned counsel who was appointed Amicus Curiae to assist the Court, has argued that considering the fact that both the appellant and the respondent were domiciled in Goa, if the Special Marriage Act applied, then the Court of civil jurisdiction having jurisdiction over the subject matter would be the competent Court to hear and decide the application for divorce by mutual consent. In the instant case the Civil Judge, Senior Division, Mapusa would be the competent Court having both territorial jurisdiction and jurisdiction over the subject matter. The District Court, it is contended, would have no jurisdiction as the Special Marriage Act has not been extended to the State of Goa.

In the alternative, it is contended, having regard to the pleadings, it is apparent that their domicile is the State of Goa. Once they were domiciled in Goa, the provisions that would be applicable would be the grounds for divorce as available under civil law existing in Goa. The matter, it is contended, has proceeded on the footing that the respondent though resident in Mumbai at the time of marriage, the Personal

Law applicable to him was the laws applicable in the State of Goa. On merits, however, learned counsel contends that once the respondent withdrew his consent, the Civil Court would have no jurisdiction to pass the final decree of divorce whether under the Special Marriage Act or the Family Laws of Goa. It is contended that the parties must not only move a joint application at the time when the provisional divorce is applied for but also for divorce by mutual consent. The consent, it is contended, must continue even at the stage of passing the final Decree. In the instant case apart from the respondent pleading that the signature was obtained when he was incapacitated of thinking for himself, he had withdrawn his consent. No Decree for divorce, therefore, could have been passed.

7. We will now deal with the issue as to whether it is the Special Marriage Act that would govern the Law of Divorce insofar as the appellant and the respondent are concerned. This is because both the trial Court and the first appellate Court have so held. If the Special Marriage Act is applicable, the next question that will have to be answered is which is the Court before which the application for divorce by mutual consent has to be filed.

Pleadings indicate that at the time of the

marriage respondent was residing at Mumbai. Learned counsel for the respondent points out that the marriage certificate would indicate that the respondent was of Goan origin. The appellant admittedly is a German national. The marriage has been solemnized under the Special Marriage Act. We proceed on the footing that the marriage was solemnized at Mumbai under the Special Marriage Act. Even if the respondent's permanent domicile was Goa, all that has to be considered at the time of contracting the marriage would be whether the parties had capacity to marry. It is not disputed that the appellant and the respondent were not suffering from any incapacity. They could, therefore, marry under Special Marriage Act. After solemnizing the marriage the material on record shows that in the year 1977 they shifted to Goa and ever since have been residing in Goa, even on the date of the application for divorce by mutual consent. The appellant and the respondent, therefore, for all intents and purposes have their domicile in the State of Goa. Insofar as Personal Law is concerned, we will have to examine whether on shifting of the domicile to Goa, the Special Marriage Act would continue to govern the parties. The Special Marriage Act has not been extended to the State of Goa. Could, therefore, a petition for divorce be maintainable under that Act in the State of Goa.

8. It is common ground that a divorce by mutual consent is available both, under the Special Marriage Act as also the Divorce Law in Goa. Both enactments provide a ground for dissolution of marriage by divorce by mutual consent. Insofar as the Special Marriage Act is concerned, it is Section 28. That is the subject matter of the Judgment by the Apex Court in the case of Smt. Sureshta Devi v. Om Prakash, A.I.R. 1992 S.C. 1904. The Court there was dealing with a matter under Hindu Marriage Act. The Court noted similarity of language between Section 13-B of the Hindu Marriage Act and Section 28 of the Special Marriage Act, 1954. The Court held that for a party to get a divorce apart from filing a joint petition, at the time of inquiry if there is no mutual consent, the Court gets no jurisdiction to make a Decree for divorce. It is no doubt true that Shri Usgaonkar tried to contend that in the case of Ashok Hurra v. Rupa Bipin Zaveri, (1997) 4 S.C.C. 226, the Apex Court has noted that in the Judgment of Smt. Sureshta Devi, the issue whether a party to a joint application under Section 13-B of the Hindu Marriage Act could withdraw his consent beyond the time limit provided did not arise for consideration and, therefore, in fact need not have to be decided and may have to be considered in an appropriate case. Suffice it to say that insofar as this Court is concerned though the Supreme Court has expressed doubt, has not departed from

the view taken in Smt. Sureshta Devi (*supra*). The ratio in Smt. Sureshta Devi (*supra*) would be binding on this Court. We, therefore, proceed on the footing that as laid down in Smt. Sureshta Devi's case (*supra*) for a decree of divorce by mutual consent not only must there be consent at the time of filing the petition but there must be also consent at the time of filing motion of consent as then only the Court would have jurisdiction.

9. Let us now consider the position of law under the Divorce Law as existing in the State of Goa. For the purpose of maintaining an application for divorce by mutual consent the spouses should be married for more than 5 years and should have completed at least 25 years of age. This is provided in Article 1472. Article 1473 provides the procedure to be followed while filing the petition. Article 1474 states that when the petition is properly filed, a meeting shall be called of the spouses and their parents as well as children above 18 years. The personal presence of the spouses is essential. For the purpose of deciding the issue in controversy herein it will be essential to reproduce Articles 1475 and 1476. They read as under:-

"Article 1475 - At the time of the meeting, the Judge shall impress upon the spouses to desist from their purpose, drawing their attention in particular to the adverse effects of divorce or separation, as to the future of the children.

If the spouses maintain their decision, minutes of the divorce or the separation by mutual consent shall be drawn, which shall be signed by the persons who are present.

The agreement of the spouses shall be homologated and provisional divorce or separation shall be granted for a period of 1 year. Such grant, has the effect of suspending the joint living of the spouses and enable the wife to apply for listing of the movables and for provisional maintenance, and as to the children clause (d) & (e) of Article 1473 shall come into effect.

Sole paragraph. The maintenance can be asked at the time of the meeting and after hearing the spouses and persons who are present the same shall be fixed in the Judgment of the homologation.

Article 1476 - After the lapse of 1 year, if the spouses do not apply for new meeting, the office, within 30 days, shall present the file to the Court, with information that period of provisional separation or divorce has ended. The spouses, the parents and children shall be notified to appear again.

When the spouses are present, the Judge once again shall try to reconcile them. If he succeeds or if there is already previous reconciliation, the provisional divorce or separation shall be declared of no effect; if it is not possible to reconcile them, the final decree of divorce or separation will be passed.

In case both the spouses or one of them do not appear, the provisional divorce or separation will be of no effect.

The Judgment which decrees the final divorce or separation shall have same effect, as if it was passed in contentious proceedings; the effects of final decree will retro act, as to the properties, from the date when the

provisional divorce or separation was granted.

Sole paragraph. The spouse who is absent from the continent or island where the meeting is to be held as provided in the Article, may be represented by attorney with special powers."

It may be mentioned that the trial Court as also the learned Single Judge has proceeded based on Articles 36 to 42. Those Articles were not in force. What were in force were the Articles referred to and the Articles reproduced above.

For the purpose of considering the submission of learned counsel for the appellant it may be necessary to reproduce old Article 40, which reads as under:-

"Article 40 - After the lapse of one year, the spouses shall appear again before the Judge of their own accord or on an application made by either of them in order to declare whether they still maintain their decision and the record of this hearing shall be drawn up with the same safeguards as in Article 37. Where a reconciliation between the spouses is arrived at or if they have already reconciled, the Court shall pass judgment invalidating the provisional divorce; if they uphold their previous resolution, the Court shall again sanction by judgment their agreement and then make the divorce absolute.

Paragraph 1. For the purpose of this Article the Court clerk shall, of his own initiative, place before the Judge the file, after the lapse of a period of one year from the first Judgment, if within the next 30 days the spouses do not appear before the Judge or no application is filed by either of

them.

Paragraph 2. The notice to which this Article refers shall be served in person, under commission, or by substituted services, as required according to the general law. Upon service of notice, the failure of either spouse to appear shall be regarded as evidence of non-reconciliation.

Paragraph 3. After the order is passed making the divorce absolute, the provisions of Article 19 and its paragraphs shall be observed.

Paragraph 4. The provisions of Articles 26 to 33, both inclusive, are extended to the absolute divorce to the extent applicable with the restriction that permanent maintenance may be applied for only after Judgment granting absolute divorce."

It is the contention of the learned counsel that once a provisional decree is passed, the second meeting called under Article 1476 is only to inquire whether there can be a possibility of reconciliation. If there is no reconciliation the Decree must be confirmed. In support of this contention, learned counsel seeks to rely on the Commentary by Prof. Alberto dos Reis from Chapter III "Divorce and Separation by Mutual Consent" from the Book 'Processos Especiais' Volume II. The learned Author therein has tried to compare the position under the old law and the position under the new law. It is the contention of the learned Author that the new Article was introduced only for the purpose of examining whether there could be reconciliation before final divorce. The learned

Author, however, notes that a new paragraph was introduced by the Review Commission. The new Article as introduced provides that non-appearance signifies desistance/relinquishment by the spouses to the proposal for separation by divorce. The proposal was approved by majority.

On a reading of Article 1476 we are unable to accept the contention made on behalf of the appellant by the learned counsel. Paragraph 3 of Article 1476 sets out that if one of the spouses does not appear, the provisional divorce or separation will be of no effect. If this be the position, the meaning sought to be given to Article 1476 that it was enacted only for the purpose of reconciliation cannot be accepted. A party appearing and opposing the application for divorce for whatever reason cannot be put on a different footing than a spouse who stays away. Articles 1475 and 1476 on a joint reading contemplate that there must be consent when the provisional decree for divorce is passed. This consent must continue till the final decree is made. If the consent is withdrawn by any of the spouses, at any point of time before the final decree is passed, the Court will have no jurisdiction to grant decree by mutual consent. This position of law is as similar to the position as contained in the Special Marriage Act.

We, therefore, do not find merit in the appeal insofar as the appellant is concerned whether under the Special Marriage Act or the Divorce Law applicable to Goa.

11. That, however, does not answer the issue altogether. In the instant case the first appellate Court has given a finding that the marriage would be governed by the Special Marriage Act. Once the Special Marriage Act is applicable, then the petition must be filed before the District Court. It is an admitted position that the Special Marriage Act has not been extended to the State of Goa. The District Court, which otherwise is not a Court having pecuniary jurisdiction to try suits by the Special Marriage Act, has been conferred a special power. If the Act is not extended, admittedly the District Court would have no jurisdiction. We may also mention, at this stage, that the other Family Laws as existing in the other States of the country, namely, The Hindu Marriage Act, 1955; The Indian Divorce Act, 1869; The Parsi Marriage and Divorce Act, 1936 and the Dissolution of Muslim Marriage Act, 1939 have also not been extended to the State of Goa. The only law which is applicable in the State of Goa are the Family Laws, which existed at the time of Goa's Liberation which includes Marriage and Divorce. How does the Court then decide the issue of dissolution

of marriage as in the instant case? We may note that the evidence on record does not indicate whether the respondent was a Portuguese National at the time of Liberation or an Indian citizen. The only material on record is an averment in one of the applications by the respondent that he was a permanent resident at Bombay at the time of the marriage. They were married under the Special Marriage Act. They, however, have their matrimonial home in Goa. They were domiciled in Goa. If not they had their habitual residence in Goa.

What then will be the position in law in a case where in one State of the Union, the laws pertaining to dissolution of marriage are different from the laws existing in the other States and/or the laws made by a Central Enactment are not applicable? It has been accepted that for the purpose of dissolution of marriage in such a situation it will be subject to the rules of Private International Law. This would follow from the Judgment in *Shankar Vishnu Burhanpurkar v. Maneklal Haridas Gujrathi*, A.I.R. 1940 Bombay 362. A Division Bench of this Court speaking through Chief Justice Beaumont observed as under:-

"No doubt, the Province of Bombay and the Central Provinces are both part of British India, but, in my opinion, where the law of one province of British India is distinct from the law of another province, the two provinces must be regarded for the purposes of

this rule as foreign countries inter se. In my view, the proper law of this contract is the law in force in the Province of Bombay, and the contract cannot be discharged by a method recognized in the Central Provinces, but not in Bombay."

In Parwatawwa v. Channawwa, A.I.R. 1966

Mysore 100 , the Division Bench of the Mysore High Court was concerned with an issue of validity of marriage of a person belonging to a Constituent State of the Union. One Siddalingiah died in 1954. His wife Siddavva who survived him died in 1956. The defendant in the suit was their daughter. One Channawwa claimed to be the second wife of Siddalingiah. She filed a suit claiming that she was the second wife having been married in Bombay and she claimed all the assets to the exclusion of the defendant. The High Court held that validity of the marriage would have to be governed by the laws of the place of celebration or the lex loci celebrationis. The trial Court held that the marriage was void as it was prohibited in the State of Bombay. The District Judge dissented from that view and held that the Bombay Act did not invalidate a marriage between spouses, one of whom was not domiciled in the State of Bombay. Siddalingiah, according to the District Judge, had no Bombay domicile but was a person with a Hyderabad domicile and, as there was no Hyderabad law prohibiting Polygamy, the marriage was held not void although the plaintiff was domiciled in Bombay. It is in this context that the issue arose as to what is 'domicile'.

After considering various aspects of the law and reference to Commentaries the Division Bench of Mysore, insofar as the domicile of the State was concerned, observed as under:-

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

This was the view taken by the Apex Court in D.P. Joshi v. State of Madhya Bharat and another, A.I.R. 1955 S.C. 334. The Court noted that under the Constitution the power to legislate on succession, marriage and minority has been conferred under Entry 5 in the Concurrent List on both the Union and the State Legislatures, and it is, therefore, quite conceivable that until the Centre intervenes and enacts a uniform code for the whole of India, each State might have its own laws on those subjects, and thus there could be different domiciles for different States. The Court

referred to various meanings of the word 'domicile' as given in various legal dictionaries.

12. Thus, in the present case, the situation is whether the respondent and the appellant had a habitual residence or domicile in Goa. Position prevailing in English Law has been expressed thus in Cheshire and North's Private International Law, 10th Edition, that the test of jurisdiction for granting divorce was finally established, at common law, by the decision of the Privy Council in Le Mesurier v. Le Mesurier. That case decided that domicile, in the true and technical sense of the term, of the husband at the time of the suit was the sole general test of jurisdiction. With such domicile the Court had jurisdiction over a foreigner as well as over a British Subject; without such domicile it had no jurisdiction, even though the parties were British subjects. The learned Authors have then noted as under:-

"The sole question in each case was whether the husband was domiciled in England at the time of the suit. Nothing else was relevant. The nationality of the parties, their residence, their submission to the jurisdiction, their former domicils, or the fact that they were domiciled elsewhere when the misconduct upon which the suit was founded occurred -- none of these was pertinent to the existence of jurisdiction."

In passing it may be noted that earlier the law for dissolution of marriage was governed strictly based on domicile. Subsequent to the Hague Conventions, English Law now also accepts the concept of habitual residence. Insofar as the choice of law is concerned, the learned Author has observed as under:-

"When the sole basis of the jurisdiction of the English Courts in divorce was domicil, no choice of law problem arose. English law was applied and this could be justified either as the application of the *lex domicilii* to issues affecting status or as the application of the *lex fori* on the basis that dissolution of a marriage is a matter which "touches fundamental English conceptions of morality, religion and public policy," and one which is governed exclusively by rules and conditions imposed by the English legislature."

Dicey and Morris in 'The Conflict of laws', Volume 1, Tenth Edition in the matter of 'Choice of Law' has observed as under:-

"The question of choice of law has never been prominent in the English rules of the conflict of laws relating to divorce or judicial separation, which have always been treated as primarily jurisdictional questions. On the one hand, as we shall see, English courts when deciding whether to recognise foreign divorces have looked only to the jurisdiction of the foreign court, and have never examined the grounds on which the decree was granted in order to see whether they were sufficient by English law. On the other hand, when English courts have themselves assumed jurisdiction, they have never applied any other

divorce law than that of England."

Insofar as India is concerned what would be the choice of law? In the first instant, Paras Diwan in his book 'Private International Law' has noted that residence for the purpose of matrimonial jurisdiction of the Indian Courts means:- The place where the parties have set up a matrimonial home or the place where the parties already have a permanent home or live together, is the place where they have their residence. The learned Author then proceeded to hold that though there is not much authority, it seems clear that once the Indian Court decides that it has jurisdiction to entertain the proceedings for divorce, then it would apply the personal law of the parties. If the marriage is performed abroad or if it has some foreign elements, the Court would apply the provisions of the Special Marriage Act, 1954. These observations of the learned Author are based on the Judgment of a Single Judge of the Rajasthan High Court in the case of Christopher Andrew Neelakantan v. Mrs. Anne Neelakantan, A.I.R. 1959 Rajasthan 133. The marriage was solemnized in England. The husband came down to India and was posted at Jodhpur. The wife refused to join him. In these circumstances, a petition was filed for divorce under the Special Marriage Act before the District Court at Jodhpur. At that time the petitioner was admittedly residing in Jodhpur. The Court held, after considering the law, that even if the marriage was solemnized abroad

and as the petitioner therein was residing in India, on the principles of Private International Law the Jodhpur District Court within whose jurisdiction the petitioner lived would be the Court having jurisdiction.

In *Hariram Dhalumal Karamchandani v. Jasoti w/o Hariram*, A.I.R. 1963 Bombay 176, a learned Single Judge of this Court sitting at Nagpur was considering the issue of dissolution of marriage which had been solemnized in Karachi before partition. Parties migrated to India after partition. The husband resided in Delhi. The wife in Nagpur. Petition was filed for divorce at Nagpur. The Court after considering the law held that in these circumstances it would be the Civil Court at Nagpur which would have jurisdiction.

Insofar as application of law is concerned, we may now briefly refer to the Judgment of the Apex Court in *Smt. Satya v. Teja Singh*, A.I.R. 1975 S.C. 105. In that case the issue was of recognition of a foreign decree of divorce. It is in that context that the Apex Court observed as under:-

"It is no doubt true that whether it is a problem of municipal law or of Conflict of Laws, every case which comes before an Indian Court must be decided in accordance with Indian law. It is another matter that the Indian conflict of laws may require that the law of a foreign country ought to be applied in a given situation for

deciding a case which contains a foreign element. Such a recognition is accorded not as an act of courtesy but on considerations of justice. It is implicit in that process that the foreign law must not offend against our public policy."

In Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and another, A.I.R. 1984 S.C. 1224, both spouses had made England their home. The father ran off with the minor boy to India. The wife got an order whereby the boy became the Ward of the Court in proceedings filed in England. She thereafter came to India and filed a petition before the Judicial Magistrate, First Class, Jagraon. The husband opposed the petition. Petition was dismissed. She went back to England and came back with the English order and filed a Writ Petition in the Punjab and Haryana High Court. A learned Single Judge who heard the matter dismissed the matter. It is against this order that the matter has now reached the Apex Court. While considering the law which would apply in such a case the Court observed as under:-

"Ordinarily, jurisdiction must follow upon functional lines. This is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with well-being of the spouses and the welfare of the offsprings of marriage." .

13. Having said so, considering the facts of this case, we will have to answer the question as to which is

the law the appellant and the respondent would be governed by. The marriage admittedly was solemnized under the Special Marriage Act at Mumbai. The appellant and respondent thereafter are domiciled and/or have their habitual residence in Goa. If the tests of Private International Law are applied, the law to be applied would be the law as applicable in the State of Goa. In that situation the Special Marriage Act would not apply. The view above would be the view if principles of English Private International Law are made applicable and some observations of the Apex Court. The principles of Private International Law are not universal. they vary from State to State. What may be applicable in one State may not be applicable in another State. In the instant case we are not really concerned with a marriage that took place in a foreign country. We are concerned with a marriage that took place in a Constituent State of the Union. Each community based on their religion have their own personal laws in the rest of the country except where these laws are not extended. Goa is one such place. For the purpose of Private International Law the marriage solemnized at Mumbai can be said to be a marriage in a foreign country. If the rules of Private International Law are to be applied, then if parties are domiciled and/or have their habitual residence in Goa, proceedings for divorce would be as per the law in force in the State of Goa. That would create difficulties insofar as marriages performed

under personal laws prevailing in the Constituent States of the Union. Personal Laws of each community are recognised. To that extent Private International Law insofar as marriage or divorce is concerned, would be the personal law and it is that personal law which would be applicable. This approach has been considered amongst Hindus governed by the Mitakshera or Dayabhag School. In such a situation insofar as appellant and respondent are concerned, it would be the Special Marriage Act. Such a view has been taken by the Rajasthan High Court in a case where marriage was solemnized in England but the husband came to reside in Rajasthan. The appellant, however, has approached this Court on the ground that they are domiciled in Goa and as such the Goan law would apply. Alternatively it was contended that the respondent was of Goan origin. Being of Goan origin irrespective of the fact that he was residing in Mumbai he would still be governed by the Portuguese Law of Divorce applicable to the State of Goa. There is no evidence on record to give any finding on that count. To give a finding it would have to be considered whether the respondent at the time of his marriage was a citizen of India or had continued to maintain Portuguese nationality at the time of Liberation or when the Citizenship Order conferring citizenship to Portuguese nationals of Goan origin was passed. In that kind of situation, it would be the Law of Divorce as prevailing in the State of Goa. Insofar as residence of

the wife is concerned, it would be immaterial as in Indian Law the domicile of the husband would be the domicile of the wife.

14. The Special Marriage Act has, however, not been extended to the State of Goa. What then would be the forum to decide the issue in the State of Goa. There can be no vested right in a forum. Private International Law accepts that the forum and procedure as to the extent applicable will be the law of domicile. In that view of the matter it will be the civil Court exercising jurisdiction in divorce matters in the State of Goa that will hear and decide the petition.

15. With that the answers to the questions formulated are as under:-

(1). If the Special Marriage Act applies, it is the competent Court of civil jurisdiction deciding matrimonial matters which is the Court in which the petition would be filed.

(2)(a). We hold that even applying the principles of Private International Law, bearing in mind various personal laws in this country, eventhough the spouses are domiciled in Goa in respect of a marriage preformed outside Goa but in any other State of the Union

they would be governed by their personal laws insofar as dissolution of marriage is concerned.

(2)(b). There is no material on record to hold that at the time of marriage the respondent was governed by the personal law in force in Goa including divorce.

(3). Consent for granting divorce by mutual consent must not only exist at the time when presenting the petition and at the passing of the provisional Decree, it must also continue till the date of the final decree. If any party remains absent or withdraws the consent, the Court would have no jurisdiction to grant decree of divorce by mutual consent.

16. With the above observations, we dismiss the appeal. As the respondent was not represented, Shri S.D. Lotlikar was appointed as Amicus Curiae to assist the Court. We place on record our appreciation to the Amicus Curiae for assisting the Court. In the light of that, appeal dismissed.

In the circumstances of the case, however,

there shall be no order as to costs.

(F. I. REBELLO)

JUDGE.

(V.C. DAGA)

JUDGE.

ed's.