

Jar. Every religion imposed many formalities and usages to observe by custom or otherwise from generations past. If a female is equated with that of male would the society agree to perform obsequies and spiritual manifestations to the deceased? Do the society accept this Radical change in custom? Does it not amount to interference with the mode of performing various rituals, ceremonies, needs of its religion on the death of the deceased ancestor? In no religion, a female is allowed to perform the ceremonies of spiritual nature for the past many generations. The moment a daughter is married she becomes a member of other family. She is not obliged to perform spiritual manifestations on the death of the father or mother as the case may be. Even if allowed under law, imposition becomes *OTIOSE*.

This amendment is directly and by implication disturbs the system of religion. It could never be to the taste of any religion. Thus the Act becomes un-implementable. Law should not be passed which is not acceptable and would not be implemented.

Persons of different categories, accustomed to a particular school of thought and faith expressing their devotion or faith towards

their deceased ancestors should not be disturbed.

The daughter takes away share along with his son, without any religious obligations to her ancestors.

So freedom of religion means, the incidents and functions or the ceremonies prescribed by the religion. Such things cannot be disturbed. It amounts to violation of the Constitution which is guaranteed under the heading "Freedom of Religion" This situation leads to a chaotic condition.

This is the reason why if a rule or a Legislation or custom is followed by the citizens for generations past the principle *stare decisis* should be maintained.

Further a female becomes entitled to inheritance in the case of intestacy as a daughter, as a mother and as a widow.

Now in view of all these Radical Changes under the present Act, can it be said that 1956 Act is improved by Act 39 of 2005 (The Hindu Succession (Amendment) Act)?

Hence, this Act deserves reconsideration keeping in view, the "Freedom of Religion conferred as a Fundamental Right.

NRI MARRIAGES: CAUSES OF CONCERN AND CONFLICT OF LAWS

By

—Dr. Y. PADMAVATHI,
Advocate,
A.P. High Court*

There is an alarming breakdown of NRI marriages resulting in a large number of Indian women helpless in an alien country, has become a cause of major concern. There is need to analyse the causes of the frequent breakdown of NRI marriages and identify areas of concern. In issues relating to marital

status, divorce, maintenance, guardianship, the application of private international law comes into picture.

This study is divided into three parts. Part I discusses the facts of cases with respect to NRI Marriages/engagements handled by

* The Author is also on the Faculty, ICADR, Hyderabad. A draft version of this paper was presented at the Annual Conference of FWLAP, on 14th April, 2007, at KLN Prasad Auditorium, Hyderabad.

the author and attempts to identify new areas of matrimonial causes of disputes and to indicate causes of concern and give some suggestions. Part II of the study deals with the nature and scope of the conflict of laws. Part III of the study discusses the case law on recognition of foreign judgments by the Indian Courts with respect to matrimonial reliefs like divorce, maintenance, and guardianship.

Objective of the Study

The objective of the study is to analyse new causes of disputes in NRI Marriages and to identify causes of concern. The study also aims to discuss the nature and scope of private International law with special focus on matrimonial causes of disputes. The study further aims to analyse judgments rendered by Indian Courts regarding recognition of foreign judgments and tries to explore if there is need for Indian legislation on this subject.

Limitation of the Study

The scope of the subject being very vast, only a restricted study is made.

Methodology of the Study

Apart from study of case law, different standard text books on subject are referred to. Author's own experience over one and half decades in dealing with cases on NRI marriages and related problems is useful. Informal discussion with Prof. *Sudarshan Rao*, Principal, AMS Law College for Women, Dr. *Rahul A. Shastri*, Joint Director, NAD, Smt. *Anita Chandra*, Managing Partner, New Delhi Law Offices, Hyderabad, are useful.

PART I

NRI Marriages and Causes of Concern

As I proceeded to attend the cases as a Counsellor or an advocate with respect to NRI marriages, an analysis of facts reveal

new causes for matrimonial litigations giving scope to new areas of concern. A few cases of importance that I have dealt with are discussed here under. In order to preserve the anonymity of the parties, the names are changed.

In *Manjula's*¹ case both wife and husband were working in Australia. There was a constant mental and physical harassment from the husband, also instigated by in-laws from India through emails and phone calls. The harassment continued when the couple visited India for a holiday. There was no dowry harassment. Husband was jealous of the wife as her career was more in upswing and her research articles were published and appreciated. A child was born out of wedlock. Wife bore the harassment of husband at Australia in order to save the marriage. Also she confided that she hates a lone home without husband as she was residing very far from India and it is difficult to bring up child alone. Many a times she was locked out of the house and only after a day or two-days she would be allowed to get into the house.

Finally, when the couple came to India for a holiday, she was physically beaten by her husband and in-laws, she was constrained to give a criminal complaint under 498 A IPC. Eventually the marriage ended in a divorce on mutual consent in Australia.

Causes of concern:

1. Difficulty to prosecute the case under IPC 498A, as she has to go back to work to Australia.
2. Lack of social/family support systems for her in Australia as she was very far from the parental home. For the same reason, though she was financially independent, she had to put up with the physical and mental cruelty.

1. This is a case where both wife and husband are software engineers, husband's sister is a Ph.D. holder and a faculty Member in a reputed University.

3. The cause of matrimonial dispute was not dowry harassment. Interestingly it was jealousy and ego problems of husband and in-laws.

Another case I dealt as an advocate is *Mitra's*². In this matter she filed an OP for Declaration of Nullity of Marriage or alternately for Decree of Divorce before Family Court, Hyderabad. In the instant case the husband was not fit for marital life. His family without disclosing the impotency of the bridegroom, got their son married to Ms. *Mitra*. *Mitra's* husband was working in Singapore and she joined her husband at Singapore to have a marital home. *Mitra's* family was a middle class family, spent a fortune on the marriage of their only daughter. *Mitra* was in a position to get a RBI officers job, she gave up her career and joined her husband at Singapore. She did not disclose the impotency of her husband to her parents as she was afraid that her parents may collapse after knowing such fact from her. The husband suffered inferiority complex due to his impotency and used to harass wife. There also was interference from in-laws through emails and phone calls. Husband used to collect 600 Singapore dollars for maintaining his wife. Many a times he used to lock the wife in the house or put her out of house. Finally, he booked a one way flight ticket and sent her to India with an intention to permanently abandoning her.

During the trial, we realized that as the husband knew the email ID of his wife, he created a false evidence against wife to show that she was sending money to her parents. As there was an interim order for maintenance, he was not willing to pay that small amount also. It was very difficult for the wife to obtain evidence regarding proof

of his income, as he is working in a foreign country. When the Court ordered for medical examination of husband, he avoided the same with many pretexts and finally never appeared before medical board duly constituted by the Court.

Causes of concern:

- (1) The mental trauma and shock, the girls undergo in a NRI marriage is more because lack of social/family support systems in a far off place.
- (2) Parents of the girl hoping that the daughter is happily placed in a marital home with all material comforts are too shocked to know the kind of cruelty inflicted on their daughter. They spend their life time savings on marriage expenses and gifts to the wedding party, left with no money to help financially their daughter to resettle her life, as they themselves are broke financially.
- (3) The girl who could not save her marriage in spite of her best efforts loses trust in humanity as such and it is very difficult for her to get back to her normal psychology. Her career prospects are also equally ruined as it would be very difficult for her to get back same self confidence and concentration in work which she had before.
- (4) She could have been an officer in RBI otherwise, but she opted to be a school teacher in a nursery for the sake of peace.
- (5) As her unhappy marriage lasted for 6 years eventually ended in declaration of nullity of marriage by competent Court, her re-marriage prospects also effected adversely due to overage factor.
- (6) The Courts as well as the advocates have to have sufficient computer knowledge to handle the cases related

2. In this matter *Mitra* is a graduate and a brilliant girl, who qualified for a RBI Officers written examination before her marriage and both her parents were clerks in a nationalized bank and retired.

to NRI marriages, as stealing of email ID, generation of false evidences through computers *etc.* are involved.

- (7) The fight between deserted wife in India who lost marriage and career in life and a husband working for a multi national company at Singapore is also an unequal legal battle. The husband and his family engage best of advocates in the profession apart from playing many tricks. It is difficult to serve summons, attach any property, as there would be no property in husband's name, also difficult to get proof of husbands' income.

The case of *Keerthi's*³ there was a demand on the wife's parents that a house in the Jubilee hills to be transferred in the name of son-in-law. Initially the husband's parents agreed that the wife can do her MS in USA but after marriage they created all problems in her studies. The father of the girl bore all her educational expenses. There was an insistence that wife should not take up any job after her completion of studies in USA as the husband had stolen all the study certificates of the wife and send them to his father. Finally, when the wife did not agree for the demands of husband and in-laws, the husband sent her to her uncle's place in USA with a false pretext, abandoned her and came to India. This was a case of dowry demand, cruelty and desertion.

After coming to India, by way of abundant caution, husband filed a criminal complaint against wife's parents and also filed a petition for divorce. When mediators approached, the husband's parents insisted that the house in Jubilee hills belonging to wife's parents need to be transferred in the name of son-in-law and the wife has to

give up her career and come to India. Eventually the marriage ended in a mutual divorce. Still the trauma and shock, the girl and her parents had to go through the interregnum period was terrible.

Causes of concern :

- (1) When the husband filed petition for divorce in India, the first step the Court has to take is reconciliation. The deserted wife obtained a job in USA and if she had to come to India for legal proceedings initiated against her, her visa status would change and perhaps she would not be able to go back to USA at all, as it is very difficult for her to get job due to a slump in the software industry. Though she had given her GPA to her father to represent on her behalf, he cannot represent her in conciliation proceedings, as the Court does not accept it. The husband in spite of all his mistakes tries to take advantage of this legal position in India and insisted on an *ex-parte* decree in his favour.
- (2) The wife's parents though being affluent spent a heavy amount on marriage expenses and wedding gifts. When their only daughter's marriage is broken in such fashion, the loss of face in society, the trauma and agony to be gone through by them is severe.

In the case of *Anupama*,⁴ she was a medical graduate hoping to pursue her higher studies in USA. She was a brilliant student. Her husband also very intelligent, met with an accident before marriage resulting in psychological disorder as well as physical impotency. Suppressing these facts, the husband's family got him married to *Anupama*. The wife after joining her husband in USA

3. In this matter both wife and husband are software engineers in USA. Wife's parents are both renowned doctors and she has an affluent background. Wife is very good looking while the boy is ordinary looking and comes from middle class family.

4. In this matter both the parents are not much educated and middle class background. They spent heavily on the marriage of the second daughter, one more daughter to be married.

realized inadequacies and deficiencies of her husband. She silently put up with unhappiness without even informing her parents about true state of affairs. Finally, the husband left his job, deserted his wife in USA and came back to India.

Anupama was practically without any help. Her parents having spent heavy amount of money on her marriage could not support her financially for her studies in USA. Luckily some persons belonging to the same village as *Anupama* settled in USA came to her rescue and funded her studies by giving a loan. For few years, she waited in good faith that her husband would rejoin her and to her surprise, he took up a job in Bangalore and never wanted to go back to USA. He did not show any enthusiasm to rejoin his wife. Eventually the marriage ended in a divorce by mutual consent in the Indian Court.

Causes of concern :

- (1) Unfortunately only one of the spouses, *i.e.* the wife had faith in the institution of marriage, and had to suffer a unhappy marriage hoping that it would become happy one day. Long years of an unhappy marriage did not leave in her much enthusiasm to get married a second time.
- (2) Parents of girls in India need to be very careful in ascertaining the credentials of the family as well as the person to whom the girl is going to be married. The blind craze for USA matches and the dollar dreams are highly shattered if due diligence is not taken in ascertaining character, behaviour of the proposed bridegroom for their daughter.
- (3) In this case also, except for fortunate helping hand from villagers, the social fall back for the deserted wife is minimal.

Another case I dealt was *Chitti's*⁵. In this matter there was no dowry demand. The husband had a perverse psychology and used to inflict mental cruelty against wife. To show one example of his cruelty is that he drove down wife to a very far off place and left her there and she had to walk back several miles to reach place of habitation. Eventually the marriage ended with a divorce of mutual consent granted by one of the Courts of USA and he also paid some amount of alimony.

Causes of concern:

- (1) The wife continued to stay in USA by taking up a job. She has become very apprehensive to get into any marital bond again. She occasionally gets depressed by recollecting the shock and trauma experienced by her during the subsistence of marriage. She committed an attempt to suicide. Her father was no more. Her mother being old cannot live with her permanently in USA. The lack of social support in USA to the deserted/divorced Indian wives is highly alarming.
- (2) She feels that she is past the age of marriage, and is not confident any longer of entering into a successful marital relationship. This has condemned her to a lonely life.

Next case is *Parvathi's*⁶. In this case she has gone through a marriage of more than 20 years. She married her first cousin and two children were born out of marriage. Initially at the time of marriage there was dowry demand and that was fulfilled by *Parvathi's* parents. The husband being a

5. Here *Chitti* was a graduate and intelligent girl. She comes from a family of high social standing but had a wish to go to USA and live there.

6. This is one of the painful cases that I had to handle as I happened to be her teacher and local guardian at one point of time before her marriage. She was a brilliant student of Economics.

medical doctor, turned out to be highly successful in USA, indulged in acts of adultery, cruelty against his wife. Neither he showed any concern towards his children. In the circumstances, the wife was forced to stay separately from her husband. Her father who was very influential and also the maternal uncle of her husband, died.

The husband was emboldened to file a petition for divorce in the state of Ohio. As per laws of Ohio, if the couple stayed separately for certain period that was a valid ground for divorce. The husband acquired citizenship of USA and he is entitled to take divorce as per that law. Though living separately (unless it satisfies the test of desertion) is not a ground of divorce under The Hindu Marriage Act 1955. *Parvathi* informed me that the husband in all probability is likely to get a divorce against her will in USA as they are governed by the laws of the State of Ohio. She was inclined to come down to India and initiate criminal complaints against her husband and in-laws under Section 498-A IPC and Provisions of Dowry Prohibition Act. But in reality it was very difficult for her to come down to India and initiate criminal proceedings as she had to be present here for most of the time. At the same time she had to handle the case filed against her for divorce in USA and take care of children in USA. The husband now having obtained citizenship in USA, the applicability of provisions of IPC to him also to be ascertained. The decree of divorce granted against her may not be valid under Indian Law, still it would be a valid divorce in the state of Ohio. The conflict of laws really comes into picture and she is in a disadvantageous circumstance.

Causes of concern:

- (1) The wife, the homemaker, after 20 years of marriage loses her marriage for no fault of hers. Otherwise comes from a family of high social standing in India, has no social support in USA.

- (2) The husband and his family who have swindled good amount of money from her parents, are very well settled financially, leaving the wife as wreck and showing no genuine concern for children.
- (3) The protracted litigation, litigation being very expensive in USA, leaves wife with an unequal legal battle.
- (4) No need to mention that it is very difficult to remake her life as she is middle aged now with the responsibility of two children.

The next is *Vijaya's*⁷. *Vijaya's* husband left for Canada for higher studies. He took a job there. He never bothered to visit wife and children in nine long years. Periodically he sent proposals for divorce through his father. *Vijaya* is a very accomplished lady. Subsequent to her husbands' shift to Canada, she did her law degree and obtained three gold medals from Osmania University. But she had to lead a lonely life and no signs of her husband coming back to India. There was active undue influence and interference from in-laws to break her marriage. She filed a criminal complaint under Section 498-A IPC. Some mediations has taken place finally she compromised to give divorce on mutual consent. The husband's family agreed to pay an alimony of Rs.10 lakhs. She also agreed to withdraw the complaint she lodged under Section 498-A IPC.

Causes of concern:

- (1) In this case the Hindu husband abandoning his children and wife for 9 long years, resolved to dissolve the marriage appears like a Muslim husband pronouncing triple talak and get out of his marriage.
 - (2) The protracted litigation or interaction with the husbands' family is a futile
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7. *Vijaya* got married at very young age. Her husband is a mechanical engineer is only son to his parents. There was constant interference of parents in-law and sister-in-law.

exercise except for the fact that she got some amount of money as alimony. The loss of fruitful years of her life, the stigma of divorced person going to be, age bar in getting remarried coupled with responsibility of children adversely affected her.

In *Madhu's*⁸ case, as he was trying to break his engagement, the girls family properly threatened *Madhu* and his family, as they had evidence of money being received by *Madhu's* family. They also threatened that they would also give complaint to US Consulate in India, as *Madhu* is likely to go to USA for his job. *Madhu* and his family as there is no other go, returned all the money taken from the proposed bride's family and also compensated them to the extent of expenses they have incurred on engagement.

Causes of concern:

- (1) Marriages as well as engagements, parties (especially boys' side) are attempting to break without any concern to the sentiments and difficulties of other side. Great caution need to be ascertained in finding out character and behaviour of other family and proposed bride groom.

It is not necessary that always a girl is an adversely effected party. Sometimes boy and his family are also unnecessarily victimised. In *Ravi's*⁹ case the wife joined *Ravi* in USA where he was working. As the couple could not live together due to the medical problem

of wife, *Ravi's* parents brought daughter-in-law to UK where they reside. Finally, as the marriage was not working out, *Ravi's* wife was sent to India. *Ravi's* in-laws did not want the marriage of their daughter to be broken. As they cannot initiate any criminal proceedings against *Ravi* or his parents, they threatened to proceed to file a criminal complaint against aged grand parents of *Ravi* under 498-A IPC and Dowry Prohibition Act. In fact *Ravi's* grand parents have not much role in the whole thing except that they are amenable to the jurisdiction of Indian Courts. This is an unfortunate situation and there is a valid justification in stating that some times the provisions of IPC especially 498-A are abused in some cases. Any how, eventually the marriage ended by divorce by mutual consent.

Causes of concern:

- (1) It is unfortunate that the frustration of their daughter's marriage going to come to an end, sometimes the girls' parents fail to acknowledge their own mistakes and try to harass other side family indiscriminately.
- (2) In this case, as son-in-law and his parents are citizens of UK and no prosecution can take place under provisions of IPC, it is wrong on the part of girls' parents to victimize aged grand parents of son-in-law, who were innocent.

PART II

Nature and Scope of Conflict of Laws

Conflict of laws, also referred to as private international law, means a branch of Indian law applied by Indian Courts wherever a dispute before it involves a foreign element¹⁰: 'Foreign Element in this content means a fact relevant to the issues involved in the

8. *Madhu* is a software engineer worked in Australia for some years and was seeking to take up a job in USA. In the interregnum period he got engaged to a girl in India on a grand scale. A part of the dowry amount was handed over to *Madhu's* family and the same is video graphed. Subsequently *Madhu* wanted to break his engagement.

9. *Ravi* is a medical doctor, his parents and himself are citizens of UK though they are of Indian origin. His marriage was taken place in A.P. His wife had some psychological disorder, the same is suppressed before marriage.

10. *Viswanathan R v. Rukn-UI-Mulk Syed Abdul Wazid*, AIR 1963 SC 1 = (1963) 1 SCR 22, cited in *Atul M. Setalvad*, Conflict of Laws, first edn., *Levis Nexis Butter Worths*, New Delhi, India, 2007, p.1.

proceedings which has a geographical or other connection with a territorial limit other than the territorial limit where the Court is dealing with the proceedings. There may be a foreign element because the parties may be citizens of a foreign country, or domiciled in a foreign company, and a dispute may relate to a contract between an Indian and a party living abroad; or a suit may relate to a tort committed outside India.

The basis for foundation of the rules of conflict of laws is principally the need to do justice. The function of conflict of laws is to indicate the area over which the rule extends—it deals with the application of laws in space. To quote a distinguished writer: It is this diversity of positive Laws [in different territorial units] which makes it necessary to mark off for each in sharp outline, to fix the area of its authority, to fix the limits of different positive laws in respect to one another¹¹.

It has been suggested that the doctrine of comity of nations is the basis for applying the principles of conflict of laws; the better view appears to be that the basis is the need to do justice to the parties through the doctrine of comity is increasingly applied in selecting the appropriate law to be applied in a particular case¹².

An instance of the Indian Parliament recognizing the rule of comity occurs in Section 11 of the Foreign Marriage Act 1969. The Act permits Indian diplomatic and consular offices to perform the marriage of persons, one of whom is a citizen of India, abroad, but provides that no such marriage can be performed if such a marriage is prohibited in the country where it is to be

performed. The Joint Committee of Parliament explained why this rule was enacted: it was done because permitting the performance of a marriage prohibiting the Courts where it is performed would have been contrary to international law or the comity of nations, and Parliament desired that a marriage performed under the Act has a high degree of international validity¹³.

A distinguished American Judge, *Cardozo J.*, has described conflict of Laws as 'one of the most baffling subjects of legal science' and observed that 'the average judge, when confronted with a problem in the conflict of laws, feels almost completely lost and like a drowning man, will grasp at a straw¹⁴.

The rules of conflict of laws must involve one or more of these questions:

- (a) Does the Indian Court have jurisdiction?
- (b) Is there a foreign judgment on the point and if there is, it is to be recognized and enforced?
- (c) What system of law is to be chosen?

The first question is basic: if the Court does not have jurisdiction obviously it will not go into the matter. If there is a foreign judgment, it is for the Indian Court to decide whether it should be recognized and enforced; if it does decide to recognize and enforce it, no question of the Indian Court choosing a system of law arises. In cases where it decides the matter itself on merits, it may have to choose which system of law to apply¹⁵.

There are two possible ways in which lack of unanimity among the various systems of private international law may be ameliorated.

11. Savigny, *Private International Law*, cited in Cheshire and North, *Private International Law*, 13th edn., p.6.

12. See Dicey and Morris, *Conflict of Laws*, thirteenth edn., Paras 1.10-1.11; Cheshire and North, *Private International Law*, thirteenth edn., p.5, cited in *Atul M Setalvad*, *Conflict of Laws*, first edn., Lexis Nexis Butter Worths, New Delhi, India, 2007, p.5.

13. This provision avoids a situation under which the marriage might have been valid in India but invalid under the *lex loci celebrationis* which would not only be unjust, but may lead to unfortunate consequences in some cases.

14. Morris *Conflict of Laws*, sixth edn., p.7.

15. *Atul M Setalvad*, *Conflict of Laws*, first edn., Lexis Nexis Butter Worths, New Delhi, 2007, p.8.

- (a) Unification of internal Law.
- (b) Unification of private international Law.

The first solution is to persuade as many countries as possible to adopt uniform rules of domestic law in fields, which are likely to raise disputes involving a foreign element. This has been done by *ad hoc* international conferences such as those that led to The Hague Rules on Carriage of Goods by Sea, and the Warsaw Convention on the Carriage by Air. Two internationally constituted bodies such as the International Institute for the Unification of Private International Law at Rome (UNIDROIT) and the United Nations Commission on International Trade Law have from time to time drafted laws for countries to adopt. A successful example is the UNCITRAL Model Law of Arbitration, which many countries (including India) have adopted as part of their domestic law. If all countries adopt uniform laws, it may become unnecessary to adopt conflict of laws rules as it would not matter which system of law is adopted to decide a particular dispute¹⁶.

The second method by which the inconvenience that results from conflicting national rules may be diminished is to unify the rules of private international law, so as to ensure that a case containing a foreign element results in the same decision irrespective of the country of its trial¹⁷.

There are a few international conventions, which adopt a uniform rule of law in specified situations, which have been given statutory force in India. Examples are the Carriage of Goods by Sea Act 1925, and the Carriage by Air Act 1972. The Arbitration and Conciliation Act, 1996, gives statutory force to the Geneva and New York Conventions

on International Arbitrations and is itself based on the UNCITRAL Model Law on Arbitration.

There is limited unification of the ordinary rules of law, or the rules of conflict of laws in India, and resort has to be had to the general principles of conflict of laws.

The importance of conflict of laws is likely to increase in India. First, there is increasing growth of international trade and commerce, which is likely to lead to many more contracts with a foreign element. Second more and more Indians are settling abroad; in due course questions of succession to their property, some of which may in India, will arise. With respect to Matrimonial cases also issues deciding capacity to marry, validity of marriage, grounds of divorce, guardianship, maintenance *etc.* whether to apply *Lex domicili*, or *Lex loci Celebrations etc.* may arise.

PART III

Foreign Judgments in Matrimonial Matters: Position in India:

There is an important International Convention on the subject namely the Hague Convention on Recognition of Divorces and Legal Separation 1970. The convention is adopted by many countries. In India no specific statutory provision has been enacted on this subject though the Law Commission of India proposed nearly 30 years ago a law be enacted on the subject. After the decision of Supreme Court in *Satya v. Teja Singh*¹⁸, the Government of India requested the Law Commission to look into the problems created in the recognition of foreign divorces in India. This led the Law Commission, 1976 to submit its sixty-fifth report in which, after a detailed survey of problem, and the solution adopted in England, and the solution recommended in Hague Convention, it prepared a Draft Bill on the subject. Nothing came of the

16. See note Supra 15, p.9.

17. Ran Loon, "In Forty Years on: The Evolution of Postwar Private International Law in Europe" (1990), pp.101-122, cited in Chesire and North, Private International Law, thirteenth edn, Lexis Nexis, TM Butterworths, 1999, p.11.

18. AIR 1975 SC 105= (1975) 1 SCC 120.

Report, no law on the subject has been enacted by the Parliament.

In the absence of express legislation our Courts apply Section 13 of Code of Civil Procedure 1908, in such matters with certain modifications which the Supreme Court has laid down¹⁹.

In *Smt. Satya v. Teja Singh*²⁰, it was held whether recognition is to be accorded to the Nevada decree depends principally on the rules of Private International Law. Each country has its municipal laws so does it have its own rules of Private International Law.

Though Indian Courts have to decide according to Indian Law, a given situation containing foreign element may require application of the Law of a foreign country. Such a recognition is accorded not as an act of Courtesy but on considerations of justice. However, the foreign law must not offend against our public policy. The rules of Private International Law evolved by other countries therefore, cannot be mechanically applied by the Courts in India. 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. The awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining these rules²¹.

It was further held that regarding proof of fraud as a vitiating factor, if the foreign decree is obtained by the fraud of the petitioner, then the fraud as to the merits of the petition is ignored in England, but fraud as to the jurisdiction of foreign Court, *i.e.* where the petitioner has successfully invoked the jurisdiction by misleading the foreign Courts as to the jurisdictional facts, provides grounds for not recognizing the decree²².

It was further held that our legislature ought to find a solution to such schizoid situations as the British Parliament has, to a large extent, done by passing the "Recognition of Divorces and Legal Separations Act, 1971". Perhaps the International 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. But any such law shall have to provide for the non-recognition of foreign decrees procured by fraud bearing on jurisdictional facts, as also for the non-recognition of decrees, the recognition of which would be contrary to our public policy. Until then the Courts shall have to exercise a residual discretion to avoid flagrant injustice for, no rule of Private International Law could compel a wife to submit to a decree procured by the husband by trickery. Such decrees offend against our notions of substantial justice²³.

In *Manganbhai Chhotubhai Patel v Maniben*²⁴, it was a suit for maintenance by wife against husband. Husband obtained foreign decree of divorce from Mexican Court. Husband neither a *bona fide* resident nor domiciled in the Mexico state. He obtained judgment by misleading Court regarding his residence. It was held that decree was obtained by fraud within Section 13(e) of CPC.

Relying on ratio laid down *Smt. Satya v Teja Singh*²⁵, the Court held domicile is a jurisdictional fact. A foreign decree of divorce is subject to collateral attack for fraud or for want of jurisdiction, even though jurisdictional facts are recited in the judgment; such recitals are not conclusive and may be contradicted by satisfactory proofs.

In *Neeraja Sarabh v Jayanth Sarabh*²⁶, the Supreme Court emphasized the need for

19. Seen Note Supra 15, p.254.

20. Seen Note Supra 18, pp.120-122.

21. Ibid.

22. Ibid.

23. Ibid.

24. AIR 1985, Gujarat, p.187.

25. Seen note supra 18.

26. (1994) 6 SCC, 461.

Parliament enacting legislation protecting the rights of Indian women married to NRIs, and suggested that the legislation should provide a nullity decree of such marriages granted outside India and they should not be recognized in India, and adequate provision should be made for alimony.

Though Section 13 of the Civil Procedure Code 1908 is broadly followed in the decisions, special rules have been indicated in some fields.

Regarding the competency of a foreign Court, it was observed that if a foreign Court had assumed jurisdiction on the ground that the parties were residents within the jurisdiction, the residence must be actual and genuine and accompanied by a desire to make that state their home, not a mere sojourn or temporary residence²⁷. Ordinarily if the parties were married under an Indian law such as The Hindu Marriage Act 1955, a Court would be competent if it is so regarded under the act, any other Court would only be recognized as competent if both parties voluntarily and unconditionally submitted to its jurisdiction, or the divorce was by consent²⁸. It has also been held that generally, the divorce should be on the grounds recognized by law under which the parties were married²⁹. In the same case it is further held by the Supreme Court that the wife had not effectively served, and consequently, the Court was not a competent Court within the meaning of Section 13, Clause (a) of the Code of Civil Procedure Code, 1908; The husband had obtained a divorce from the Missouri Court by falsely representing that the parties were resident in Missouri, the decree had, therefore been obtained by fraud³⁰.

In the context of matrimonial disputes, it is not enough merely that the respondent was served, she must be in a position effectively to appear and contest the proceedings and if she is not in a financial position to do so, arrangements must be made to enable her to do so to ensure adequate opportunity to defend herself³¹.

With respect to guardianship of children in *Surender Kaur Sandhu v. Harbax Singh Sandhu and another*³², it was held that the modern theory of conflict of laws recognizes and, in any event, prefers the jurisdiction of the state, which has the most intimate contact with the issues arising in that case. Therefore, 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 welfare of the offspring of the marriage. Ordinarily, the jurisdiction must follow upon functional lines and is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged.

In the present case the fact that the child is a British citizen and that the matrimonial home of the spouses was in England, established sufficient contacts or ties with that state in order to make it reasonable and just for the Courts of the state to assume jurisdiction to enforce obligations which were incurred therein by the spouses. It is the countries duty and function to protect the wife against the burden of litigating in an inconvenient forum, which she and her husband had left voluntarily³³.

In *Saritha Sharma v. Susbil Sharma*³⁴, the Supreme Court held that the conduct of removing the children from USA against the

27. See note supra 18.

28. *Narsimha Rao v Venkata Lakshmi*, (1991) 3 SCC 451.

29. Ibid.

30. Ibid.

31. Ibid.

32. (1984) 3 SCC 698.

33. Ibid.

34. (2000) 3 SCC 14.

Courts order is a relevant fact but it cannot overwrite the various aspects relating to welfare of children. Having regard to those relevant aspects, it was further held that High Court erred in restoring custody of the children to respondent on the sole ground of breach of American Court's order and High Court should have directed the respondents to initiate proceedings for holding a full fledged enquiry as to what would be in the interests of children.

In *Jagraj Singh v Birpal Kaur*³⁵, dealing with a divorce petition filed by wife and issuance of an interim order of non-bailable warrant for non-compliance with the Courts order to appear in person against husband, the Supreme Court held the Court must make every endeavour to bring about reconciliation—therefore, in a divorce petition filed by the wife, issue of non-bailable warrant against the husband for persistent disobedience repeated orders of Court for appearing in person, held, was within the power of the Court. In this case the contention raised on behalf the husband that the Court had no such power and that at the most it could proceed to decide the case *ex parte* against him, rejected – since in view of the apprehension of the husband, who was then in a foreign country, of likelihood of his arrest on coming to India, interim stay already been granted and was continuing against impugned order of the High Court, held, is case of disobedience of the impugned order despite of the grant of such protection, the husband would not be entitled to claim the equitable relief under Article 136³⁶.

Conclusions

The study reveals that the causes for disputes in NRI marriages do not limit to traditional dowry problems and in-law harassment. Lack of compatibility, ego

problems, jealousy, lack of time to have tolerant attitude towards the spouse are some of the new factors leading to separation of spouses. In a foreign land, due to western influence also, the commitment towards the institution of marriage is dwindling. In a separation/divorce, generally women and children are more adversely affected. Lack of social/family support in a foreign land makes the separated wife more miserable. Though the woman may acquire financial stability at a later point of time, the breakdown of marriage makes them a loner in life.

The Judges and Advocates need to be trained with computer knowledge to handle NRI cases.

Though, way back in *Satya v. Teja*³⁷, the Supreme Court had suggested for enacting legislation with respect to enforceability of Foreign Judgments, no law is enacted so far.

Indian Courts have evolved their own principles in recognising or not recognising a foreign judgment in accordance with Section 13 of Civil Procedure Code, 1908³⁸. When fraud is played by one of the Parties with respect to Jurisdiction, the foreign judgment is not recognised by the Indian Courts. With respect to guardianship of children, the Supreme Court applied the test of welfare of the child.

The unification of internal laws and adoption of Uniform Private International Law also minimises the friction of laws of different countries and would result in uniform justice delivery system.

There is need to bring a legislation with respect to NRI Marriages and recognition of foreign judgments and other related issues keeping in view the 65th Law Commission Report and observations made by the Supreme Court in different judgments.

35. (2007) 2 SCC pp.564-567.

36. Ibid.

37. See note Supra 18.

38. Ibid.

The National Commission for Women, New Delhi, having gone into such problems of NRI marriages, submitted a report making the following recommendations³⁹

1. Registration of marriage be made compulsory;
2. Bilateral agreements for protection of such marriages be concluded between Indian and such other countries where the Indian Diaspora is in large numbers.
3. If the NRI husband has not become a citizen of the country, in which he resides, concerned Indian laws to apply irrespective of the place of the filing of the petition for dissolution of the marriage.
4. Government monitored conciliation process of settlement of matrimonial disputes be initiated.
5. Suppression of information regarding marital status by NRI grooms taken through extradition treaties wherever operational; and the other measures suggested in the new report include:
 - a. Seeking the help of authorities at the work places of the husband;
 - b. Attaching property, if any, in India.
 - c. Initiating legal action against the fraudulent spouse for compensation in India and

- d. If overseas citizenship has been given to the husband, the same to be withdrawn.

Similarly, in a session organised to deal with the problems related to NRI marriages by Ministry of External Affairs with the participation of several representatives, the following suggestions were made:

1. Instituting series of measures ranging from sensitization and creation of awareness to legal and legislative changes.
2. Releasing information booklets to prevent fraudulent marriages.
3. Setting up a Gender cell in the Ministry of Overseas Indian Affairs to deal with gender issues of Overseas Indians.
4. Continued interaction with the stakeholder bodies such as between the Ministry of Overseas Indian Affairs and NCW and related women groups.
5. Advise State Governments to set up special cells for providing free legal aid and Counselling.
6. Orientation programmes to help brides from rural background to adjust to western way of life.

These suggestions may also be taken for consideration for solving the problems related to NRI marriages.

39. The National Commission of Women, New Delhi, after going through these NRI marriage problems has submitted a report in September 2004. These may be adopted after legal scrutiny