Chapter 3
Concept of Non-Resident Indian Marriages & Legal Issues - A Detailed Study

In the West, relationship is through the girls. They say, “Son is a son till he gets a wife. The daughter is a daughter all her life”.

Swami Vivekananda

3.1 Definition of Non-Resident Indian

Section 2 of Foreign Exchange Management Act, 1999 (FEMA)¹ defines a person resident in India and a person resident outside India, but does not define the term NRI. Under FEMA, a person resident in India is one who resides in India for more than 182 days in the preceding financial year and who comes or stays in India for any purpose. Non-Resident Indian is defined as a person who is not a resident in India. Therefore, an NRI or Non-Resident Indian can be summed up as an Indian citizen who is ordinarily residing outside India and holds an Indian passport. In other words “Non-Resident Indian- NRI” means an individual, being a citizen of India or a person of Indian origin who is resident outside India. Marriages by and/or with Non Resident Indians (NRI marriages) are a class apart in matrimonial law. Generally, the main motive for such a marriage is immigration to a foreign land in pursuit

¹ Foreign Exchange Management Act 1999, (Act 42 of 1999), Section 2.
of greener pastures. Non Resident Indian marriages may be between Non-resident Male and an Indian Female:-

1. Non-resident female and an Indian male

2. Both Indian spouses who later on migrate to a foreign land either together or separately

3. Both non-resident Indian spouses who marry under Indian marriage laws either in India or in a foreign country

4. An Indian spouse, male or female, marrying a foreign spouse under Indian marriage laws either in India or in a foreign country

NRI marriage is mostly a well-planned personal decision in life these days. The traditional parental selection of spouses based upon caste and status is retained but would be spouses have come to play a big role in individual spousal choice. These marriages are traditional in form only but in intent; these are contractual in nature as individuality and personal liberty overwhelm mutuality and spousal commitment. The spouses in the NRI marriage, like any other Indian Hindu marriage, may be between

(i) Both parties being from the same caste

(ii) Parties may be from different caste–inter-caste marriage.

(iii) One of the parties may be a non-Hindu–inter-faith marriage, with or without conversion to mutual faith.
(iv) With or without surrendering the overseas citizenship if married in India or acquiring or not acquiring a foreign citizenship if married abroad.

(v) Similarly NRI groom or NRI bride who comes to India for marriage with a native spouse may be a foreign citizen of a foreign country either by adoption or by birth; a green card holder; on a work permit or on a temporary visa or may have dual citizenship as an ‘Overseas Citizen of India’

(vi) These marriages may be between bachelors, remarriage of both or of either spouse after divorce or after widowhood

(vii) Bigamous or fraudulent marriage based on wrong information regarding job, matrimony, addiction, illness or even criminal record

Even though this is a gender-neutral term, typically the ‘NRI marriages’ are considered to be between a woman from India and an Indian man residing in another country (NRI–non-resident Indian), either as Indian citizen at the time of marriage (when he would legally be an ‘NRI’) or as citizen of that other country (when he would legally be a PIO–Person of Indian Origin). PIO means a foreign citizen who any time held an Indian passport; or he/she or either of his/her parents or grandparents or great grandparents was born in India and was permanently resident in India or that he/she is spouse of a Indian citizen or Indian Origin.

Indians settled abroad, having acquired foreign citizenship, get married either to Indian spouses who are
themselves citizens of that country or to foreign spouses. They are, thus, governed by the local civil marriage laws and generally do not pose any legal problems for Indian Courts.

3.2 Mode of Matrimonial Alliance in NRI Marriages may be-

- Family sources or caste based social links in India or abroad.
- Matrimonial advertisements in the newspapers delineating the age, usually beyond 28 or even 30 years; professional or economic status, caste/caste-no-bar, citizenship status; marital status/divorced/ widow/bachelor;
- Internet mode with broadband facilitated direct interview or exchange of personal particulars.
- Personal or professional contact/friendship

The considerations of religion, caste, clan and physical attributes, which normally dominate in local matchmaking, are not strictly adhered to for foreign grooms, who are viewed to have other potential merits including the power to change one’s destiny profoundly for the better.

3.2.1 The Motives of NRI Marriages

Motives are also as varied as their composition. There is a motive behind every NRI marriage apart from conjugal matrimonial relationship. Some of the motives of Indian spouses are:
• Most marriages are to gain immigration status for economic well being, glamour, freedom & liberal life style. A vast network of immigration consultancy services has sprung up to facilitate and broker the deals, some genuine, others fraudulent. Immigrants are attracted by foreign States as cheap trained workforce and immigration rules are constantly being updated to suit the socio-economic requirements of each country. Obsession to migrate to foreign shores has allowed many unfair trade practices to flourish, which have swindled the common man of his hard-earned money, dignity and social standing in society. It is not surprising to discover that these matrimonial advertisements many a times exaggerate the achievements of boy as well as of his family. They even conceal vital aspects normally considered as liability in matchmaking. While some are honest, many lie about the jobs, earnings, citizenship, family background and even current marital status to get a good match for their daughters and sons. Parties do not get enough time to cross check claims made by boys abroad. Moreover, the usual premarital verification of the background of the family and the boy is quite difficult when he is staying abroad. That is the reason why unscrupulous Travel Agents and Marriage Bureaus have flourished, ruining the lives of these innocent, gullible people.
• Professional opportunities and personal ambition for excellence also motivate a few highly qualified persons.

• Sometimes it is an escape route for inter-caste/inter-religious loving spouses from the wrath of their respective families.

• Dowry consideration, where the girl’s parents cannot meet the dowry demands of indigenous grooms and in view of the advancing age of the qualified girls beyond twenties, force the parents of the girls to seek foreign grooms–themselves in their thirties.

• Unemployment and lack of opportunities in India is also a grieving factor in immigration of skilled labor force.

• Non-resident Indian families, on the other hand, have a preference for Indian spouses to combat cultural clashes in family life. Lure for cultural roots, traditional thinking and maladjustment in western society are also factors in seeking Indian spouses.

• For many Non-resident Indians, marriage is a means to stay connected to their roots. They hold a strong desire to instill the set of Indian values in their children that they themselves grew up with.

• Fraudulent intentions & planning by NRI spouses, as they prey upon the weakness of
gullible parents of girls in India, is also not uncommon these days.²

3.3 Concept of Marriage in Western Society

*The glory of woman in the West is wifehood whereas the glory of woman in the East is motherhood.*

*Swami Vivekananda*

The concept of marriage resulting in mutual obligations of the spouses towards each other and the family in general differs from country to country, from society to society and religion to religion. These differences among societies of the world give rise to differences in marriage laws.

People marry for many reasons, including one or more of the following: legal, social, emotional, economical, spiritual, and religious reasons. These might include romantic/love marriages, arranged marriages, family support and establishment of a nuclear family unit, legal protection of children and public declaration of mutual commitment. In India, Hindu marriage is a sacramental affair, Christian marriage is a union of man and woman for life and Muslim marriage is a contract between the spouses. Divorce is a stigma in life for most Indians but it is not so in European or American societies. The high rate of divorce in the West is mainly because the laws there make it easy to separate and obtain a divorce. The inter-country marriages by Non-Resident Indians are likely to

result in conflict of law issues due to failure of adjustment or other reasons of personal or individual nature.

Surinder Gupta, who lived in Canada as a teacher for several years has written a book on American Life. The following are excerpts from his chapter on sex, marriage, divorce and family life in the western society of which our NRIs are a part. The romantic marriages in the west have appeared on the social scene only recently. It took a long time to evolve such a pattern in Europe and America. Only in the 20th century, mate selection in America became a completely do-it-yourself process. Arranged marriage is a natural consequence of the philosophy of separation of sexes—an Asian answer to the many problems of great magnitude created by the free mixing of sexes from a very early age. In arranged marriages, love comes in after marriage and grows with association; whereas in romantic marriages it starts before formal marriage & withers away with the attainment of sexual satisfaction in too many cases. In the individualistic culture of the west, marriage is a personal affair between a man and a woman, as opposed to Indian Hindu marriage, which is mostly between two families. These ‘nuclear’ marriages in west are not arranged by parents, rather they are the result of so called love as “in most of the cases they are swept into marriage on a tidal wave of romance, not love but a strong drive, fear of being unloved or a hunger for approval”.

---


4 Lederer & Jackson, The Readers Digest, (February, 1974) (quoted by supra note 3).
Even the consent of parents, usually after 18 years of age, is not legally required. At best, the role of the parents is confined to bringing together their young ones together in the hope that this might lead to marriage of their children. “In our country, it is accepted that parents must keep out of the marriage game beyond mild exposure of the young to each other in social affairs”, wrote American Nobel Laureate Pearl S. Buck.5

According to Dr. Kurian, eastern style arranged marriages in modified form where parents take their children’s wishes into account in arranging their marriage has definitely a lot to contribute to marital happiness & stability. In the love marriages of the west style, the couple expects too much before marriage, since idealization of each other is essential for maintaining their emotional ties, but get too little as the soaring divorce rate testifies. On the other hand, in eastern arranged marriages, the couple expects only the minimum but gets much more than the minimum from the marriage. Moreover, if the western style loves marriage runs into a tiff, loving couples do not usually tolerate interference from interested relatives; they may go to strangers like marriage counselors or psychologists—all working for money—to get help to patch up their differences. On the other hand, traditionally matched couples value highly the mediation of other family

---

5 Pearl S. Buck, To My Daughters With Love, 86 (N.Y. John Day Co., 1967) (quoted by supra note 3).
members who will do all they can to help solve such problems.⁶

Many married couples in the west constantly worry about keeping the mates they have. This worry is constantly fed by statistics, which show marriages breaking up at an increasing rate in almost every area of married life.⁷

Indian boys and girls, alternatively, know that they will be married when their time comes and feel fully secure leaving the worry part to their parents. The phenomena of spinsterhood or forced bachelorhood leading to desperate loneliness has arisen in the so called ‘progressive and modern’ people of India too.

A nationwide survey of the divorce rate in America had reported that one out of every two marriages ends in divorce; it does not include separations and desertions.⁸ Census reports indicate that more than 40% new marriages will end in divorce.⁹

What causes divorce? Not only rising expectations but also rising temptation of infidelity is the cause of marital problems and divorce. Adultery is said to be the cause of

---

⁶ Dr. Kurian, Report: Mate selection and marriage; some changing trends with special reference to India, (28th International Conference of Orientalists, Canberra, Australia, 1971).
⁷ The Reader’s Digest, 34 January, 1974 (quoted by supra note 3).
⁹ “Divorced Fathers”, Psychology Today, 42 (April, 1977), (quoted by supra note 3).
nearly half of the problems marriage counselors deal with.\textsuperscript{10} Society as a whole is the ultimate sufferer.

There is total lack of communication or a spirit of sacrifice and an intolerance of any interference in their personal life.\textsuperscript{11} Noted Nobel Laureate Pearl S Buck has written, “I was talking the other day with Madame Vijaylakshmi Pandit of India & I begged her to see to it, as far as possible, that family system of Asia is not lost as her country modernizes itself”.\textsuperscript{12}

Literally millions of American males today are sex perverts or deviants.\textsuperscript{13} A new morality has sprung up in the west which commends promiscuity and condemns virginity; where the ‘virgin’ may be suspected of frigidity or lesbianism and indeed she may suspect herself of one or the other.\textsuperscript{14}

The facts are that few men and slightly more women in our (American) culture go through life with sexual experience confined to one partner only. The myth is monogamy; the fact is frequently polygamy inspite of the fact that adultery is a punish-able offence in the Criminal Codes of 45 of the 50 States of America. Humankind is biologically polygamous; monogamy is an artifact of upbringing and social regulation rather than part of instinctual human nature. We are by nature polygamous, by upbringing monogamous and therefore perennially at

\textsuperscript{10} The Glove and Mail, April 11, 1977 (quoted by supra note 3).
\textsuperscript{11} The Citizen, November 2, 1973 (quoted by supra note 3).
\textsuperscript{12} Pearl S. Buck, My Several Worlds, 326 (N.Y. John Day Co., 1954), (quoted by Supra note 3).
\textsuperscript{13} Ellis Albert, Sex and the Single Man, 160 (Lyle Stuart inc, 1963), (quoted by Supra note 3).
\textsuperscript{14} Time Magazine, 7 (July 9, 1973), (quoted by Supra note 3).
war with ourselves. At all social levels there are appreciable number of people whose conduct is not consistent with the expectations of the monolithic code.\textsuperscript{15}

In China also, arranged marriages or marriages of convenience are a norm in society. Parents congregate in parks to exchange photographs and educational qualifications of prospective brides and bridegrooms. Co-habitation before marriage is being accepted due to industrialization and economic independence of women, leading to an increase in divorce rate as well.

An interesting explanation of man-woman relationship in the American sub-continent was given by Professor Sahdev Gupta,\textsuperscript{16} Department of Man Environment Studies, Canada. According to him, adventurous able-bodied sailors from seaside western countries settled in American sub-continent, leaving their families behind. They occupied wide stretches of land, barbed it and enslaved the native population. They had lustful relationship with the local women without much attachment.

Their mixed progeny intermingled freely with no permanency of relationship. Thus, psychobiological kinship formed the basis of man-woman relation unlike the religious social relationship of marriage. Gradually, state laws and personal rights were super imposed upon this loose relationship, which has become a way of life. This

\textsuperscript{15} Morton Hunt, Psychology of Love, Sex and Marriage, The world of the formerly married,11-286, (quoted by Supra note 3).
\textsuperscript{16} Personal Communication, December 20, 2008.
explains lack of social responsibility, family commitment or personal ethics in western society.

When we say ‘Modern India’ we literally mean a generation of Indians who have adopted the western ways of life without shedding their Indianness in personal/family affairs, more so in matters of marriage. This dichotomous lifestyle produces a sense of disorientation and confusion in life. Thus, we have many stories of persons who are unable to fit into the society in which they live. This is more marked in NRIs who migrate to foreign lands in search of dollars and free promiscuous lifestyle but are internally unhappy with the emotional identity they create for themselves. This absurdity and hopelessness gets manifested in man-woman relationship in real life. The spirituality and well-protected family life in Hindu society, for centuries, have been protective influences against materialistic, body-hungry western culture.

According to wikipedia report, since 1998 thirty-one U.S. states have held popular votes on whether or not to preserve marriage as the union of one man and one woman. All 31 states voted to retain the traditional definition. Nearly 63,400,000 Americans have voted on marriage at the ballot box, with 63.1% affirming the traditional definition. While public opinion surveys document some decline in overall support for marriage as traditionally defined, the majority who favor it has risen in the past two years.17

UK battles with marriage as an institution since the British Office for National Statistics reports that married parents could be outnumbered by single mothers and co-habiting couples within a generation. Britain has unique problems of forced, arranged and sham NRI marriages. Sometimes Asian families in Britain force their children to marry in India against their will. These ‘shot-gun marriages’ sometimes lead to suicide or ‘honor killing’ when second generation NRI Asians defy their conventional parents in marital matters.¹⁸

3.4 Non Resident Indian Marriages: A Historical Perspective

The term Non-Resident Indian is a new coinage of post-independence era. In the past, Indians migrated to foreign lands for different reasons and acquired citizenship of the country of their domicile. These ‘Persons Of Indian Origin–PIOs’ are now called ‘Overseas Citizens Of India (OCI)’ as defined under Citizenship (Amendment) Act, 2005.

During British period, Indians went abroad for higher education but mostly came back to settle in India. However after independence, started migrating for personal or professional reasons and were subjected to cross-cultural influences. These migrants often married native spouses either for romantic alliances with their colleagues or subordinates or contractual union to fulfill the requirements for Visa-regulations. Thus, a phase of mixed racial progeny and naturalization started among Indian migrant population. Foreign governments also, in line with

¹⁸ Anil Malhotra, India, NRIs & The Law, 139 (Universal Law Publishing Co, New Delhi, 2009).
their national policy, offered Visa-facility to Indian families back home on sponsorship or marriage basis. With the increase in numbers, these migrants started establishing community gatherings and interpersonal contacts. Their living standards improved and the family finances swelled with the passage of time. They started visiting their ancestral home more frequently and started influencing the local society with their western lifestyle. Young generation brought up with western values created a wide gulf in their otherwise well-knit family system. Naturally, the elder generation was concerned about the loosening of moral values and family ties. They started dictating their preferences to the young generation, more so in marriage match making. These ‘forced marriages’ were not acceptable in liberal, individualistic western society. In U.K., they have established a separate ‘Forced Marriage Cell’ in the Police department.\textsuperscript{19}

Lure for immigration started a chain reaction. This had two visible effects on society; firstly the practice of Barter marriages for easy migration of other family members on sponsorship basis and secondly the beginning of educational tourism, to secure validity scores to become eligible for foreign Visa or residency status. Marriage with an NRI spouse became an easy route for immigration.

Late age marriages, high divorce rate and remarriages are a common feature of NRI marriages. The concept of marriage shifted from a sacrament bond to a contractual union or a live-in relationship for mutual convenience.

\textsuperscript{19} Graeme Kirk, “Happy Families-The immigration procedure for spouses and dependents is not always simple” \textit{The Economic Times}, November 13, 2006 at 11.
Women married from India to NRI grooms were used as domestic help, sexual gratification or plain housekeeping.

Stability of family life, parental support and care of old-age family elders became prominent problems. Degradation of cultural values and drug abuse necessitated the role of psychiatrists and marriage counselors. Thus, NRI marriages present two contrasting pictures for Indian society. On the one hand, NRI marriages are transforming the living standard and economic welfare of most families and on the other hand, these are creating disastrous problems for many families for which there seems to be no easy remedy either in law or in civil society.

Majority of the two million Indian diaspora is Punjabis; it is natural that the issue of marriage and migration are more crucial for Punjab than any other state in India. It is observed that Punjabi society is in the grip of a widespread craze for international marriages for historical and contemporary reasons. Parents as well as prospective brides/grooms irrespective of their class, caste and religious background aim at overseas settlement through international marriage and emigration thereafter.

These transnational marriages do not characterize average Indian marriage, as they are seen as the safest way of migrating to the western world. They largely turn out to be fake ones, split fast, and pose serious long-term consequences not only for the wife, husband, children and families but also for the society and economy as a whole.\(^{20}\)

\(^{20}\) PAK/IPAR Conference on International Marriage Migration in Asia, (Seoul, 2007).
3.5 Application of Marriage Acts in Non Resident Indian Marriages

Marriage laws outline the legal requirements, which determine the validity of a marriage. The NRI marriages may be solemnized under either, The Hindu Marriage Act, 1955, The Special Marriage Act, 1954, The Foreign Marriage Act, 1969 or any other personal law governing the spouses.

The law under which the parties have married will determine the law that will be applicable to the couple. It will also affect their children in respect of rights relating to inheritance and succession, as also the couple’s right to adopt, to be guardians or to obtain custody of children. Each of the laws specifies persons who can marry under the provision of that law. The Hindu Marriage Act, 1955 requires that both the parties who are getting married must be Hindus. So that if a non-Hindu wants to marry a Hindu under the Hindu Marriage Act, 1955, the non-Hindu partner will have to get converted to Hinduism before their marriage can take place. The Muslim law, on the other hand, as applied in India permits a Muslim marriage between two Muslims or between a Muslim man and a Christian/Parsi woman but not a Hindu/Buddhist or Sikh woman. The Christian law of marriage permits a marriage between any two Christians or even a Christian and a non-Christian under it.

The marriage under The Hindu Marriage Act, 1955 can be solemnized only between two Hindus as defined in Section 2, who are citizens of India. This marriage can be registered under the same Act under Section 8 or even
under the Special Marriage Act, 1954 under Section 15 but such registration by itself does not confer on the spouses all the rights guaranteed under the Special Marriage Act, 1954. The Special Marriage Act, 1954 is a secular Act where religion or caste of the spouses is legally not relevant, as Section 4 has used the words “any two persons”. This even excludes the need of wedding persons to be Indian Citizens, so any two foreigners, namely two non-citizens domiciled in India may have their marriage solemnized under the Special Marriage Act, 1954. The Special Marriage Act, 1954 is in reality an Indian Marriage Act, which applies to all Indians irrespective of caste, creed or religion. The concept of marriage under this Act is monogamous, that is union for life, dissolvable by judicial authority of law only.

The unique feature of Special Marriage Act, 1954 is that it avoids the conflict of inter-communal and inter-religious laws, which is bound to arise when parties to marriage belong to different communities or different religions. Even succession to the property of such persons is also not governed by their personal law i.e. by the law of the community to which the party belongs; it will be governed by Indian Succession Act, 1925. This is so, even when both the parties belong to the same community. Inter-religious marriages, which give rise to inter-personal conflicts will be governed by provisions of this Act, provided such marriages are performed under this Act or though solemnized under any other law but are registered under this Act. The entire Act is in the form of a conflict

statute in India answering all the issues arising out of conflict situations due to inter-religious marriages.  

The Law Commission in its 212th Report has recommended that the word “Special” be dropped from the title of the Special Marriage Act, 1954 and it be simply called “The Marriage Act, 1954” or “The Marriage and Divorce Act, 1954”. The suggested change will create a desirable feeling that this is the general law of India on marriage and divorce and that there is nothing “special” about a marriage solemnized under its provisions. A provision be added to the application clause in the Special Marriage Act, 1954 that all inter-religious marriages except those within the Hindu, Buddhist, Sikh and Jain communities, whether solemnized or registered under this Act or not shall be governed by this Act.

In some cases the marriage may even be under The Foreign Marriage Act, 1969, which is just an extension of The Special Marriage Act, 1954 except that marriage under this Act is between parties one of whom at least is a citizen of India by fulfilling the conditions laid down in Section 4 of the Act. The Act provides facility for an Indian national to marry abroad with another Indian national or a national of another country or with a person domiciled in another country. Such a marriage may have been solemnized in India or before a marriage officer in a foreign country. This Act too, like other Acts, is a monogamous marriage Act where bigamy is void and punishable under Section 19.

Under this Act, Foreign marriages solemnized under other laws can also be registered under Section 17.

For marriages to be celebrated in a foreign country, where at least one of the parties is a citizen of India, effective and elaborate provisions have been made under the Foreign Marriage Act, 1969, where parties can proceed to have their marriage solemnized under the said Act, the question of domicile in India would no longer be relevant.

Considerable uncertainty as to the law governing foreign marriages & the application of principles of private international law to such marriages is now removed as a result of this Foreign Marriage Act, 1969. This Act provides that marriages where one of the parties to the marriage is an Indian citizen and the other party is a non-Indian, would be governed by the provisions of the Special Marriage Act, 1954. The courts in this country and in some other countries may therefore, deal with the provisions of the Special Marriage Act, 1954 while dealing with dissolution of marriages which are covered by the Foreign Marriage Act, 1969, which is a complete code in itself as it answers all the issues in conflicts.

Parties marrying under their personal law in a foreign country are governed by the law in force in that country in respect of such marriage for matrimonial relief. Parties marrying in a foreign country according to the civil law of that country, relief can be claimed in India under Sub-Section (1) of Section 18, of Foreign Marriage Act, 1969, which lays,
“Subject to the other provisions contained in this Section the provisions of Chapter IV, V, VI, and VII of the Special Marriage Act, 1954, shall apply in relation to marriages, solemnized under this Act & to any other marriage solemnized in a foreign country between parties of whom one at least is a citizen of India as they apply to marriages solemnized under that Act”. In the latter situation, (i.e. the parties marrying under civil law) the formal validity of the civil marriage in foreign country will be governed by the civil law of that country. For matrimonial relief as envisaged by Section 18 (1), the law of domicile of the parties is applicable. Section 17 (6) of the Foreign Marriage Act, 1969 being a deeming provision, makes the provisions of the Special Marriage Act, 1954 applicable to all marriages performed under the Foreign Marriage Act, 1969 for purposes of matrimonial relief. Section 17 (6) thus lays, “A marriage registered under this Section shall, as from the date of registration, be deemed to have been solemnized under this Act”. In view of the deeming provision found in Section 17 (6) of the Act, registration absolves the parties of proving that the marriage of the parties was in fact solemnized under the Act.24 A marriage solemnized under British Marriage Act, 1949, between a Muslim husband and a Hindu wife in 1966 is a foreign marriage within the meaning of Foreign Marriage Act, 1969. The marriage is governed by Chapter IV of the Act. The said marriage would be governed by the

---

Special Marriage Act, 1954 and not by the personal law of the husband.\textsuperscript{25}

Sometimes Non Resident Indians contract civil marriages abroad under foreign laws without solemnizing ceremonial marital customary rites simultaneously either in India or abroad nor register their marriage under any of the Indian marriage laws, such marriages do not come within the ambit of Indian law in any way. However if the couple, in addition take the precaution of solemnizing their marriage under the Foreign Marriage Act, 1969 in any Indian diplomatic office abroad, such a marriage can come under the jurisdiction of Indian courts. Alternatively, NRI spouses may have to choose either their foreign nationality law or their domicile law abroad to resolve their marital disputes in accordance with such laws.

Section 29 of Hindu Marriage Act, 1955 gives statutory recognition to customary marriages and divorces. This aspect is very important as far as a certain category of Indian immigrants are concerned–those men who have migrated abroad from parts of rural India and have subsequently remarried after divorcing their Indian wives by pleading customary divorce. Before permanent settlement can be obtained by the Indian immigrant, who has subsequently remarried a woman of foreign origin and extraction, the immigration authorities will require evidence regarding the legal validity of the customary divorce obtained in India. However, custom has to be pleaded and proved that it must be a regular practice in the community of the parties pleading it. Such a custom

\textsuperscript{25} Abdur Rahim Undre v. Padma Abdur Rahim, AIR 1982, Bom. 341.
should be ancient, certain, reasonable and not opposed to public policy. The Madras High Court held that customary divorce was recognized both before and after passage of Hindu Marriage Act, 1955, it is not necessary for the parties in such a case to go to Court to obtain divorce on grounds recognized by custom.\textsuperscript{26}

For the application of Hindu Marriage Act, 1955 as well as Special Marriage Act, 1954, the parties must be domiciled in India at the time of marriage while the question of domicile is not relevant under The Foreign Marriage Act, 1969.

\textbf{3.5.i Type of Marriage Ceremony for Non-Resident Indian Marriages}

Every Hindu domiciled in India shall be governed by the Hindu Marriage Act, 1955 and those whose marriage has been solemnized under the Special Marriage Act, 1954 would be governed by the Special Marriage Act, 1954.

The Special Marriage Act, 1954 provides for a civil form of marriage, which can be availed of by any one domiciled in India irrespective of the religion, through registration as provided in Chapter II of the Special Marriage Act, 1954, by fulfilling the conditions laid down in clause (a) to (e) of Section 4 of the said Act. Thus the Hindus availing of Chapter II of the Special Marriage Act, 1954 i.e. Sections 4 to 14 would be outside the pale of the Hindu Marriage Act, 1955. Having married under the

\textsuperscript{26} Mariamonia P. v Padmanabham, AIR 2001 Mad. 350.
Special Marriage Act, 1954 they cannot be heard to complain of the rigors.\textsuperscript{27}

A certificate of registration of marriage under the Special Marriage Act, 1954 operates as conclusive evidence of two facts: (1) the marriage under the Act had been solemnized and (2) that the formalities respecting signatures of witnesses have been complied with.\textsuperscript{28}

Many NRIs of Hindu origin who have foreign domicile or have acquired a foreign citizenship, come to India and solemnize their marriage either with an Indian national spouse or with a foreign domiciled spouse in India in accordance with customary rites and ceremonies under Hindu Marriage Act, 1955 and have to get their marriage registered in India for purposes of immigration or entry into their present foreign home country. They are faced with the dilemma as to whether they should get their marriage registered under Special Marriage Act, 1954 or under Hindu Marriage Act, 1955. In the first Act, there is a prolonged process of time i.e. two months notice and prescribed objection period before the Certificate of marriage can be obtained while in the second Act this period is spared. However if one of the spouses is a foreigner and not Hindu by religion at the time of marriage ceremony, they will have to get their marriage registered under Special Marriage Act, 1954.

Kerala High Court\textsuperscript{29} has ruled that Hindu Marriage Act, 1955 has extra-territorial operation and applies to all

\textsuperscript{27} Anil Kumar Mahsi v. Union of India, (1995) 1 SCJ 90-94.
\textsuperscript{28} Madhubala v. Jagdish Chandra, (1978) 4, All LR 457.
\textsuperscript{29} Vinaya Nair v. Corporation of Kochi, AIR 2006 Ker.275.
Hindus even if they reside in different parts outside India. However, both parties must be Hindu by religion in any of its forms and they satisfy the conditions and have performed the ceremonies provided in the Hindu Marriage Act, 1955. There can be no denial by local authorities to register marriages under Hindu Marriage Act, 1955 between Hindus having foreign domicile who have solemnized marriages under Hindu Marriage Act, 1955.

On the question of marriage between two Hindus, one being not of Indian domicile, Kerala High Court\(^\text{30}\) has held that Section 1(2), Hindu Marriage Act, 1955 specifically makes it clear that the Act extends to the whole of India except the State of Jammu and Kashmir and also that it applies to Hindus domiciled in the territories to which this Act extends, who are outside the said territories. Therefore, the Act will apply to a Hindu outside the territory of India, only if he is a Hindu domiciled in the territory of India. Therefore, only those Hindus having permanent residence in India will be covered by the Hindu Marriage Act, 1955. There cannot be a Hindu marriage between a Hindu and a Christian.\(^\text{31}\)

As a Hindu marriage between a Hindu and a Christian is invalid and issuance of a certificate of marriage does not cure the invalidity.\(^\text{32}\) On the question of inter-territorial operation of Section 1(2) of the Hindu Marriage Act, 1955, the Court held, that it applies to all Hindus, Budhist, Jains and Sikhs, residing in India,

---

30 Ramesh Kumar P. v. Secretary, Kannapuram Gram Panchayat, AIR 1998 Ker 95.
irrespective of the question whether they are domiciled in India or not unless prohibited by the domestic rule of law of the land to which one of the parties, a foreigner, may belong, in which case the question of domicile may assume importance.33

Commenting on the intention of the legislature in enacting the provisions of Section 19 along with those of Section 1 (2) of the Hindu Marriage Act, 1955, it was to make this law applicable to all Hindus irrespective of domicile and/or residence. The only thing is that they have performed the marital rites.34

According to M.N. Das35 reasonable, meaningful, schematic and purposive reading of Section 1(2) of the Hindu Marriage Act, 1955 would show that the decisions of the Division Bench of the Calcutta High Court and of the Gujarat High Court have laid down the correct law, that the only thing is that they (marrying parties) must be Hindus and the marriage must be performed according to Hindu rites.

Justice Sujata Manohar36 said in a symposium, “One of the cases which I dealt with relating to conflict between inter-personal laws was a case where a Hindu woman and a Muslim man decided to marry in a manner which pleased the families of both sides. The couple first went through a Hindu ceremony of marriage and then it went through a

---

34 Nitaben v. Dhirendra Chanderkanta Shukla, AIR 1985 NOC 76 Guj.
Muslim marriage. Both the marriages were legally a nullity. So that when the parties wanted a divorce, they found that despite two marriage ceremonies, there was in fact, no valid marriage”.

Within the parameters set by the law of the jurisdiction in which marriage or wedding takes place, each religious authority has rules for the manner in which weddings are to be conducted by their officials and members. To avoid any implication that the state is “recognizing” a religious marriage (which is prohibited in some countries)–the “civil” ceremony is said to be taking place at the same time as the religious ceremony. Often this involves simply signing a register during the religious ceremony. If the civil element of the religious ceremony is omitted, the marriage is not recognized by government under the law.

Civil marriage is the legal concept of marriage as a governmental institution irrespective of religious affiliation, in accordance with marriage laws of the jurisdiction.37

3.5.ii Validity of Non Resident Indian Marriages

Hindu Marriage is essentially a monogamous marriage and the marital bond cannot be broken without Court intervention. NRI marriages are heterogeneous & problematic group, involving sensitive and intricate issues of law as well as facts. Here the issue of validity of marriage assumes great significance.

In matrimonial cases involving the foreign element viz. NRI matrimonial disputes, the courts have to decide about the validity of marriage. The validity of marriage is judged in two ways:

The first requirement is the formal validity as to whether a religious or civil ceremony has been observed; whether due formalities under the relevant marriage Act have been complied with. These matters are regulated by the *lex loci celebrationis* i.e. the law of the place where the ceremony takes place. This is also called the rule of *locus regit actum*.38

The second important consideration is the personal laws of parties, because marriage is a personal matter of the marrying spouses. This is called substantial or essential validity of marriage.

A person’s capacity to marry is governed by the law of domicile because the religious traditional laws differ from one region to another in many aspects, more so in the face of religious conversions for the sake of marriage. This results in inter-personal conflict of laws in India.39

Supreme Court of India has held that the capacity to marry and impediments in the way of marriage would have to be resolved by referring to their personal law.40 Here the Court has followed the rule of personal law i.e. the law of domicile.

39 Sarla Moudgal, President Kalyani v. Union of India, AIR 1995 SC 1531.
There is a sharp distinction in Private International Law between the formal and substantial validity of marriage. When the personal law of a party attaches some fundamental conditions, which are essential for the validity of marriage, compliance with these conditions makes marriage substantially valid. These fundamentals vary from place to place. In England, capacity to marry and marriage between consanguinity as prohibited by the statutes are examples of substantial validity of marriage. In India, amongst the Hindus, now marriage during lifetime of his or her spouse is void ab initio and this constitutes one element for substantial validity of marriage. On the other hand when the law of the land where the marriage is celebrated attaches some formalities for the marriage between persons whether domiciled in that country or in a foreign land these are called formal validity of marriage. The formal validity of marriage is not as vital as the essential validity to a particular society. Non-observance of any formality renders a marriage voidable only, not void.\textsuperscript{41}

According to Cheshire there is no rule more firmly established in Private International Law than that, which applies the maxim locus regit actum to the formalities of marriage. Whether any particular ceremony constitutes a formally valid marriage depends solely upon the law of the country where the ceremony takes place.\textsuperscript{42}

Section 8(5) of Hindu Marriage Act, 1955 specifically lays down that failure to register a Hindu marriage does not affect its validity. Even where compulsory registration

\textsuperscript{41} Supra note 35.
\textsuperscript{42} Cheshire & North's \textit{Private International Law}, 3 (Oxford University Press, First Indian Reprint, 2006).
of marriage is laid down under the rules, such as immigration rules, non-registration does not affect the validity of the marriage, but merely entails a nominal fine. Moreover, mere registration of a marriage under Section 8 will not ipso facto make the marriage valid.

3.6 Causes of Marital Discord in Non-Resident Indian Marriages

Difficulties at individual and family or social level are the outcome of mode of matrimonial alliance and to the method of solemnization of marriage besides the socio-economic background of both the sides involved in these marriages.

Among the common causes of matrimonial discord are delay in immigration of the left out spouse usually the bride; pregnancy before departure; divorce before childbirth or even after childbirth with attendant problems of maintenance, custody of children and status of wife; cultural clash between spouses or with the family on both sides after marriage; job requirements putting stress on family life or forced separation due to distant postings; economic burden due to increased family responsibilities or health reasons etc.43

Multiple marriages by NRI youths, luring girls into 'short liaison’ during their stay in India and then leaving them in lurch, in many cases with a child, now termed as ‘run-away marriages’ or ‘holiday-wife-syndrome’, are

43 Available at, http://www.nrilegalservices.org/reports (visited on December 2, 2009).
creating a lot of hardship to such brides in the absence of appropriate legislation to address the problem.\textsuperscript{44}

Western cultures do not discourage splitting of marriages the way Indian values do. Additionally, unlike India, it is also relatively easy to file and obtain a divorce in USA, Europe, and other countries, where a majority of Indians live. All these factors lead to the phenomena of two unequal lives and results in divorce in the end.

Following are some of the typical instances of the issues that arise in NRI marriages that have been repeatedly highlighted in the actual case studies from different states of the country:

Woman married to an NRI groom, who was abandoned even before being taken by her husband to the foreign country of his residence. After a short honeymoon, the husband had gone back, promising to soon send her ticket that never came. In many instances, the woman would already have been pregnant when he left and so both she and the child (who was born later) were abandoned. The husband never called or wrote and never came back again. The in-laws who could still be in India, would either plead helplessness or flatly refuse to help.

Woman who went to her husband’s home in a foreign country only to be brutally battered, assaulted, abused both mentally and physically, ill fed, and ill-treated by him in several other ways. She was therefore either forced to flee or was forcibly sent back. It could also be that she was

\textsuperscript{44} S.S. Negi, “Legal Notes”, \textit{The Tribune, Chandigarh.},(Jan. 18, 2007) at 11.
not allowed to bring back her children along. In many cases, the children were abducted or forcibly taken away from the woman.

Woman who was herself or whose parents were held to ransom for payment of huge sums of money as dowry, both before and after the marriage, her continued stay and safety in her husband’s country of residence depending on that.

Woman who reached the foreign country of her husband’s residence and waited at the international airport there, only to find that her husband would not turn up at all.

Woman who was abandoned in the foreign country with absolutely no support or means of sustenance or escape and without even the legal permission to stay on in that country.

Woman who learnt on reaching the country of her NRI husband’s residence that he was already married in the other country to another woman, whom he continued to live with. He may have married his new wife due to pressure from his parents and to please them or sometimes even to use her like a domestic help.

Woman who later learnt that her NRI husband had given false information on any or all the following: his job, immigration status, earning, property, marital status and other material particulars, to convince her into the marriage.
Woman whose husband, taking advantage of more lenient divorce grounds in other legal systems, obtained ex-parte decree of divorce in the foreign country through fraudulent representations and/or behind her back, without her knowledge, after she was sent back or forced to go back to India or even while she was still there.

Woman who was denied maintenance in India on the pretext that the marriage had already been dissolved by the Court in another country.

Woman who approached the Court, either in India or in the other country, for maintenance or divorce but repeatedly encountered technical legal obstacles related to jurisdiction of courts, service of notices or orders, or enforcement of orders or learnt of the husband commencing simultaneous retaliatory legal proceeding in the other country to make her legal action futile.

Woman who sought to use criminal law to punish her husband and in-laws for dowry demands and/or matrimonial cruelty and found that the trial could not proceed as the husband would not come to India and submit to the trial or respond in any way to summons, or even warrant of arrest.

Woman who was coaxed to travel to the foreign country of the man’s residence and get married in that country, who later discovered that Indian courts have even more limited jurisdiction in such cases.

Woman who had to fight nasty legal battles for custody of her children and for child support, and to bring them back with her after she was divorced or forced to
leave, sometimes even facing charges of illegally abducting her own children.  

3.6.i Common Causes of Marital Conflict Unique to Non Resident Indian Marriages

Factors at the root of NRI marital conflict can be summed up as follows:

The reasons why Overseas Indians prefer to marry a Resident Indian differ from the reasons a Resident Indian would marry an NRI. These reasons have a direct effect on the expectations one spouse has from the other. For most resident Indians, marrying an NRI is the easiest route for immigrating to a foreign country with an assurance for a comfortable and lavish lifestyle abroad. For many Overseas Indians, on the other hand, marriage is a way to stay connected to their roots. They want to instill the Indian values of family life in their children, which they have inherited from their parents.

The day-to-day communication requires a familiarization with the regional dialects and colloquial phrases. Learning a new language takes a significant amount of time, effort and practice. Language therefore becomes a barrier unless the emigrating spouse is already well versed in the same language or is willing to learn the same.

Many resident Indians find it extremely difficult to adapt to the foreign culture of the country where overseas spouse resides. This cultural shock is an important factor.

---

in their inability to cope with the sudden change in lifestyle.

Some countries impose employment restrictions on spouses of overseas Indians who are on work/student visa. In USA for example, NRI spouses on H4 or F2 visa are prohibited from any employment. In such a situation, spouses who were employed in India before emigrating find themselves unable to gainfully utilize their education and skills. This causes enormous frustration in them, which at times leads to added friction in the marriage.

Complete dependency on NRI spouse puts strain on the family economy. According to Immigration Laws in USA, H4 dependant-visa holders are not eligible for a social security number. Without this number, the individual faces great difficulties in opening a bank account or to secure a driver’s license and cannot be gainfully employed either. This makes the H4 visa holder spouse completely dependent on the overseas Indian spouse, which produces tremendous frustration and loss of self-esteem in the dependent spouse.

Delay in securing Visa, as it takes considerable amount of time after marriage to complete paper work for obtaining spousal visa, is also a cause for worry & misunderstanding. At times, this results in frustration to the spouse residing in India who may start suspecting foul play when actually there is none. Similarly, inability to visit India by the overseas spouse may also trigger homesickness and frustration in the newly married spouse.
Lack of social support system and absence of joint family system further complicates the issues between the spouses and leads to a rapid deterioration of relationship. Nuclear families are devoid of the counseling, help & support that elder and children in a family can provide. Absence of this cushion can trigger marriage disputes.

Unfulfilled expectations due to the misconception about Indians living in foreign countries that they are able to earn enormous amounts of money, relatively easily, is also an important cause for tension. Not all of their expectations are fulfilled when they discover, for the first time, the problems of those living abroad.

Homesickness due to separation from friends & family while traveling to foreign shores can be difficult to deal with for many persons. This transition imposes a psychological stress especially among women. Those who are enterprising might find methods to keep themselves occupied or learn new things. While those who cannot find anything that interests their minds might feel life in a different country to be very unexciting and restraining.

3.6.ii Fraudulent Non-Resident Indian Marriages

There are two broad categories:

Broken marriages but not fraudulent marriages:

- All broken marriages are not fraudulent marriages.
- Inability of spouses to cope with mutual differences as well as an inability to come to terms with the cultural differences prevalent in
a foreign land cannot be reasons to classify a marriage as fraudulent.

Fraudulent Marriages; major reason and underlying intentions for such marriages are:

1. Concealment of material facts about marital status, education, age, medical/health conditions.
2. To seek easy immigration to foreign shores for one's own self and family members (parents and children).
3. Fulfilling academic ambitions of acquiring a foreign degree by marrying an NRI spouse.
4. To draw from the funds made available through overseas Indian spouse’s income.
5. To gain an entry into foreign lands to reunite with their paramours.
6. Extort money by filing false and frivolous charges/cases.
7. To seek hefty alimony by resorting to divorce thereby facilitating easy money for a lavish lifestyle.
8. Dowry expectations due to Indian traditions.
10. The notion that Indian Law is lax and can be manipulated.
It must be recognized that failure of NRI marriages may be due to a variety of reasons and that both men as well as women are responsible for such failures. The absolving of all women from blame is unjustified. The notion that every case of abandoned bride is due to harassment/dowry demands is over simplistic.

Sometimes people marry for purely pragmatic reasons, sometimes called a ‘marriage of convenience’ or ‘sham marriage’. For example, according to one publisher of information about “green card” marriages, “Every year over 450,000 United States citizens marry foreign-born individuals and petition for them to obtain a permanent residency (Green Card) in the United States”. While this is likely an over-estimate, in 2003 alone 184,741 immigrants were admitted to the U.S. as spouses of U.S. citizens. Many more were admitted as fiancés of US citizens for the purpose of being married within 90 days. Regardless of the number of people entering the US to marry a US citizen, it does not indicate the number of these marriages that are convenience marriages, which number could include some of those with the motive of obtaining permanent residency, but also include many people who are US citizens. One example would be to obtain an inheritance that has a marriage clause. Another example would be to save money on health insurance with preexisting conditions offered by the new spouse’s employer. Many other situations exist, and, in fact, all marriages have a complex combination of conveniences motivating the parties to marry. A marriage
of convenience is one that is devoid of normal reasons to marry.\textsuperscript{46}

3.7 Marital Laws and Non Resident Indian Marriage, Nationality, Domicile and Residence in NRI Marital Cases

Basic legal facts, the so called connecting factors, which must be known before one can comprehend the various aspects of Marital Laws and NRI marriages are:-

3.7.i Citizenship

About 30 million NRIs live all over the world. Their marital or inter-parental conflicts originate in foreign lands. For any meaningful discussion on NRI marriages, it is imperative to first know the legal position of citizenship and status of domicile of NRI and Indian spouses.\textsuperscript{47}

The Citizenship Act was amended in 2005 for a new form of Indian nationality, the holders of which are to be known as Overseas Citizens of India (OCI). The Indian Constitution does not permit dual citizenship or dual nationality except for minors where the second nationality was involuntarily acquired. Over-seas Citizenship of India is not a full-fledged citizenship of India. Acquisition of citizenship of another country by a citizen of India results in the termination of his Indian Citizenship.

\textsuperscript{46} Available at: \url{http://ImmigrationtotheUnitedStates/Fiscalyears18202003.pdf} (visited on December 22, 2009).

\textsuperscript{47} Malhotra Anil, "Born Abroad and Removed To India", \textit{India, NRIs & The Law}, 15 (Universal Law Publishing Co. New Delhi 2009)
The Prime Minister of India,\(^{48}\) announced the Government’s intention to give dual citizenship to Persons Of Indian Origin (PIOs) domiciled in any country (except Pakistan & Bangladesh). This has since been given legal backing after the Indian Parliament approved the Citizenship (Amendment) Act, 2005. The amended Act enables the Central Government to register, as an Overseas Citizen of India (OCI), any person of full age and capacity:

1. Who is a citizen of another country now, but was a citizen of India at the time of, or at any time after the commencement of the Constitution of India on 26\(^{th}\) January 1950;

2. Who is a citizen of another country but was eligible to become a citizen of India at the time of commencement of the Constitution;

3. Who is a citizen of another country but belonged to a territory that became a part of India after 15\(^{th}\) August 1947;

4. Who is a child or a grandchild of such a citizen; or a minor child of a person mentioned in (1) to (4) above.

No person who is or has been a citizen of Pakistan or Bangladesh shall be eligible to be registered as an Overseas Citizen of India (OCI).

Indian Government celebrates a Pravasi Bhartiya Divas every year, which has become a good platform for

resolving social issues of the Indian diaspora, specifically the problems created by cross border marriages, spousal desertion, divorce, adoption, inter-parental child abductions, spousal maintenance & property settlements. It is a matter of grave concern that the verdicts of Indian Courts, even that of the Supreme Court, on these matters, were not recognized by the courts and authorities in foreign countries.

3.7.ii Domicile

Domicile is derived from the Latin word ‘domicilium’ meaning ‘dwelling’ and ‘domus’ meaning home. Domicile in a territory conveys the idea of intention to reside or remain in the territory. 49

Citizenship denotes the relation between a person and the state law while domicile denotes the residence of the person.

Domicile in India is considered an essential requirement for acquiring the status of Indian Citizenship. Article 5 of The Constitution of India deals with citizenship by Domicile. A person is entitled to citizenship by domicile if he/she fulfils the two conditions:

Firstly, he/she must at the commencement of Constitution, have his domicile in the territory of India;

Secondly, such person must fulfill any of three conditions, namely,

(1) He was born in India

Either of his parents was born in India

He must have been ordinarily resident in the territory of India for not less than five years immediately before the commencement of the Constitution.

Domicile is the legal relationship between an individual and a territory with a distinctive legal system, which invokes that system as his personal law. It is basically a legal concept to determine the personal law applicable to an individual and even if an individual has no permanent home, he is invested with a domicile by law. No person can be without domicile even if he is homeless.\(^50\)

A cardinal principle of a personal law is that a person carries the law with him wherever he may be.

There are two main classes of domicile: the domicile of origin and domicile of choice.

The domicile of origin is communicated by operation of law to each person at birth, that is the domicile of his/her father if legitimate or his/her mother if illegitimate.

A minor during the minority has no legal capacity to acquire a domicile different from that of his/her guardian.\(^51\)

---

\(^{50}\) Udny v. Udny, (1869) LR I Sc. & Div. 441.

A married woman takes the domicile of her husband.\textsuperscript{52} A widow retains the domicile of her husband until changed by her own act.\textsuperscript{53} If the marriage is void, the wife does not acquire the domicile of her husband.\textsuperscript{54}

A person is domiciled in the country in which he is considered to have his permanent home. His domicile is of the whole country and not confined to a part of it. Individual Indian State are not legally considered as capable of conferring domicile, it will be the habitual residence in the State/country, which is considered in law.

Supreme Court has held that in India Article 5 recognizes only one domicile viz. domicile of India. It does not recognize the notion of State domicile.\textsuperscript{55}

It is possible for the domicile of origin to be passed on through generations, no member of which has ever resided for any length of time in the country of the domicile of origin. The domicile of origin continues until one acquires a domicile of choice in another country.\textsuperscript{56}

Article 8 of The Constitution of India confers citizenship on Indian nationals residing abroad on their complying with its provisions.

The domicile of choice is acquired by a person of full age, in substitution for that which he/she presently

\textsuperscript{52} Karimunissa v. State of MP, AIR 1955 Nag. 6.  
\textsuperscript{53} Prakash v. Shahni, AIR 1956 J & K 83.  
\textsuperscript{54} Mehta v. Mehta, (1945) 2 All ER 690.  
\textsuperscript{55} AIR 1984 SC 142.  
\textsuperscript{56} Yogesh Bhardwaj v. State of UP, AIR 1991 SC 356.
possesses, by residence in a territory subject to a distinct legal system.\textsuperscript{57} Domicile of choice is acquired by a combination of fact with intention. The fact is residence and the intention is that the residence should be permanent.\textsuperscript{58}

Thus, there must be both the \textit{factum} and \textit{animus} to constitute the existence of domicile. Domicile of choice is not acquired by mere assertion.\textsuperscript{59}

For the acquisition of a domicile of choice, it must be shown that the person concerned had a certain state of mind, the \textit{animus manendi}, of making his permanent home in the country of residence. The word ‘permanent’ describes the residence, not the intention.

There is a distinction between residence and domicile. Residence alone in a place is not sufficient to constitute the domicile. Residence alone unaccompanied by the state of mind or intention to make it a permanent home, is insufficient to make it a domicile.\textsuperscript{60}

Under both the Indian and English private international law, there are four general rules in respect of domicile:

\begin{itemize}
  \item No person can be without a domicile;
  \item No person can have simultaneously two domiciles;
\end{itemize}
Domicile denotes the connection of a person with a territorial system of law;

The presumption is in favour of continuance of an existing domicile.61

Derivative domicile: So long as the marriage subsists, the domicile of the husband is the governing factor and the derivative domicile of the wife must necessarily follow that of her husband.62

The Indian Succession Act, 1925, Sections 15 and 16 states the general rule:

On marriage the wife acquires the domicile of her husband. Exceptions-The wife can acquire her own domicile in the following two cases:

If the wife is living separate under a decree of the Court, or If the husband is undergoing a life sentence.63

Domicile is central to the determination of issues relating to the person and which receives treatment in any work on conflict of laws.

Formal validity of marriage is connected to *lex loci celebrationis* i.e. law of the place where a marriage is celebrated.

Substantive validity of marriage or the capacity to marry is connected to *lex domicili* i.e. law of domicile.

---

63 The Indian Succession Act, 1956 (Act 30 of 1956) Sections 15 and 16.
3.7.iii Residence

Domicile is important for ‘validity’ in law and residence is important for ‘jurisdiction’ in law.

In order to give jurisdiction on the ground of ‘residence’ something more than a temporary visit is required. It must be more or less of a permanent character and of such a nature that the Court in which the respondent is sued is his natural forum. The word “reside” is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one’s own dwelling permanently as well as in its extended sense. In its ordinary sense, ‘residence’ is more or less of a permanent character. The expression “resides” means to make an abode for a considerable time; to dwell permanently on or a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. Where there is such a fixed home or such abode at one place, the person cannot be said to reside at any other place when he had gone on a casual or temporary visit, e.g. for health or business or for a change. If a person lives with his wife and children in an established home, his legal and actual place of residence is the same.

If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his
actual and physical habitation is the place where he actually or personally resides.\textsuperscript{64}

The word residence must answer a qualitative as well as a quantitative test i.e. two elements of \textit{factum} and \textit{animus} must concur.

Ministry of Overseas Indian Affairs has recommended that the rule of habitual residence needs to be considered as a possible basis of matrimonial jurisdiction in any attempt of future legislation. The principal reason for this suggestion being, that the rule of habitual residence has struck a balance between domicile on the one hand and nationality on the other. Besides, this rule is also capable of providing a minimum common basic understanding amongst majority of the countries.

The matrimonial laws provide for a matrimonial dispute being filed at a place where the marriage was performed or where the spouses have last resided together. When such laws were framed the place of marriage used to be the place of residence of bride’s parents. Now a days, the groom’s family has started insisting upon marriage to be solemnized at their place. The courts are now allowing the petitions by wives for transfer of matrimonial cases, filed at the place of the residence of the husband founded on the plea of ‘last resided together’, to the place where the wife is residing with her parents on account of the marriage having broken down. This is a pro-active, liberal protection extended by the Courts for the women in accordance with the spirit of times.

\textsuperscript{64} Jeewanti v. Kishan Chandra, AIR 1982 SC 3.
Marriage Laws (Amendment) Act, 2003 (Act No. 50 of 2003) has invested the Family Court with the jurisdiction to entertain and try the petition of wife where she is residing on the date of presentation of the petition.

At the International level, The Hague Convention on Nationality prescribes the ‘last common law’ as the national law under Article 8. This Article 8 of The Hague Convention on Nationality states:

“If the consorts do not have the same nationality for one of them having been naturalized or having acquired another nationality or by some other way having lost the nationality, which he held before, the last common law shall be deemed to be the national law”.

3.7.iv Dual Domicile Doctrine

This is the general rule of English Conflict of Laws that the personal law of each party, that is to say, the law of the place where he or she is domiciled governs the substantial validity of marriage. In other words, *lex loci domicilii* of each party to the marriage determines the validity of the marriage.

3.7.v Alternative Intended Matrimonial Home Doctrine

Propounded by Lord Denning, who affirmed that substantial validity of marriage contracted between persons domiciled in different countries is governed by the law of the country where they intend to live and on the basis of which they have agreed to marry.

In England the controversy over the *lex* to be applicable as to capacity of the marriage is settled once for
all by the effect of Marriage Enabling Act, 1960. Section 1(3). The Dual Domicile Doctrine now governs the capacity to marry.

The rule of domicile is replacing the nationality rule in most of the countries, for assumption of jurisdiction and granting relief in matrimonial matters.

Domicile of Dependence-Domicile of Dependence means that a married woman’s domicile follows, in general, that of her husband. If it is made the basis of jurisdiction, it may be unfair to the woman who can have no independent domicile. This violates the principle of equality.

Law Commission of India in its 65th Report has proposed that the domicile of woman should be determined independently of that of husband, in conformity with the spirit of the Indian Constitution.

Under Section 5 (1)(c) of Citizenship Act, 1955, a woman married to a citizen of India does not automatically become an Indian citizen, though she may make an application and be registered as a Citizen of India.

A decision of the question whether she should be registered is left to the discretion of Central Government. In substance, the scheme of Citizenship Act is in conformity with the U.N. Convention on the Nationality of Married Woman.65

---

The Citizenship Act is of no use in determining the question as to how far as Indian woman married to a foreigner becomes a foreign citizen. In India, there is no presumption that the wife would, by marriage, acquire the husband's nationality. The theory of unity of the husband and wife for the purposes of determining the nationality does not seem to have found favor in England or in other Commonwealth jurisdiction.66

The Law Commission of India in its 65th Report has, thus proposed that the rule that on marriage the wife acquires a domicile or nationality of the husband shall not apply in relation to the recognition foreign divorces and separations. That the domicile and nationality of the married woman should be ascertained by reference to the same factors as in the case of any other individual capable of having an independent Domicile.67

3.8 Private International Law

In day-to-day practice, courts decide every case according to the law of their jurisdiction i.e. the domestic laws and they are under no obligation to apply any other law. However, in cases having foreign elements, a reference to concerned foreign law is called for in such cases. Obviously, questions arise as to when the courts can assume jurisdiction over cases having foreign element or in which cases a foreign law is to be applied or foreign judgments are to be recognized. It is here that Private International Law can provide answer to these questions.

---

What is meant by ‘foreign law’? In literal language, foreign law means the law of a foreign country. However, in Private International Law foreign law has a legal meaning. When a case is decided by a Court with reference to a system of law, which is different from the system of law, which the Court will apply to a purely domestic case, such law is called a foreign law. This may be the law of a country or it may be the law of a part of a country.

Private International Law is a separate and distinct unit in English legal system. This is more popularly called Conflict of Laws as it deals with cases/problems involving a foreign element i.e. which affect foreign persons or foreign things or transactions that had been entered into, wholly or partly in a foreign country, with reference to some foreign system of law. It is not a uniform law due to the existence of separate legal units of different States or countries.

It is not necessary that a suit will be governed by one system of law. It can happen that on different aspects of the suit, different systems of law apply. Thus, in an adjudication in respect of a marriage, questions of formal validity (ceremonies and rites of marriage) are regulated by *lex loci celebrationis* (the law of the place where the marriage was solemnized), questions of capacity to marry by the *lex domicili* (law of the domicile of the parties) and all matters relating to procedure by the *lex fori* (the law of the place where the trial takes place).

The Private International Law deals with individuals. It does not confer any absolute rights. In most of the countries,
“Conflict of Laws” or “private international law” is mainly Court developed law. India has not yet developed any such law. The rules of Private International Law as applied in India are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition some rules have also been evolved by judicial decisions.

The increase in immigration of different nationals to foreign lands has added new dimensions to Private International Law rules in India and elsewhere, particularly in the field of matrimonial matters.

According to Cheshire,\textsuperscript{68} objects of Private International Law are threefold:

(a) Jurisdiction i.e. conditions under which the Court is competent to entertain a claim,

(b) Choice of law i.e. to determine for each class of case, the particular municipal system of law by reference, to which the rights of the parties must be ascertained,

(c) Recognition and enforcement of a foreign judgment i.e. to specify the circumstances in which a foreign judgment can be recognized as decisive of the question in dispute and the right vested in the judgment creditor by a foreign judgment can be enforced by the Court.

\textsuperscript{68} Supra note 42.
As a preliminary to legal proceedings, the existence of marriage has to be established, as it may raise a problem of private international law, since the parties may have gone through a marriage ceremony abroad which, though valid by the law of the place of celebration or by the law of domicile, does not create the status of marriage according to the law of the land where the case is filed. Each legal system determines its own attributes of marriage, which are necessary to create the relationship of husband and wife.

There is a sharp distinction in Private International Law between the formal and substantial validity of marriage. When the law of the land where the marriage is celebrated attaches some formalities for the marriage between persons, whether domiciled in that country or in a foreign land, these are called formal validity of marriage. When the personal law of a party attaches some fundamental conditions, which are essential for the validity of marriage, compliance with these conditions make the marriage substantially valid.

The general rule of English Conflict of Laws is that the personal law of each party, i.e. to say, the law of the place where he or she is domiciled governs the substantial validity of marriage, this is called the Dual Domicile Doctrine.

The Alternative Intended Matrimonial Home Doctrine affirms that substantial validity of marriage contracted between persons domiciled in different countries is governed by the law of the country where they intend to live after marriage.
The most vexed questions in private international law is: under which law should marriage be characterized as monogamous or polygamous? Cheshire suggests that the character of whether polygamous or monogamous, should be determined by the law of the matrimonial domicile.

The next question is: how far do English courts accord recognition to the wife of a polygamous union? Morris thinks that she would be treated as wife unless there is some reason to the contrary. In the context that the personal law in India differs from community to community, it seems inevitable that in India there is no uniform or common concept of marriage. India is a country where personal law of a person is not determined by his/her domicile or his/her nationality but by his/her membership of the community to which one belongs.

Conflict of laws is an institution of international law and intra-national interstate law that regulates all lawsuits involving a “foreign” law element where different judgments will result depending on which jurisdiction's laws are applied as the *lex causae*.

In civil law systems, private international law is a branch of the internal legal system dealing with the determination of which state law is applicable to situations crossing over the borders of one particular state and involving a “foreign element” (élément d'extranéité), (collisions of law, conflict of laws).

In common law systems, conflict of laws, firstly, is concerned with determining whether the proposed forum has jurisdiction to adjudicate and is the appropriate venue
for dealing with the dispute, and, secondly, with determining which of the competing state's laws are to be applied to resolve the dispute. It also deals with the enforcement of foreign judgments.

There are two major streams of legal thought on the nature of conflict of laws. One group of researchers regard Conflict of Laws as a part of international law, claiming that its norms are uniform, universal and obligatory for all states. This stream of legal thought in Conflict of Laws is called “universalism”. Other researchers maintain the view that each State creates its own unique norms of Conflict of Laws pursuing its own policy. This theory is called “particularism” in Conflict of Laws.

Private international law is divided on two major areas (a) Private international law “sensu stricto” (narrow sense) comprising conflict of laws rules which determine the law of which country (state) is applicable to specific relations. (b) Private international law “sensu lato” (broader sense) which comprises private international law “sensu stricto” (conflict of laws rules) and material legal norms which have direct extraterritorial character and are imperatively applied (material norms of law crossing the borders of State) usually regulations on real property, currency control.

3.8. i. Terminology

Three different names—conflict of laws, private international law, and international private law are generally interchangeable, although none of them is wholly accurate or properly descriptive.
The term conflict of laws is primarily used in jurisdictions of the Common Law legal tradition, such as in the United States, England, Canada, and Australia.

Private international law (droit international privé) is used in France, as well as in Italy, Greece, and the Spanish and Portuguese speaking countries.

International private law (Internationales Privatrecht) is used in Germany and other German-speaking countries.

Within the federal systems where legal conflicts among federal states require resolution, as in the United States, the term conflict of laws is preferred simply because such cases do not involve an international issue. Hence, conflict of laws is a general term to refer to disparities among laws, regardless of whether the relevant legal systems are international or interstate.

The term, however, can be misleading when it refers to resolution of conflicts between competing systems rather than “conflict” itself. The term conflict of laws is usually used by common law countries, while for civil law countries the term private international law is more appropriate. The term private international law was coined by American lawyer and Judge Joseph Story, but was abandoned subsequently by common law scholars and embraced by civil law lawyers.

3.8. ii. History

The first instances of conflict of laws in the Western legal tradition can be traced to Greek law. Ancient Greeks dealt straightforwardly with multistate problems, and did
not create choice-of-law rules. More significant developments can be traced to Roman law.

The *jus gentium* was a flexible and loosely defined body of law based on international norms essentially created new substantive law for each case. This is called a "substantive" solution to the choice-of-law issue.

The modern conflict of laws is generally considered to have begun in Northern Italy during the late Middle Ages. Much of the English law became the basis for conflict of laws for most commonwealth countries.

**3.8.iii. The stages in a conflict case**

The Court must first decide whether it has jurisdiction and, if so, whether it is the appropriate venue given the problem of forum shopping.

The next step is the characterisation of the cause of action into its component legal categories which may sometimes involve an incidental question (also note distinction between procedural and substantive laws).

Each legal category has one or more choice of law rules to determine which of the competing laws should be applied to each issue. A key element in this may be the rules on *renvoi*.

Once the applicable law is decided, that law must be proved before the forum Court and applied to reach a judgment.
The successful party must then enforce the judgment, which will first involve the task of securing cross-border recognition of the judgment.

In those states with an underdeveloped set of Conflict rules, decisions on jurisdiction tend to be made on an ad hoc basis, with such choice of law rules as have been developed/embedded into each subject area of private law and tending to favour the application of the *lex fori* or local law. Because these rules are directly connected with aspects of sovereignty and the extra-territorial application of laws in the courts of the signatory states, they take on a flavour of public rather than private law because each state is compromising the usual expectations of their own citizens that they will have access to their local courts, and that local laws will apply in those local courts.

### 3.9 Choice of Law Rules

Courts faced with a choice of law issue have a two-stage process: the Court will apply the law of the forum (*lex fori*) to all procedural matters (including, self-evidently, the choice of law rules); and it counts the factors that connect or link the legal issues to the laws of potentially relevant states and applies the laws that have the greatest connection, e.g. the law of nationality (*lex patriae*) or domicile (*lex domicilii*) will define legal status and capacity, the law of the state in which land is situated (*lex situs*) will be applied to determine all questions of title, the law of the place where a transaction physically takes place or of the occurrence that gave rise to the litigation (*lex loci actus*) will often be the controlling law selected.
when the matter is substantive, but the proper law has become a more common choice.

In reality, however, moves to harmonise the conflictual system have not reached the point where standardisation of outcome can be guaranteed.

3.10 Conflict of Law Rules in Matrimonial Cases

In divorce cases, when a Court is attempting to distribute marital property, if the divorcing couple is local and the property is local, then the Court applies its domestic law lex fori. The case becomes much more complicated if foreign elements are thrown into the mix, such as when the place of marriage is different from the territory where divorce was filed; when parties' nationalities and residences do not match; when there is property in a foreign jurisdiction; or when the parties have changed residence several times during the marriage. Each time a spouse invokes the application of foreign law, the process of divorce slows down, as the parties are directed to brief the issue of conflict of laws and provide translations of the foreign laws.

The lex fori also applies to all procedural relief (as opposed to substantive relief). Thus, issues such as the ability to grant pre-trial relief, procedure and form, as well as statutes of limitations are classified as “procedure” and are always subject to domestic law where the divorce case is pending.69

---

3.11 Indian Courts Scenario and International Law

NRI marriages are essentially inter-country marriages with legal ramifications as to: Validity of marriage, Jurisdiction of Indian courts vis-a-vis Foreign Courts, Recognition of foreign decrees and Enforcement of Foreign judicial orders.

India has as yet no legislative law to combat matrimonial disputes involving a foreign element—i.e. where at least one of the spouses is domiciled outside India. Each case has to be dealt with on the basis of precedents as adjudicated law or judge-made law.

The English law has grappled with similar legal disputes under the category of “Conflict of Laws” & have enacted ‘Private International Law’. It is a distinct unit in English legal system and it is always concerned with one or more of four questions, namely:

(a) jurisdiction;
(b) choice of law;
(c) recognition;
(d) enforcement of foreign judgments.

There is no legislative law in India compared to ‘Private International Law’ or Conflict of Laws as in some western countries. In family and marriage cases involving NRI spouses, Indian courts rely upon Sections 13 and 14 of the Civil Procedure Code, 1908 and Section 44 A of the Civil Procedure Code, 1908. While the former deals with the competence to adjudicate and jurisdiction of a foreign
Court as to their conclusiveness, the later deals with presumption of a decree by a foreign Court for its execution.

- **Sections 13 and 14 Of The Civil Procedure Code, 1908**

  Section 13: When foreign judgment not conclusive. . .

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

  Where it has not been pronounced by a Court of competent jurisdiction where it has not been on the merits of the case.

  Where it appears on the face of 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.

  Where the proceedings in which the judgment was obtained are opposed to natural justice. Where it has been obtained by fraud

  Where it sustains a claim founded on a breach of any law in force in India.

  These six exceptions are concise, precise and comprehensive in wording. This Section is of a general nature and does not specifically deal with judgments of divorce or matrimonial matters. Still, this Section has become an effective tool in the hands of Indian Courts in
the absence of Indian legislation comparable to Private International Law in matters of family law.

Section 13 embodies the principle of *res judicata* in foreign judgments. It applies to the plaintiff as well as to the defendant who is equally entitled to non-suit the plaintiff on the basis of a foreign judgment. However, a foreign judgment is not conclusive as to any matter directly adjudicated upon, if one of the conditions specified in clauses (a) to (f) of Section 13 Civil Procedure Code, 1908 is satisfied and it will then be open to a collateral attack.

The Hon’ble Supreme Court of India has held “We believe that the relevant provisions of Section 13 of the Civil Procedure Code, 1908 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 sanctity of the institution of marriage and the unity of family which are the cornerstones of our societal life”.70

According to Dicey,71 “A foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either (1) of fact; or (2) of law”. Thus, a foreign judgment can be examined from the point of view of competence but not of errors. Hence, the Indian Court cannot go into the merits of the original claim.

---

70 See infra note 78 & 71.
Section 13 of the Civil Procedure Code, 1908 is the part of procedural law followed in Indian Courts. It concerns with recognition of the foreign decree only. The decree holder has to proceed before an Indian Court by filing a regular suit as the first stage of the enforcement proceedings. The Court after hearing the suit proceedings, may pass a judgment for its enforcement through an execution petition. Thus, a foreign decree is converted into a domestic judgment for its enforcement.

Once the Court comes to the conclusion that the foreign judgment is a judgment of competent Court, it will not go into the question whether the foreign law made a mistake on matters of law or facts. If the judgment is not a judgment of a Court of competent jurisdiction it would be given no effect, even if the foreign Court correctly chose the applicable law and correctly determined the facts of the case.

The questions of competency of the foreign Court is determined by the rules of Private International Law. Sometimes, in a suit before the Indian Court, a foreign judgment is pleaded as res judicata then it will be the duty the Indian Court to find out whether the foreign Court, which rendered the judgment has jurisdiction in the international sense.

Section 14 lays presumptions as to Foreign Judgments. The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on
the record; but such presumption may be displaced by proving want of jurisdiction.

In a case the Apex Court,\textsuperscript{72} held that mere production of a Photostat copy of a decree of foreign Court is not sufficient. It is required to be certified by a representative of the Central Government in America.

\textbf{Section 44 A of Civil Procedure Code, 1908}

This Section deals with the execution of decrees passed by courts in reciprocating territory.

Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied under this Section, being conclusive proof of the extent of such satisfaction or adjustment.

The provisions of Section 47 shall, as from the filing of the certified copy of the decree, apply to the proceedings of a District Court executing a decree under this Section and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13.

\textsuperscript{72} Infra note 81.
Explanation 1: “Reciprocating territory” means any country or territory outside India which the Central Govt. may, by notification in the official gazette, declare to be a reciprocating territory for the purposes of this Section; and ‘Superior Courts’ with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2: “Decree” with reference to Superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

A foreign decree can be executed under Section 44-A CPC only if all the conditions of Section 13 (a) to (f) CPC are satisfied.

Unlike Section 13 Civil Procedure Code, 1908, Section 44-A of Civil Procedure Code, 1908, envisages a direct enforcement of the foreign decree through an executing petition in civil matters without the necessity of going through initial suit proceedings. This facility of direct execution of the foreign decree is available only on the basis of a bilateral understanding on the basis of reciprocity between India and the country from where the decree has been delivered. This ensures a speedier disposal.
Section 3 and Section 108-A of the Indian Penal Code, 1860

It provide for extra-territorial jurisdiction. It is, however, debatable whether these could be invoked in case of problems in NRI marriages. Section 3 of The Indian Penal Code 1860, reads as under: Punishment of offences committed beyond, but which by law may be tried within India.

“Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India”.

Section 108-A of The Indian Penal Code1860 read as under: Abetment in India of offences outside India.

“A person abets an offence within the meaning of this Code who, in India, abets the commission of any act within and beyond India which would constitute an offence as if committed in India”.

3.11.i Jurisdiction

Under Section 9 of Code of Civil Procedure, 1908, a civil Court has jurisdiction to try suits of a civil nature unless they are barred. Suits for matrimonial disputes, restitution of conjugal rights and dissolution of marriage are all civil suits.

Jurisdiction of courts Under Section 19 of Hindu Marriage Act, 1955 has been defined as under:
(i) Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction— The marriage was solemnized, or

(ii) The respondent at the time of presentation of the petition resides, or

(iii) The parties to the marriage last resided together, or

(iv) The petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends or has not been heard of as being alive for a period of seven years or more by those persons who would have heard of him if he was alive.

Bombay High Court\textsuperscript{73} has held that ‘last resided’ in Section 19 (iii) of Hindu Marriage Act implies last residence in India and the High Court in India within whose jurisdiction the parties last resided together can take cognizance of the matter.

Here Clause (iv) includes the respondent residing abroad or where his or her whereabouts are not known to the petitioner.

The jurisdiction where the marriage was solemnized is called \textit{lex loci celebrationis}.

\textsuperscript{73} Meera v Anil Kumar, (1992) 2, HLR 284.
Under Criminal Procedure Code 1973, Section 182 (2), any offence punishable under Section 494 or Section 495 of IPC 1860 may be inquired into or tried by a Court within whose jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage or the wife by the first marriage has taken up permanent residence after the commission of the offence.

Here the incorporation of the clause "or the wife by the first marriage has taken up permanent residence after the commission of the offence" in Section 182 (2) is mainly to facilitate the first wife to file a complaint at the place where she permanently resides after the commission of the offence.  

Similarly, Section 188 of Criminal Procedure Code 1973 deals with offences committed outside India by a person, he can be dealt with in respect of such offence at any place at which he is found.

Section 3 of Recognition of Divorce and legal separations Act 1971 of U.K. reads as follows:

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, either spouse was habitually resident in that country; or either spouse was a national of that country.

This law can be compared with Indian Law on presumption of foreign judgments under Section 14 Civil Procedure Code, 1908 as stated above.

In England a foreign nullity decree should be recognized if either party's domiciliary law would recognize it. As a granting Court will recognize its own valid decrees, domiciliary recognition may be formulated thus: A foreign decree of nullity will be recognized in England if at the time of institution of the proceedings in the granting State either party was domiciled in the State, which recognized that decree. 75

In another case the husband was domiciled in England; wife lived most of her life in Pennsylvania, it was held that the decree would be recognized in England since she had a substantial connection with Pennsylvania. 76

3.12 Desertion

In the context of NRI marriages “desertion” ipso facto means deserted wife. Such marriages have also been called “run away” marriages. This group forms a big chunk of Court cases of NRI matrimonial disputes.

If the marriage takes place in India and the husband goes abroad after some time leaving the wife behind, courts have to deal firstly with the validity of marriage and secondly the enforce-ability of the authority of law due to uncertainty of domicile or even non-traceable deserting spouse (husband).

If the marriage had taken place on foreign soil and the aggrieved spouse (wife) comes to India to seek matrimonial justice, Indian courts are confronted with not

76 Mohor v. Mohaney, (1968)-3, All ER 223.
only validity of marriage but even of its own jurisdictional authority.

Thus, desertion of wife in purely Indian marriages, where both spouses are Indian residents, has different legal perspective where the courts have devised the term ‘constructive desertion’ in which the active or passive role of husband in inter-spousal or inter-family circumstances force the wife to get separated from her matrimonial home. Whereas, desertion or separation of wife in NRI marriage, where the foreign element becomes relevant, the courts have yet to devise a definitive course of law.

The distinction between ‘desertion’ and ‘separation’ has been defined in law.

Desertion means physical separation as well as intention to stay away from the society of the other spouse permanently. Separation may be only physical separation and intention to stay away, which may or may not be intended to be permanent.

‘Judicial separation’ under Hindu marriage is an adjudicated device/decree, to keep marriage under temporary suspension to allow cool down tempers either to aid reconciliation or prepare grounds for dissolution of marriage after the statutory period of one year at least. The term ‘legal separation’ includes separation by mutual agreement also.

In many cases women do approach the attorneys and NGOs in the foreign country; then depending on their convenience they jump jurisdictions and flee to India under one pretext or another putting the other party at
inconvenience. Though divorce should be used only as a last resort when all attempts for reconciliation have been exhausted, unfortunately, in some cases, it is in the best interest of both the individuals to separate gracefully, rather than live a life of constant conflict. Western judicial system recognizes that it is futile to force two unwilling adults to stay together in a marriage.

3.13 International Conventions Relating to Non-Resident Indian Marriages

United Nations sponsored International Conventions called Hague Conventions related to our study are listed below:


5. Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971.\(^\text{77}\)

3.14 Adjudicated Law in Non-Resident Indian Marital Cases: Jurisdiction of Indian courts, recognition of foreign judgments and enforcement of foreign Judicial orders in non-resident Indian marriages.

Three types of cases leading to Matrimonial Disputes between NRIs and their Spouses are set out below:

Firstly, the prospective NRI bridegroom gets married to an unsuspecting bride and then he goes abroad, abandoning the hapless spouse behind along with the money that he gets by way of dowry etc.

Secondly, the groom and the bride, both Indian nationals and domicilliaries, get married while abroad. The wife due to illtreatment by the husband or due to his extramarital affairs or due to any other compelling reasons gets back to India and files a petition for appropriate action before the Indian Court.

Thirdly, both the groom and bride resident abroad get married there. Marital disharmony leads to a Court action in the said foreign country. Reported cases in this category are not as numerous as in the first two categories.

Parallel matrimonial petitions, one by the NRI husband in a foreign Court and the other by the bride in the Indian Court, are quite common these days. Such litigation contested in two jurisdictions with conflicting orders are of grave legal concern, both for the litigating parties as well as for the courts in India. Some of the landmark judgments delivered by The Hon’ble Supreme Court of India and various High Courts involving NRI spouses in matrimonial litigation, relating to jurisdiction of
Indian Courts recognition of foreign judgments, enforcement of foreign judicial orders in NRI marital disputes, forum hunting for ex-parte divorce decrees, interpretation of statutory law in the absence of Private International Law in India, meaning of residence and domicile in the context of NRI marriages, legal importance of law under which the marriage is celebrated by the NRI spouses, personal appearance & impounding of passport for defiance of Court summons, are being listed below:

In *Teja Singh v. Satya*, the husband who was alleged to be domiciled in the state of Nevada, USA, got a decree of divorce from a local Court against deserted wife in India who had filed an application under Section 488, Cr.P.C., 1898, against the husband for maintenance. The husband resisted the petition on the ground that the marriage having been dissolved by competent Court, the husband’s liability to maintain his erstwhile wife had ceased. The Punjab High Court ruled that the exclusive jurisdiction for the dissolution of marriage vests in the Court where the parties are domiciled. Thus, *lex loci domicilii* would govern such proceedings. The decree of Nevada Court was held binding and the wife’s application for maintenance failed.

However, in *Satya (Smt) v. Teja Singh*, the wife filed an appeal in the Supreme Court as the forum-hunting husband had obtained a divorce decree from a convenient jurisdiction in Nevada Court (U.S.A). The Apex Court pointed out that the word ‘residence’ must answer a qualitative as well as a quantitative test i.e. the two

---

79 AIR 1975 SC 105.
elements of factum and animus must occur. Since the husband, a forum-hunting man, found a convenient jurisdiction, which would easily purvey a divorce to him and left it immediately after the decree, the Court found that the Nevada Court lacked jurisdiction and the decree of divorce obtained in Nevada was a nullity.

While delivering the judgment, the Apex Court, highlighted the fact of limping marriages. The Court observed that the principles of Private International Law governing within the divorce jurisdiction are so conflicting in different countries that not un-often a man and a woman are husband and wife in one jurisdiction but treated as divorced in another jurisdiction. The Court, therefore, stated 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”.

Towards this objective, the Court recommended an appropriate legislation. In the absence of any specific legislative/ statutory law equivalent to the ‘Conflict of Laws’ in India, recognition of foreign decrees in matrimonial and family matters in Indian Courts is dealt with under Sections 13 and 14 of the Civil Procedure Code, 1908, which lay down conditions for conclusiveness of a foreign judgment in India. However, according to Cheshire, the proposition that a decision of matrimonial Court on a defendant who is not domiciled in India is binding is questionable. For such a person such adjudication is a foreign judgment. In addition, the first and overriding essential for the effectiveness of a foreign judgment is that
the adjudicating Court should have had jurisdiction in the international sense over the defendant. 80

Indian Court cannot assume jurisdiction over a non-domiciled Hindu. 81 Thus, the different decisions rendered by the various High Courts and Supreme Court of India on the burning issue of desertion of wife by an NRI husband have highlighted the insufficiency and non-clarity of law on this subject. The Apex Court had suggested that “the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament”. This British Act has a scheme of direct enforcement of foreign judgments similar to Section 44-A of the Civil Procedure Code, 1908.

Another important explanation of Section 13 came in the Supreme Court judgment in Narasimha Rao Y. v. Venkata Lakshmi. 82 In this case, the Circuit Court of St. Louis County, Missouri, USA passed the decree of dissolution of marriage. Supreme Court of India observed that the United States Court passed the decree by assuming jurisdiction over the divorce petition filed by the husband there, on the ground that the husband had been a resident of the State of Missouri for 90 days preceding the commencement of the action as the minimum requirement of residence. Secondly, the decree had been passed on the only ground that there remained no reasonable likelihood that the marriage between the parties could be preserved and that the marriage had, therefore, “irretrievably

80 Supra note 78.
broken”. Thirdly, the respondent wife had not submitted to the jurisdiction of the foreign Court.

Taking on from where it was left by Satya v. Teja Singh case, the Court explained the implications of each clause of Section 13 in this case. This landmark judgment is worth quoting in detail:

“Clause (a) of Section 13 CPC states that a foreign judgment shall not be recognized if it has not been pronounced by a Court of competent jurisdiction. We are of the view that this clause should be interpreted to mean that only that Court will be a Court of competent jurisdiction which the Act or the law under which the parties are married recognizes as a Court of competent jurisdiction to entertain the matrimonial dispute. Any other Court should be held to be a Court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that Court. The expression “competent Court” in Section 41 of the Indian Evidence Act has also to be construed likewise”.

“Clause (b) of Section 13 CPC states that if a foreign judgment has not been given on the merits of the case, the Courts in this country will not recognize such judgment. This clause 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 this respect the general rules of the acquiescence to the jurisdiction of the Court which may be valid in other matters and areas should be ignored and deemed inappropriate”.

“The second part of clause (c) of Section 13 states that where the judgment is founded on a refusal to recognize the law of this country in cases in which such law is applicable, the judgment will not be recognized by the Courts in this country. 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 recognized 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”.

“Clause (d) of Section 13 CPC which makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained are opposed to natural justice, states no more than an elementary principle on which any civilized system of justice rests. However, in matters concerning the family law such as the matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure.

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 these are filed by either party. If the foreign Court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the costs of travel, residence and litigation where necessary, it should be held that the proceedings are in breach of the principles of natural justice. It is for this reason that we find that the rules of Private International Law of some countries insist, even in commercial matters, that the action should be filed in the forum where the defendant is either domiciled or is habitually resident”.
On the basis of the above interpretation, the Court then went on to lay down a golden rule that has been repeatedly followed and relied upon in subsequent cases:

“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 only three exceptions to this rule were also laid down by the Court itself as follows:

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;

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;

Where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties”.

Bringing in the benefit of certainty and predictability of law, the Court held “. . . 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 Private International Law of different countries with regard to jurisdiction & 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. . .".

According to the Court, the decree dissolving the marriage passed by the foreign Court was without jurisdiction in this case as according to the Hindu Marriage Act, 1955 neither the marriage was celebrated nor the parties had last resided together nor the respondent resided within the jurisdiction of that Court. The decree was also passed on a ground, which was not available under the Hindu Marriage Act, 1955, which is applicable to the marriage. Further, the decree had been obtained by the husband by representing that he was resident of the Missouri State when the record showed that he was only a "bird of passage". He had, if at all, only technically satisfied the requirement of residence of 90 days with the only purpose of obtaining the divorce. The Court reiterated that residence does not mean a temporary residence for the purpose of obtaining a divorce, but 'habitual residence' or residence which is intended to be permanent for future as well.

The final judgment therefore was that since with regard to the jurisdiction of the forum as well as the
ground on which the foreign Court had passed the decree in the case, were not in accordance with the Act under which the parties were married, and the respondent had not submitted to the jurisdiction of the Court or consented to its passing, it could not be recognized by the Courts in this country and was unenforceable.

The Court finally said: "We believe that the relevant provisions of Section 13 of the Civil Procedure Code 1908 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 sanctity of the institution of marriage and the unity of family which are the cornerstones of our societal life".

In the opinion of the Court these guidelines have the advantage of rescuing the institution of marriage from that uncertain maze of the rules of the Private International Law of different countries and frees women from the bondage of the husband's domiciliary laws because the much abused Conflict of Laws principle i.e. *lex domicili* by run-away Indian spouses (husbands mostly) gets negated.

However, this Court ruling assumes either of the two situations, Viz. (i) that the parties are married under Indian marriage laws and seek dissolution in a foreign forum and the foreign Court follows Indian Supreme Court guidelines/ruling in its verdict or (ii) the parties are married in one country and are granted divorce in another country and now seek its execution/recognition in an Indian Court. Thus, the Indian Courts are directed to evaluate the choice of law, depended upon by the Foreign
Court, between the law of domicile or the law under which the parties are married.

The rule of nationality is being replaced by the rule of domicile in most of the countries where non-resident Indians are settled and if the Foreign Court chooses the *lex domicilii*, the numbers of limping marriages are bound to increase. Limping marriage means, a marriage, which is legally valid in one country but illegal or void in another country.

To overcome such a situation in view of the peculiarities of Hindu matrimonial social structure, especially with regard to NRI marriages, Hon’ble Supreme Court of India in *Neerja Saraph v. Jayant Saraph*,\(^83\) dealing with recognition of the American nullity decree by US based husband against India based wife, who were married in India under Hindu Marriage Act, 1955, laid the following guidelines:

No marriage between a NRI and an Indian woman, which has taken place in India, may be annulled by a Foreign Court;

Provision may be made for adequate alimony to the wife in the property of the husband in India and abroad;

The decree granted by Indian Courts may be made executable in Foreign Courts both on principle of comity and by entering into reciprocal agreement like Section 44-A of the Civil Procedure Code, 1908, which makes a foreign

\(^83\) (1994) 6 SCC 461.
decree executable, as it would have been a decree passed by that Court.

These decisions have been followed by different High Courts in India.

According to S.K. Verma, the Supreme Court of India has, thus, filled the much-felt void in the matter of recognition of foreign matrimonial decrees in India, at the same time providing a new perspective to all the clauses of Section 13 of CPC in the context of matrimonial disputes from the point of view of choice-of-law situation. It is not uncommon for an Indian couple, married in India, to establish their matrimonial home permanently in a foreign country. In such situations, the Supreme Court's ruling becomes a directive to the Foreign Court where the petition for the matrimonial cause has been filed in accordance with the local rules of jurisdiction. If the Foreign Court decides to allow the rule of \textit{lex domicili}, it will be a case of limping marriage as the decree will not be valid in India. In addition, in a conflict case the involvement of more than two nations is possible, in which case the validity of the marriage is tested in terms of its formal validity and essential/substantial validity.

Under these circumstances, 'the law under which the parties are married' means: \textit{lex loci celebrationis} (law of the place of celebration of marriage) or \textit{lex domicilii} (personal law).

---

84 S.K. Verma, Director Indian Law Institute, University of Delhi; \textit{NRI and Matrimonial Law & practice in India}, 10 – 20.
The judicial recognition of a foreign divorce decree in terms of Section 13 of CPC merely confirms the dissolution of a valid marriage by a foreign law and does not annul, abolish, wipe out or cancel the registration of marriage, which was dissolved by the foreign divorce decree.

S.K. Verma further notes that the Court’s observation that foreign Courts should not exercise jurisdiction over matrimonial disputes involving Indian women and NRIs is in the nature of a directive to the foreign forum. For an NRI who may have got foreign citizenship and who is domiciled in the country of the forum, the Court of that country is the Court of domicile, which is well within its right to exercise matrimonial jurisdiction in the international sense under conflict of law principles.

Strictly speaking, the Apex Court has not been confronted with any choice of law situation so far. Most of the cases are related to the enforcement of foreign decrees and that too a decree obtained by the NRI husband, divorcing his Indian domiciled wife. This ruling has once again highlighted the fact that there is every possibility of increasing the number of limping marriages in due course.

In Harmeeta Singh v. Rajat Taneja, the wife was deserted by her husband within six months of marriage as she was compelled to leave the matrimonial home within three months of joining her husband in the US. When she filed a suit for maintenance under the Hindu Adoptions and Maintenance Act in India, the High Court disposed of the interim application in the suit by passing an order of

---

restraint against the husband from continuing with the proceedings in the United States Court in the divorce petition filed by the husband there and also asking him to place a copy of the order of the High Court before the US Court.

The Court made some other observations while passing this order, mainly that even if the husband succeeded in obtaining a divorce decree in the US that decree would be unlikely to receive recognition in India as the Indian Court had jurisdiction in the matter and the jurisdiction of the US Courts would have to be established under Section 13, civil procedure code 1908. The Court then said that till the US decree was recognized in India, he would be held guilty of committing bigamy in India and would be liable to face criminal action for that. The Court also said that since the wife’s stay in the US was very transient, temporary and casual, and she may not be financially capable of prosecuting the litigation in the US Court, the Delhi Court would be the forum of convenience in the matter.

*Veena Kalia v. Jatinder Nath Kalia,*86 was another case where the NRI husband obtained ex parte divorce decree in Canada on the ground not available to him in India. The Delhi High Court held that not only did such divorce decree not bar divorce petition by wife in India as it could not act as *res judicata*, it also did not bar applications for maintenance filed by the wife in her divorce petition. The Court also looked into the circumstances in which the wife did not contest the husband’s divorce petition in Canada.

---

86 AIR 1996 Del 54.
that she had no means to contest the proceedings there and the decree of divorce was passed as she was unable to appear & contest the proceedings as the prohibitive cost of going to Canada and other circumstances disabled her and the husband took full advantage of that handicap. Also, the only ground on which the husband sought divorce was that there had been a permanent breakdown of the marriage, which was not a ground of divorce recognized under the Indian law.

The Court also relied upon a judgment in *Maganbhai Chaturbhai v. Maniben*,\(^87\) that 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 CPC.

In most of the other cases, it is the foreign judgement *v* Indian Courts, but in the following cases just the opposite viz. *Indian Court v. Foreign Court*, was the point under litigation.

In the *Rakesh Kumar v. Ashima Kumar*,\(^88\) in the Punjab and Haryana High Court, a suit for permanent injunction restraining the defendant from continuing with the complaint for divorce pending in the Superior Court of New Jersey Chancery Division *Family Part Passaie County* (a Foreign Court) was filed. The petitioner had filed his objections before the Foreign Court raising objections regarding jurisdiction of the Foreign Court to entertain the complaint for divorce, thus submitting to the jurisdiction of the Foreign Court. The learned Judge, referred to *Modi*

---

\(^87\) AIR 1985 Guj 187.

\(^88\) (2007) 2 RCR(Civil) 786 (P & H).
Entertainment Network\(^89\) case in which the Court concluded as follows:

“In exercising discretion to grant an anti-suit injunction the Court must be satisfied of the following aspects:–

The defendant against whom injunction is sought, is amenable to the personal jurisdiction of the Court;

If the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and the principle of comity respect for the Court in which the commencement or continuance of action/proceeding is sought to be restrained must be borne in mind.

In a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (\textit{forum conveniens}) having regard to the convenience of the parties and may grant anti-suit injunction in regard to the proceedings which are oppressive or vexatious or in a forum non-convenience”.

Thus, the said judgment provided little assistance to the petitioner on any of the above counts.

Similarly, reference was made to Cotton Corporation\(^90\) case invoking the amended Section 41 (b) of the Specific Relief Act, 1963 to the effect: “The legislature manifestly expressed its mind by enacting Section 41 (b) in such clear


and unambiguous language that an injunction cannot be granted to restrain any person, the language takes care of injunction acting in personam, from instituting or prosecuting any proceeding in a Court not subordinate to that from which injunction is sought.

Section 41 (b) denies to the Court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceeding in a Court, which is not subordinate to the Court from which the injunction is sought. In other words, the Court can still grant an injunction restraining a person from instituting or prosecuting any proceeding in a Court, which is subordinate to the Court from which the injunction is sought.

As a necessary corollary, it would follow that the Court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceeding in a Court of co-ordinate or superior jurisdiction. This change in language deliberately adopted by the Legislature after taking note of judicial vacillation has to be given full effect”. Still further, it considered that the expression ‘Court’ in Section 41 (b) of the Specific Relief Act, 1963, is used in its widest amplitude comprehending every forum where relief can be obtained in accordance with law. The Court also considered that there is near unanimous view that the Courts had no jurisdiction to grant interim injunction restraining a person from instituting any proceeding in a Court not subordinate to that from which injunction is sought. In view of the above, the Foreign Court cannot be treated as a Court subordinate to the
Panchkula Court. Therefore, in terms of Section 41 (a) & (b) of the Specific Relief Act, 1963, injunction cannot be granted”.

This judgment has a great bearing on the jurisdiction of Indian Courts vis-à-vis Foreign Courts, in terms of Section 41 (a) and (b) of the Specific Relief Act, 1963 as a Foreign Court is not a Court subordinate to Court in India.

Anubha v. Vikas Aggarwal,91 was a case in which the issue was whether the decree of ‘no fault divorce’ obtained by the husband from a Court of the United States of America (USA) could be enforced on the wife when their marriage was solemnized as per the Hindu rites and the wife had not submitted to the jurisdiction of the Court in USA and had not consented to grant of divorce.

The facts of this case were that the plaint iff, the young wife, was seeking decree of declaration that she was entitled to live separately from her NRI husband, the defendant, and also for a decree for maintenance in her favor besides the pendente lite expenses as she had been deserted and abandoned by him very soon after the marriage, after being subjected to cruelty. During the pendency of the suit when the wife learnt of divorce petition having been filed by the husband in the USA, she also approached the Court to restrain that action from proceeding in the USA whereupon the Court passed the order restraining the defendant from proceeding further in the Court in the State of Connecticut, USA for a period of thirty days. However, inspite of the order the husband

91 (2002) 100 DLT 682.
proceeded with the “No Fault Divorce Petition” proceedings in the US.

When this fact was brought to the notice of the Court in India, the Indian Court passed an order asking the defendant for recording of the statement under Order X of the CPC and on his failure to appear, his defense was struck off and contempt proceedings were initiated. After the husband obtained the decree of divorce despite all these, the question that arose foremost for determination was whether the decree of divorce obtained from the Court at Connecticut in the USA during the pendency of the proceedings of the case in India in the given facts and circumstances was enforceable in law or not.

The Court held that the ground on which the marriage of the defendant was dissolved is not available in the Hindu Marriage Act, 1955. The parties were Hindus, their marriage was solemnized according to the Hindu rites. Their matrimonial dispute or relationship was, therefore, governable by the provisions of Hindu Marriage Act, 1955. Since the plaintiff did not submit to the jurisdiction of the USA Court nor did she consent for the grant of divorce in the US Court, the decree obtained by the defendant from the Connecticut Court of USA was held to be neither recognizable nor enforceable in India.

Another judgment passed by the Madras High Court in the case of Balasubramaniam Guhan v. T Hemapriya, also applied Section 13 CPC to an NRI Marriage. Here the wife had filed a suit for declaration to declare the decree of

divorce passed by the Court at Scotland for divorce as *ultra vires*, unsustainable, illegal, unenforceable and without jurisdiction; and for a consequential injunction restraining the petitioner herein from enforcing the said decree or claim any rights under the said decree either by seeking to take a second wife or otherwise. The High Court held that if the foreign judgment falls under any of the clauses of Section 13 of CPC, it will cease to be conclusive as to any matter thereby adjudicated upon and will be open to collateral attack on the grounds mentioned in Section 13. As in the suit filed by the wife, the foreign judgment granted in favour of the husband was challenged on the ground that it was an *ex parte* decree, the Court, which passed the decree, was held to have no jurisdiction as the decree was passed when the wife was in India.

The closely related issue of jurisdiction of courts has been specifically dealt with by the Indian courts in several judgments and in progressive manner, as will be clear from some of the following judgments.

One of the earliest judgments on this issue was rendered by The Hon’ble Supreme Court of India in *Jagir Kaur v. Jaswant Singh*.

Jagir Kaur, the first wife of Jaswant Singh, was married to him in 1930. After about 7 years of the marriage, during which the respondent husband was away in Africa, he came to India on five months leave when the couple lived in his parental house in a village in Ludhiana. Thereafter he left for Africa but before going he married another wife and took her with him to Africa. After 5 or 6 years, he came back to India on leave

---

93 AIR 1963 SC 1521.
and took the first wife/appellant to Africa. There she gave birth to a daughter, the second appellant. As disputes arose between them, he sent her back to India, promising to send her money for her maintenance but did not do so. In the year 1960, he came back to India. When he was admittedly in India, the appellant filed a petition under Section 488 of the Code of Criminal Procedure in the Court of Ludhiana, within whose jurisdiction the respondent was staying at that time. The petition was filed by the first appellant on behalf of herself and also as lawful guardian of the second appellant, who was a minor, claiming maintenance for both of them on the ground that the respondent deserted them and did not maintain them. The question in the appeal was whether the Magistrate of Ludhiana had jurisdiction to entertain the petition filed under Section 488 of the Code of Criminal Procedure. The question turned upon the interpretation of the relevant provisions of Section 488(8) of the Court, which demarcates the jurisdiction limits of a Court to entertain a petition under the said Section. Section 488(8) of the Code reads: "Proceedings under this Section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child".

The crucial words of the sub-Section are, "resides", "is" and "where he last resided with his wife". The Court noted that under the old Code of 1882 only the Court of the District where the husband or father, as the case may be, resided, had jurisdiction. Later the jurisdiction was deliberately made wider and it gave three alternative forums, obviously to enable a discarded wife or a helpless
child to get the much needed and urgent relief in one or other of the three forums convenient to them. Also keeping in mind the fact that the proceedings under this Section are in the nature of civil proceedings; the remedy is a summary one and the person seeking that remedy is ordinarily a helpless person, the Court felt that the words should be liberally construed without doing any violence to the language.

Interpreting the three words, the Court said that the juxtaposition of the words “is” and “last resided” in the sub-Section also throws light on the meaning of the word “resides”. The word “is” confers jurisdiction on a Court on the basis of a casual visit and the expression “last resided” indicates that the Legislature could not have intended to use the word “resides” in the technical sense of domicile. The word “resides” cannot be given a meaning different from the word “resided” in the expression “last resided” and, therefore, the wider meaning fits in the setting in which the word “resides” appears.

The word “resides” implied something more than a brief visit but not of such continuity as to amount to a domicile though it implied something more than “stay” and implied some intention to remain at a place and not merely to pay it a casual visit. The sole test, it was held, was whether a party had animus manendi or an intention to stay for an indefinite period, at one place; and if he had such an intention, then alone could he be said to “reside” there. The Court also held that the words “where he last resided with his wife” could only mean his last residence with his wife in the territories of India. It could not
obviously mean his residing with her in foreign country, for an act cannot confer jurisdiction on a foreign Court.

It would, therefore, be a legitimate construction of the said expression to hold that the district where he last resided with his wife must be a district in India. The most useful interpretation was made for the word “is”. The Court said that the word “is” connotes in the context, the presence or the existence of the person in the district when the proceedings are taken. It is much wider than the word “resides”: it is not limited by the *animus manendi* of the person or the duration or the nature of his stay. What matters is his physical presence at a particular point of time. This meaning accords with the object of the Chapter wherein the concerned Section appears. It is intended to reach a person, who deserts a wife or child leaving her or it or both of them helpless in any particular district and goes to a distant place or even to a foreign country, but returns to that district or a neighboring one on a casual or a flying visit. The wife can take advantage of his visit and file a petition in the district where he is, during his stay. In fact the Court went even further and said that, if the husband who deserts his wife, has no permanent residence, but is always on the move, the wife can even catch him at a convenient place and file a petition under Section 488 of the Code or she may accidentally meet him in a place where he happens to come by coincidence and take action against him before he leaves the said place.

In the facts of the case the Court held that here in any case the husband had “last resided” in India when he came to India and lived with his wife in his house in village
in Ludhiana, as he had a clear intention to temporarily reside with his wife in that place. He did not go to that place as a casual visitor but went there with the definite purpose of living with his wife in his native place and he lived there for about six months with her. The second visit appeared to be only a flying visit to take her to Africa. In the circumstances, it was held that he had last resided with her in a place within the jurisdiction of the Court in Ludhiana.

That apart, since it was admitted that he was in a place within the jurisdiction of the said Magistrate on the date when the appellant filed her application for maintenance against him, the Court in any case had jurisdiction to entertain the petition, as the proceedings could be taken against any person in any district where he “is”. The Court’s jurisdiction was therefore upheld.

Above observations by the Apex Court are important as these make a distinction between residence and domicile. Here, the expression ‘resides’ has been construed to include temporary residence as well.

The other very progressive judgment on jurisdiction was delivered by the Kerala High Court in *Marggarate Pulparampil v. Dr. Chacko Pulparampil*, on the basis of the principle of “real and substantial connection” of the wife with the place where she approaches a Court, overruling that of wife and children following husband/father’s domicile.

---

94 AIR 1970 Ker 1 (FB).
In this case the father, the 1st respondent, an Indian National, married as per the ecclesiastical rites, the appellant wife, a German, who he had met when he went to Germany to study medicine. Two children were born to them but then differences arose. The approach to the German Courts seems to have been almost simultaneous by the petitioner and her husband. The father asked for access to the children, who were with the mother shortly after the separation and the mother sued for divorce. So the husband petitioned the German Court for his access to the children. The parties thereafter agreed on new terms regarding access, which were filed in the German Court.

In the meantime, the wife’s divorce petition was dismissed by German Court. The petitioner wife appealed from that order and while that appeal was pending, on the application of the mother, the father was ordered by the German Court to pay to the children maintenance. Soon after, the father took out the children one day but instead of returning them to the mother in the evening, drove them in a taxi to the Airport and took a plane for India for the children. The children were two and half years and 10 months at that time. The father neither informed the mother about his departure nor did he cable her after reaching India.

After making frantic enquiries the mother moved a petition the next day before the Appellate Court in Germany where the divorce matter was pending and obtained an order by which it was ordered that the father hand over the custody of the children to the mother. Nothing happened pursuant to this order and the mother
continued to make enquiries about the whereabouts of the children. Sometime later, the appeal taken by the father from the order directing maintenance to the children was dismissed by a German Court and the wife's appeal from the divorce matter was allowed and the marriage was dissolved in Germany. On the same day another order was passed by another German Court directing that the custody of the children be given to the mother. When the wife came to India and filed a habeas corpus petition in Indian Court for the return of her children, the High Court was convinced that the domicile of origin of the father was Indian and that of the mother German. Even though according to the canons of Private International Law, the mother and the children in this case would have the father's domicile, and therefore the father, the mother, and the children were of Indian domicile and as per that rule Indian Court would have jurisdiction. The Court held that a competent German Court will have jurisdiction to pass a decree for divorce or custody of the children on the ground that the petitioning wife had a "real and substantial connection" with the country of that Court and also the children were ordinarily resident in that country.

In another child custody case the Supreme Court of India in *Surinder Kaur Sandhu v. Harbax Singh Sandhu*,\(^5\) observed that, "the modern theory of Conflict of Laws recognizes and, in any event, prefers the jurisdiction of the State which has intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the

\(^5\) AIR 1984 SC 1224.
circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping”.

In this case while the wife who was still in England, the husband had clandestinely taken away the children to India to his parents place and was questioning the English Courts’ jurisdiction in the matter of the children’s custody which the Indian Court did not allow him to do as the English Court had already passed an order on the children’s custody in England which was the place where the matrimonial and children’s home was located.

In Dipak Bannerjee v. Sudipta Bannerjee,96 the husband questioned the jurisdiction of Indian Court to entertain and try proceedings initiated by wife under Section 125 for maintenance, contending that no Court in India had jurisdiction in international sense to try such proceeding as he claimed to be citizen of United States of America and his wife’s domicile also followed his domicile. The Court held that where there is conflict of laws every case must be decided in accordance with Indian Law and the rules of Private International Law as applied in other countries may not be adopted mechanically by Indian Courts. The Court felt that keeping in view the object and social purpose of Sections 125 and 126, the objection raised by husband was not tenable and the jurisdiction of Indian Court was upheld, as it was the Court within whose jurisdiction she ordinarily resided.

96 AIR 1987 Cal 491.
In Mrs. M v. Mr. A I,\textsuperscript{97} in an appeal filed in the Bombay High Court the appellant wife had prayed for a decree of nullity of her marriage solemnized at Houston, U.S.A. Alternatively, she prayed for a decree of divorce on the ground of cruelty. The petition was originally filed before the Court at Bombay under the provisions of the Special Marriage Act, 1954, which applied to the parties by virtue of the provisions of Section 18 of the Foreign Marriage Act, 1969. The trial Judge dismissed the petition on the ground that the Court was not vested with the requisite jurisdiction as it is a requirement of law that the petitioner should have been residing in India continuously for a period of 3 years immediately preceding the presentation of the petition. The High Court held that the Section refers to a period of not less than three years immediately preceding the presentation of the petition and that the learned trial Judge was not justified in having grafted on the word “continuously”.

The difficulty that had arisen in this case centered around the fact that the petitioner had left India in December 1986 and returned in August 1987 and the petition was filed on April 1988. The Court also took into account the fact that the petitioner had not emigrated from India which was established by the fact that she had gone out of the country only on a “tourist visit” and she did, in fact, return and has been permanently domiciled and resident in India all through. The Court said that in matrimonial statutes in this country, the law confers local jurisdiction on a Court if the party concerned is in fact

\textsuperscript{97} (1993) DMC 384.
resident there and not on the basis of casual short-term visits.

In *Indira Sonti v. Suryanarayan Murty Sonti*, the plaintiff wife traveled all the way to, and got married in USA to an NRI living there, but was deserted by him. After coming back to India, she filed a suit for maintenance in Indian Court under the Hindu Adoptions and Maintenance Act 1956. Since the marriage had taken place in the US, the wife made averments in the plaint alleging that part of cause of action had arisen in Delhi where her father was approached by her father-in-law for her marriage with the defendant husband and discussion having taken place at New Delhi between the parties for marriage to be performed in USA. It was also stated by her that her father-in-law had phoned her father at New Delhi to inform that he was sending the plaintiff back to Delhi. The father-in-law also asked for giving consent for divorce proceedings on phone to her father at New Delhi.

The Court held that while it would be appropriate if the legislature steps in and enacts a specific provision relating to territorial jurisdiction in the matters of claiming maintenance under the Hindu Adoptions and Maintenance Act 1956, in the Act itself, on the lines suggested by Section 126 of the Criminal Procedure Code 1973, as the provisions contained in Section 126 of the Criminal Procedure Code 1973 are more in tune with the needs of society, however in the absence of any provision in the Hindu Adoptions and Maintenance Act 1956, whether the principles contained in Section 20 of CPC 1908 or the

---

principles contained in Section 126 of Criminal procedure Code 1973 would govern was the moot question which Court had to address itself at the appropriate stage but on which the Court could adopt a purposive approach, which advanced justice. While leaving this important question of law to be dealt with at an appropriate stage, the Court held that in this particular case even if the provisions of Section 20 of Civil procedure code 1908 were applied, the case of the plaintiff was that part of action arose in Delhi and so the Delhi Court had jurisdiction in the matter.

In *Sondur Rajini v. Sondur Gopal*,99 the appellant wife’s petition was filed *inter alia* seeking judicial separation under Section 10 of Hindu Marriage Act 1955, custody of minor children and maintenance. The NRI husband took the objection that the petition filed by the wife was not maintainable on the ground that the parties were citizens of Sweden and not domiciled in India and, therefore, the jurisdiction of the Family Court was barred by the provisions of Section 1(2) of Hindu Marriage Act 1955. As against this, the case set up by the wife was that their domicile of origin was in India and that was never given up or abandoned though they had acquired citizenship of Sweden and then moved to Australia. The husband’s application was also challenged by her on the ground that even if it was assumed that he acquired domicile in Sweden, she never changed her Indian domicile and continued her domicile in India. In the alternative, it was contended that even if it was assumed that she also had acquired domicile of Sweden, that was abandoned by

---

99 Supra note 61.
both the parties after shifting to Australia and, therefore, their domicile of origin i.e. India, got revived. In short, the case of the wife was that she and the respondent both were domiciled in India and, therefore, the Family Court in Mumbai had jurisdiction to entertain her petition seeking a decree of judicial separation. She also submitted that once the Hindu Marriage Act applies, there is no provision in the said Act stating that it ceases to apply at any subsequent stage and the issue of domicile raised by the husband was therefore, totally irrelevant keeping in view the scheme of the Act and that, acquisition of citizenship and domicile are independent of each other and in any case it could not be said that by acquiring citizenship of Sweden they also acquired domicile in that country. By making reference to Section 19 of Hindu Marriage Act, she submitted that the parties must satisfy any one of the requirements of Section 19 to invest a Court with jurisdiction in a matrimonial petition and Section 19 does not speak of domicile at all. She further submitted that if the requirement of Indian domicile is held to be necessary for applicability of Hindu Marriage Act, it will lead to great hardship to the Hindu wife who is required to go from place to place wherever her husband takes her and that will also lead to very serious social problem.

It was next submitted by her that even if the requirement of domicile were held to be necessary the relevant date for considering a domicile of the parties would be the date of marriage and not the date of filing of the petition. She also contended that the Marriage Laws (Amendment) Act, 2003 (Act No. 50 of 2003) invested the Family Court with effect from 23-12-2003, with the
jurisdiction to entertain and try the petition of wife where she is residing on the date of presentation of the petition.

The Court substantially accepted the wife’s pleas and held that the 2003 amendment was introduced to alleviate the hardship faced by Hindu wife as is evident from the statement of objects and reasons of Amendment Act No.50 of 2003. The Legislature intended to confer right on the wife to present a petition seeking relief under the provisions contained in Act at the place where she is residing at the time of presentation of such petition. What is common in all the clauses of Section 19 is the word ‘residence’ but a close look at the provisions of clauses (ii), (iii), (iiia) and (iv) would show that they do not specify a length and/or character of residence. The Court felt, would not mean a residence, which is purely of a temporary nature without there being an intention to stay there permanently or for considerable length of time. A conjoint reading of Sections 1, 2 and 19 of Hindu Marriage Act would, thus, show that a residence alone is not sufficient to maintain a petition seeking relief under the Act, and residence coupled with domicile in India would be necessary to maintain such a petition in the Courts in India. However, the residence of a wife with her parents at the time of filing of a petition under the Hindu Marriage Act would be sufficient to attract the jurisdiction of Court where the residence of her parents situate.

The Court therefore held that under Sub-Section (iiia) of Section 19 her petition would be maintainable in the Family Court, Mumbai.
The Court then explored that since a domicile of India is a condition precedent for invoking the provisions of Hindu Marriage Act, what would be the relevant time, whether the date of marriage or of petition. In this case, admittedly, the marriage was solemnized by Hindu Vedic Rites and registered under Hindu Marriage Act and none of the provisions of the Act lay down the time and condition under which it will cease to apply. The Court therefore held that, once the Hindu Marriage Act applies, it would continue to apply as long as the marriage exists and even for dissolution of the marriage. The Hindu marriage gives rise to a bundle of rights and obligations between the parties to the marriage and their progeny. Therefore, the system of law, which should govern a marriage, should remain constant and cannot change with vagaries or the whims of the parties to the marriage. It has also been universally recognized that questions affecting the personal status of a human being should be governed constantly by one and the same law, irrespective of where he may happen to be or of where the facts giving rise to the question may have occurred. If the position is taken that the time at which the domicile is to be determined when the proceedings under Hindu Marriage Act are commenced, then every petition filed by the wife whose husband moves from one country to another for the purposes of job or for any purpose whatsoever, he would be able to frustrate a petition brought by the wife by changing his domicile even between the presentation of the petition and the hearing of the case. The rule therefore recognized by the Court was "once competent, always competent" even if the party domiciled in India at the time of their marriage has since
changed his domicile, dissociated himself from the determination of his status by the Court in India.

The proposition of law canvassed that the time at which the domicile is to be determined is when the proceedings are commenced, therefore, was not accepted, being against the public policy in this country and which may create a serious social problem. The Court said that once the parties have selected Hindu Marriage Act as their personal law, they could not abdicate the same at their free will or as per exigencies of situation or according to their whims and fancies. As a natural corollary thereof, even if a party to the matrimonial petition establishes that after marriage he acquired a domicile of some other country, it would not take away the jurisdiction of the Court in India if on the date of the marriage he were domiciled in India. It is unjust that a party to the marriage can change his entire system of personal law by his or her unilateral decision. If that were allowed it would make the position of a wife very miserable or helpless. The provisions of Hindu Marriage Act will continue to apply to the marriage of parties who were admittedly domiciled in India on the date of their marriage and they cannot be heard to make a grievance about it later or allowed to by-pass it by subterfuges.

In *Meera v. Anil Kumar*, Bombay High Court held that ‘last resided’ in Section 19 of Hindu Marriage Act, 1955, implies last residence in India and the High Court in India within whose jurisdiction the parties last resided together can take cognizance of the matter.

---

100 (1992) 2 HLR 284.
However, in *Kashmira Kale v. Kishore Kumar Mohan Kale*,\(^{101}\) Bombay High Court has ruled that Section 1(2) of Hindu Marriage Act, 1955 applies only to Hindus in the territories to which it applies and set aside the Family Court order and upheld the US divorce decree dissolving the Hindu marriage since the parties were domiciled in USA. This lends sanctity to a US Divorce decree in preference to proceedings under the Hindu Marriage Act, 1955 between the same litigating parties.

The parties married in Mumbai in 2005 under Hindu Marriage Act, 1955, migrated to USA and intermittently visited India. However, in September 2008, the wife filed divorce petition in the US Court, which was challenged by the husband on the plea that the US Court had no jurisdiction to entertain the petition. Simultaneously the husband filed a divorce petition in the Pune Family Court. In October 2008 as it was the competent Court for adjudicating their dispute. The husband did not pursue the wife’s divorce petition in the US Court any further and in January 2009 the US Court dissolved their marriage and passed order to divide the assets of the parties. However, in September 2009 the Pune Family Court ruled that it still had the jurisdiction to try the husband’s petition for divorce in India. In the appeal, Bombay High Court set aside the Family Court Order and upheld the US divorce decree dissolving the Hindu marriage.

Earlier precedents on the point enunciated by different High Courts stipulate that Hindu Marriage Act, 1955 applies to all Hindus irrespective of domicile or

\(^{101}\) (2011) 1 HLR 333.
residence if they have married in India according to Hindu rites. Thus, it has been held that the Hindu Marriage Act, 1955 has extraterritorial application as a Hindu carries with him his personal law of marriage and Courts in India have jurisdiction to try their matrimonial disputes regardless of change of nationality or new domicile.\footnote{Anil Malhotra, “Hindu Marriages : HC ruling upsets settled law”, \textit{The Tribune}, April 11, 2011 at 12.}

In \textit{Naveen Chander Advani v. Leena Advani},\footnote{(2005) 2 HLR 582.} Bombay High Court, held that the Pune Family Court had wrongly declined to entertain a matrimonial petition relating to a marriage where parties who last resided and married in the US according to Hindu rites and ceremonies as the Family Court had jurisdiction to deal with matters under the Hindu Marriage Act, 1955.

In \textit{Vikas Aggarwal v. Anubha},\footnote{AIR 2002 SC 1796.} case the Supreme Court had been approached by the NRI husband whose defense had been struck off in a maintenance suit filed by the wife in the High Court as he had not appeared in the High Court despite the High Court's order directing him to personally appear and giving him several opportunities.

The High Court had directed him to personally appear to give clarifications to the Court on the circumstances in which the US Court had proceeded with and granted decree in a divorce petition filed by the husband in the US despite order of restraint having been issued by the Indian Court against the proceedings in the US. The High Court had also rejected his application for exemption from personal appearance on the basis that he apprehended that he

\footnote{Anil Malhotra, “Hindu Marriages : HC ruling upsets settled law”, \textit{The Tribune}, April 11, 2011 at 12.}
\footnote{(2005) 2 HLR 582.}
\footnote{AIR 2002 SC 1796.}
would be arrested in the case under Section 498 A, IPC 1860 filed by the wife.

The Hon’ble Supreme Court of India upheld the High Court’s order and held that Order X of CPC 1908 is an enabling ‘provision that gives powers to Courts for certain purposes. The Delhi High Court was therefore justified in requiring the husband to personally appear before the Court for his clarification, especially since the affidavit of his counsel in America annexed with the affidavit filed in the trial Court was not enough to clarify the position and his father, as found by the trial Court, could not throw further light in the matter, having not been present during the proceedings in America. Also the inherent powers of the Court under Section 151 C.P.C 1908. can always be exercised to advance interests of justice and it was open for the Court to pass a suitable consequential order under Section 151 CPC 1908 as may be necessary for ends of justice or to prevent the abuse of the process of Court.

In *Venkat Perumal v. State of AP*,\(^\text{105}\) is a judgment passed by the Andhra Pradesh High Court in an application filed by an NRI husband for quashing of the proceedings of the wife’s complaint in Hyderabad under Section 498A of the Indian Penal Code 1860 against matrimonial cruelty meted out to her. She had alleged that she was subjected to harassment, humiliation and torture during her short stay at Madras as well as US and when she refused to accept the request of her husband to terminate her pregnancy, she was dropped penniless by her husband at Dallas Air Port in the US and she returned back to India

\(^{105}\) (1998) II DMC 523.
with the assistance of her aunty and on account of the humiliation and mental agony she suffered miscarriage at Hyderabad. The High Court held that the offence under Section 498-A of Indian penal Code 1860 is a continuing offence and the mental harassment of the wife had continued during the stay with her parents at Hyderabad. The Court therefore rejected the contention of her husband that sanction of the Central Government, as contemplated under Section 188 of the Code of Criminal Procedure 1973, is required to prosecute and held that even otherwise, it is not a condition precedent to initiate criminal proceedings and the same can be obtained, if need be, during trial and hence, it could not be said that the proceedings were liable to be quashed on that ground. The Court also refused to be influenced in its decision with the divorce decree from the US Court produced by the husband since in any case the FIR had been lodged by the wife prior to the US Court’s decree.

In Rajiv Tayal v. Union of India and Others,106 is another judgment, which shows that the wife also has an available remedy under Section 10 of the Passport Act 1967 for impounding and/or revocation of the passport of her NRI husband if he failed to respond to the summons by the Indian Courts. The NRI husband had filed a writ petition seeking to quash the order passed by Consulate General of India, New York, USA, on the directions of the Ministry of External Affairs, Government of India, New Delhi, for impounding his passport. The NRI husband had filed the petition on the ground that he was residing in

USA and subjecting him to the criminal process in India would be an unfair burden. The petitioner submitted that the investigation in his case ought to be conducted by sending him a questionnaire and he should not be asked to join the investigation in India.

The Court held that acceptance of such a plea would give a premium to the accused husband just because he happened to be abroad. It would then be open to such an accused to misuse the process of law and to make a mockery of the Indian judicial system by asking for such a special procedure, which is in any case totally opposed to the principles of the criminal jurisprudence. The Court therefore held that there was no merit in the plea as to the invalidity of Section 10(e) and (h) of the Passport Act being violative of Articles 14, 19 and 21 of the Constitution and the plea of Constitutional validity of such provisions thus stood rejected.