

# LAWS RELATING TO NRI MARRIAGES AND THEIR IMPACT ON WOMEN

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# CHAPTER I

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## INTRODUCTION

### **SCOPE OF THE PROBLEM:**

The last few decades have witnessed a phenomenal increase in NRI marriages due to the increased migration of Indians abroad. In many of these marriages the groom is typically an NRI while the wife is a resident of India. Naturally the number of disputes relating to such marriages has also increased. While in some marriages the wife may be able to fight a legal battle, particularly if she is in a financially strong position, in most marriages wives are the more vulnerable party. The present study therefore focuses on the problems faced by women when a marital dispute arises in NRI marriages (marriages in which at least one party is an NRI or Person of Indian Origin), since they are the persons who are affected most adversely.

As marriage is a patrilocal affair in India, the wives are expected to join their husbands wherever they might be living. However, an alarming number of these marriages are fraudulent marriages or marriages for dowry etc. in which the groom has no intention to actually live with his wife. Instances of abandonment/desertion of the wife after a short while have been reported in some NRI marriages. Sometimes the wife never joins her husband abroad and is abandoned in India and sometimes she is forced to return to India or left to fend for herself in foreign lands.

The National Commission for Women is the coordinating agency at the national level to receive and process complaints relating to Indian women deserted by their husband overseas. Though these figures relating to disputes in NRI marriages obviously reflect just the tip of the iceberg, about 1300 cases have been registered

with the NRI Cell of the National Commission for Women and the Ministry of Overseas Indian Affairs from 2005 to 2012.<sup>1</sup> Thus, this is only the number of complaints that have reached these State appointed authorities and do not indicate the actual number of cases that have gone unreported. However, the data does acknowledge the problem of desertion by an NRI spouse, and harassment that results in desertion or forces the wife to leave the matrimonial home.

Many of these marriages are conducted in haste or without verifying the antecedents of the groom properly. The groom is thus a stranger whose only attraction is that he lives in a foreign country. The parents of the bride also wish their daughters to take up permanent residence in another country which seems to promise a better life for their daughter. It has been noticed that sometimes the particulars of employment, immigration status, earning, property, marital status and other material particulars are wrongly supplied by the prospective groom to con a girl into marriage for ulterior motives. Sometimes the prospective groom is already a married man and marries again to appease his family members as he fears that his first marriage will not be socially acceptable to his family. Sometimes the groom is in a relationship with another person or is already living with someone and does not reveal this again as he fears disapproval.

The various kinds of disputes that arise in these marriages are:

- Disputes relating to divorce/separation
- Disputes relating to maintenance/ monetary compensation and execution of maintenance etc. orders
- Disputes relating to custody
- Disputes relating to return of *Stridhan* and dowry

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<sup>1</sup> MANU/PIBU/1101/2012

- Disputes relating to cruelty and harassment

### **DISPUTES RELATING TO DIVORCE/SEPARATION**

As stated above, in NRI marriages that fail, often the wife is either abandoned in India or is forced to return here. In her absence, the husband files a petition for divorce abroad. Since the wife is starved for resources, and is unable to go to the other country to contest the proceedings, the husband easily procures an ex parte decree. The courts in India have, however, held such divorces invalid, and contrary to Indian law if the ground under which the divorce was granted is not available under the personal law applicable to the parties in India. The Courts have also held that a decree obtained abroad would be invalid if it was obtained without a proper contest between the parties. They have relied on Section 13 of the Code of Civil Procedure, 1908 (hereinafter “CPC”) which defines when a foreign judgment is not conclusive. The most celebrated case in this regard is the decision of the Supreme Court in *Y Narsimha Rao and Ors. v. Y. Venkata Lakshmi and Anr.*<sup>2</sup>

This, and subsequent cases, highlight how the Indian courts have protected wives in NRI marriages from ex parte proceedings initiated abroad without contestation from them. It is for these reasons that many have claimed that it is not beneficial for India to sign bilateral treaties or conventions recognizing Divorce decrees granted by foreign courts.

Wives face additional problems if they initiate proceedings in Indian courts. Since the husband is located abroad, courts are unable to issue summons and get them served to the husband in a timely and efficient manner, due to which several months are lost in matrimonial proceedings in India .

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<sup>2</sup> (1991)3SCC451

**DISPUTES RELATING TO MAINTENANCE/ MONETARY COMPENSATION AND EXECUTION OF MAINTENANCE AND OTHER ORDERS**

A study conducted by NIPCCD in Punjab and Haryana found that most deserted wives do not receive any maintenance from their husbands. Those who do receive maintenance because of court orders do not receive it regularly. In fact, some only received these payments once or twice. The wife thus faces a double burden, of not only trying to get an adequate maintenance order from Court, but also seeking to enforce it, sometimes in a foreign country. This is extremely difficult unless both countries agree to enforce maintenance decrees mutually. India can enter into 'reciprocity agreements' which can then be enforced under Section 44A of the Code of Civil Procedure, 1908.

Sections 44A and 45 of the CPC provide for execution of decrees passed by Courts in reciprocating territories, and execution of decrees outside India respectively. Section 44A limits its operation to Reciprocating Territories, that is, territories with which India has agreements to mutually enforce its decrees. So far, India has Reciprocating Agreements with the following countries:

Aden, Bangladesh, The Cook Islands (including Niue) and the Trust Territories of Western Samoa, Federation of Malaya, Fiji, Hong Kong, New Zealand, Papua and New Guinea, Republic of Singapore, Trinidad and Tobago, United Arab Emirates and the United Kingdom.

In a High Court decision involving the judgment of a Californian Court order of a sum of USD 500 per month towards child support, it was clarified that Section 44A of the CPC requires a certified copy of a decree of a superior court of any

reciprocating country to be filed in the District Court in India and the decree will be executed in India as if it had been passed by the District Court here.<sup>3</sup>

In *Satya v. Tej Singh*, the Supreme Court in 1975 clarified the manner in which an Indian maintenance decree can be executed outside India under Section 45 of the CPC.<sup>4</sup>

### **DISPUTES RELATING TO CUSTODY**

Disputes relating to custody and visitation rights of the children arise in some NRI marriages that have lasted for sometime. In some cases, fathers forcibly take away the children abroad, while in others, mothers return with their children to India finding it difficult to live in a hostile foreign environment. In doing so, they might be violating custody and visitation orders granted by foreign courts. If custody orders have not been previously granted, then often the fathers procure them ex-parte in a foreign country in their own favour. Transnational custody battles raise several legal complications, such as:

- Whether Indian Courts have jurisdiction to decide the question of custody of a child who, in these cases, may be a foreign citizen?<sup>5</sup>
- Does the intention of the mother and the child to reside in India confer jurisdiction upon Indian courts?<sup>6</sup>
- Whether Indian Courts should uphold custody orders passed by foreign courts? In what circumstances can they be upheld?<sup>7</sup>

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<sup>3</sup> Paul Tushar Biswas v ADJ and Anr, II (2006) DMC 59.

<sup>4</sup> Satya vs Teja Singh AIR 1975 SC 105

<sup>5</sup> Ruchi Majoo v Sanjeev Majoo AIR 2011 SC 1952.

<sup>6</sup> Mst. Jagir Kaur and Anr. v. Jaswant Singh, MANU/SC/0242/1963 : AIR 1963 SC 1521.

<sup>7</sup> Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112.

- Whether Indian courts should undertake summary proceedings in the face of a pre-existing custody order from a foreign court to send the child back to the foreign country?<sup>8</sup>
- What principles govern the issue of custody in such cases? Should the question of the welfare and interests of the child prevail?<sup>9</sup>

In a long line of decisions, the Supreme Court of India and the High Courts had upheld the welfare and best interests of the child to be the guiding principle in custody matters, even when they involved children who had been brought to India. Therefore, even if a foreign court had already decided the issue of custody, Indian courts took a re-look at the question through the angle of the best interests of the child if one of the parents filed for these proceedings in India. This came to the aid of mothers who had to flee a foreign country due to the hostile environment with their children. Courts considered it in the child's best interest to grant custody to the mothers who were their primary caregivers.

However, the recent decision of a Constitutional Bench of the Supreme Court of India in *V. Ravichandran v. Union of India*<sup>10</sup> makes a break from the long line of precedents. It prioritized the principle of comity of nations over that of the welfare of the child, by ordering that the child, a US national aged 7 years old, should be sent back to the United States of America. The SC held that instead of approaching Indian courts, the mother should apply for variation of custody orders in that country. On facts, the mother had been moving from place to place with the child in an attempt to escape legal proceedings initiated by the husband. The child, accordingly, had also been compelled to regularly switch schools, preventing him from developing a stable life in India. It appears that the Court was greatly swayed

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<sup>8</sup> Elizabeth Dinshaw v. Arvand Dinshaw, AIR 1986 SC 3.

<sup>9</sup> Gaurav Nagpal v. Sumedha Nagpal, MANU/SC/8279/2008 : (2009) 1 SCC 42.

<sup>10</sup> (2010) 1 SCC 174.



by this fact. The Court also blamed the mother for not asking for custody when she first arrived in India.

This authoritative precedent by the Supreme Court has thrown the previous line of authority into disarray, such that subsequent cases have had to justify their orders against this decision.

The Hague Convention on the Civil Aspects of International Parental Child Abduction provides one solution to address this heterogeneous trend of decisions. However, India is not currently a signatory to this. Though the Law Commission of India in its 218<sup>th</sup> Report, and some other entities, have recommended that India should accede to the Convention, women's rights activists have opposed it. This is because the Convention pays no heed to women who are often forced to flee a foreign country with their children to escape mistreatment and abuse by their husbands. It instead blindly provides that if a parent abducts a child in contravention of custody orders from a country in which the child was residing, the courts in the recipient country are bound to summarily decide the case and return the child to the country of earlier residence, except in limited circumstances.

### **DISPUTES RELATING TO *STRIDHAN* AND DOWRY AND DISPUTES RELATING TO CRUELTY AND HARASSMENT**

A significant number of cases reveal a trend that large demands of dowry are made at the time of and repeatedly after marriage as well. Any refusal to provide Dowry causes harassment and physical abuse of the wife. The wife either stays on to face such abuse as she sees no future outside and is insecure, or actually does leave the matrimonial home to escape it. In the latter case, the husband and his family refuse to return the dowry and the wife's *stridhan* which is her legal entitlement.. It is left to the wife to pursue it's recovery from India. If the husband is an NRI, he

deliberately ignores summons and does not appear before either the police or the Court. This wastes a lot of time. As with maintenance cases, even if the court decides in favour of the wife, it is difficult for the wife to actually recover her *Stridhan* or Dowry.

Section 105 of the Code of Criminal Procedure states that the Central Government should make reciprocal arrangements with foreign governments for the service of summons/warrants/judicial processes. Accordingly, the Ministry of Home affairs has entered into Mutual Legal Assistance Treaty/Agreements (hereinafter “MLAT”) with 22 countries providing for serving of documents, whereby these countries are legally bound to serve the documents.<sup>11</sup> In other cases the Ministry makes a request on the basis of an assurance of reciprocity to the concerned foreign government through their mission/embassy. However, this casts no legally binding obligation upon them to consider the request.

When any complaint for recovery of *Stridhan*, or cruelty, or harassment is made to the court, they must try to serve the summons through these channels. However, the Ministry of Home Affairs has laid down a minimum period of 12 weeks to do so. In NRI cases, it takes even longer to start the criminal proceedings. Problematically, summons cannot be served through these channels in case of non-bailable offences, such as Section 498A of the Indian Penal Code. The Ministry of Home Affairs in its notification dated 11.2.2009<sup>12</sup> has stated that it does not undertake the service of non-bailable warrants of arrest. The service of non-bailable arrest warrants amounts to the extradition of the individual. The requests for extradition are based on certain legal procedures contained in applicable

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<sup>11</sup> These countries are Switzerland, Turkey, United Kingdom, Canada, Kazakhstan, United Arab Emirates, Russia, Uzbekistan, Tajikistan, Ukraine, Mongolia, Thailand, France, Bahrain, South Korea, USA, Singapore, South Africa, Mauritius, Belarus, Spain and Kuwait.

<sup>12</sup> Notification No. 25016/17/2007- Legal Cell.

treaties negotiated on the basis of International Principle of Extradition. Such requests are to be forwarded to the Ministry of External Affairs.

The Guidelines issued by the Delhi Police for handling NRI cases present a grim picture. The Guidelines stipulate that the accused should participate in the investigation process from the start, i.e., right after the complaint for recovery of Stridhan or dowry has been filed by the wife with the police. They also require the Police to exhaust all measures, such as mediation, before proceeding with a complaint. Though alternative dispute resolution measures are perceived as effective tools, they normally adversely impact the more vulnerable party, who mostly tend to be women. Instead of recovering their stridhan or dowry immediately, the Police give the husband sufficient time to get rid of the *stridhan* or hide it. The husband may also abuse this provision to delay the criminal proceedings. In cases where the accused refuses to be present during proceedings before the Police, issuing a Red Corner Notice to recover dowry is not possible since dowry offences lie outside the jurisdiction of the Interpol. The Guidelines read:

“Red Corner Notice (RCNs):- It is issued by Interpol to arrest criminals all over the world. The Interpol does not issue RCNs in case of dowry with the plea that RCNs are issued on terrorist, Mafia, murders.”

Therefore, issues relating to recovery of *Stridhan* and Dowry, apart from prosecution for cruelty and harassment, are problematic, and still need to be thought through.

## CHAPTER II

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### PREVENTIVE STEPS

A large number of NRI marriages are arranged marriages, in which normally the groom is a resident of a foreign country and the bride is a resident of India. The parents of the girl are eager to relocate the girl to a foreign country- a move which supposedly greatly enhances their social status. In this eagerness, they do not check the antecedents of the groom in as thorough a manner as they should. Sometimes, due to his absence from the country, it is difficult to ascertain anything more than the basic details about him. They may, for instance, not know whether the groom already has a wife or girlfriend in the foreign country. Due to the lack of information, the bride is unable to take any preventive steps to safeguard her future and her rights. Thus, when a marital dispute does take place, she is often taken by surprise.

It has therefore become necessary to lay down certain preventive steps to safeguard the future of the NRI bride. Most of these preventive steps should be taken prior to the marriage. These preventive steps include:

1. **Do not rush into the marriage:** Families should not rush into the marriage. There should be extensive interaction and communication between the groom and the bride and both the families prior to the marriage. The couple must be permitted to interact freely and frankly, in privacy, before the marriage. The alliance must also be discussed publically, with friends, families and neighbours. These steps will ensure that the relevant information can be gathered by the girl and her family before marriage,

either from the groom and his family themselves, or through other relations and friends. This will also permit the couple themselves to make up their minds about the alliance, free from external pressure. The couple should get married out of their own free will, consent and affinity with each other, and it should not be motivated only by a desire for overseas residence or green cards etc.

2. **Ensure consent:** The free and voluntary consent of *both* the parties, the bride and the groom, must be ensured. It must be ascertained whether the groom is getting married due to parental/social pressure, or whether he voluntarily wants to get married as well. It is possible that he has a girlfriend/wife in the foreign country, but his parents are compelling him to get married to an Indian girl. Similarly, the girl should not be forced into the marriage . If anything goes wrong, then it is she who needs to live through the turbulence the most.
3. **Verify the background/antecedents of the groom and his family:** The background of the prospective groom must be verified The background information that is normally relevant includes full particulars about the groom's age and marital status, whether he has a live-in partner, his employment details and his residency/citizenship status. One way of ensuring that the background information given by the NRI groom is correct is to insist that the groom gets certificates from his employer about his current employment status. The groom can also be asked to get an affidavit attested by the relevant authority in his country of residence stating his present marital status. If the groom gives a false affidavit, he is likely to be subject to perjury and other proceedings in the country of his residence. Thus, the following facts should be checked and verified:

- a. Marital status: whether he is single, divorced, separated. (This should be stated on an affidavit)
  - b. Employment details: qualification and post, salary, address of office, employer and their credentials, supported by a certificate from the employer. This can also be stated on an affidavit.
  - c. Nationality/Citizenship and immigration status should be stated on an affidavit and supported by attested copies of Passport, Voter or Alien Registration Card, identification document/documents, and documents which show the Social Security number.
  - d. Immigration status: type of visa, eligibility to take spouse to the other country, supported by relevant documents.
  - e. Financial status: Properties owned by him in India and abroad, residence address, family background, supported by property papers, like Sale Deeds, and other relevant documents. This should be stated on affidavit also.
4. A declaration that no criminal/civil case is going on against him in the country of his residence or in India. This could be included in the Affidavit as well.
5. **No reliance on Marriage Brokers/Bureaus:** The bride and her family should not rely on the information furnished on matrimonial sites, marriage bureaus, agents/middlemen blindly. It is possible that the groom has not made full disclosure, or even if he has, the broker is withholding that information on the instructions of the groom. All information must always be verified through friends, family, data from public authorities (such as the

employer of the groom), other friends staying abroad in the vicinity of the groom etc.

6. **Lay down your own terms:** The marriage should not be on the terms of the groom or his family alone. The bride should insist that the marriage take place in India. She must also not accede to the demands of the groom to give a hefty Dowry. In some cases, the NRI husband does not take the wife with him to his country of residence after marriage, assuring her that he will return later. He then advances unreasonable demands upon her or her family as a precondition to taking her with him to her marital home. The family must not give in to these demands, and alert the authorities immediately.
7. **Registered Marriage:** All NRI marriages should be registered, including marriages which are performed according to customary rites and ceremonies under different personal laws, under the Special Marriage Act, or the Foreign Marriage Act. The marriage should be well publicized, and there should be ample photographic and videographic evidence of the ceremonies.
8. **Furnish only Genuine Documents:** The Guidance Booklet on Marriages to Overseas Indians released by the Ministry of Overseas Indian Affairs warns the concerned parties not to forge documents or enter into any fake transactions, on any pretext whatsoever.<sup>13</sup> Accordingly, all papers furnished by either side must be genuine, and the family of the bride must not come under pressure from the groom to act illegally. Apart from eroding the rights and entitlements of the bride, these forgeries may additionally land her in legal trouble, where criminal proceedings may be initiated against her.

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<sup>13</sup> Ministry of Overseas Indian Affairs, MARRIAGE TO OVERSEAS INDIANS: A GUIDANCE BOOKLET, January 2007 at 20.

9. **Continuous Contact between the Couple:** If the bride is not joining the groom abroad immediately after the marriage, they should nevertheless remain in contact with each other constantly. Technology now makes communication over long distances much easier, through phones, Skype video calling and chatting, e-mail, social networking sites, etc. Wherever possible, the family should also get in touch with friends and relatives living in the same country as the husband so that they can check up in case of any red alerts.

### **Other general precautions**

1. **The Woman should be Financially and Socially Independent:** Ideally, the woman should be equipped with professional and vocational qualifications so she can be financially independent abroad. She should retain possession of all the necessary financial and immigration related documents such as her bank account book, ATM card, passport, visa papers etc. She should keep an independent account in the foreign country so that she can withdraw money in emergencies.

She must also engage socially independently so she can seek help abroad when she finds herself in trouble. She should have a list of contact details of neighbours, friends, relatives, husband's employer, police, ambulance, and the Indian embassy or high commission, if abroad.

2. **Gain knowledge of legal rights and entitlements and emergency services abroad:** The bride should gain knowledge of her rights and entitlements in the foreign country, especially against any kind of abuse or neglect. She should also have the phone numbers and e-mail IDs of the police and other state authorities, help-lines and legal aid bodies in the foreign country,



Indian embassy and Indian welfare officers, if any. It would also help her to know the contact details of social support groups and networks.

3. **Speak out Against Violence:** The woman should inform people whom she trusts in case she faces violence of any kind from her husband or in-laws- including physical, emotional, financial, and sexual violence. She must also complain of this violence to state authorities, or at least consult with legal advisors or other authorities.
4. **Keep copies of Important Documents with Family/Friend of the ‘Bride’:** The family of the woman, in India and also abroad, or a close friend should keep copies of all her important documents, such as the passport, visa, bank and property documents, marriage certificate, other essential papers and phone numbers. In case these papers are lost or forcibly taken away/ mutilated/ destroyed by or at the instance of spouse or in-laws, the copies will come in handy; if possible, a scanned soft copy can be kept with the woman and any person she trust so that the same can be retrieved if necessary.

It is equally important for the woman’s family to keep a photocopy of the *husband’s personal details*, including passport, visa, property details, license number, social security number, voter or alien registration card, among others.

#### **Steps to be taken by the State:**

1. **Role of the Embassy:** Indian embassies located abroad should have an active role to play in NRI marriages, especially when the Indian wife is

subject to ill treatment in the foreign country. They should provide crisis assistance and response. They should also appoint Welfare Officers, especially in countries with a large number of Indians, specifically for this purpose, who can provide support services. They must also institute processes whereby wives in NRI marriages, in the midst of a crisis, can avail of residence status or permits, and prompt visas for defending herself in legal action initiated by NRI husband in the other country; monetary and shelter support, access to police protection to the wife and action against the NRI husband in case of cruelty etc.

2. **Pro-active Legal Aid:** Within and outside India, the State should provide free or affordable and accessible legal aid and advice to wives in NRI marriages. For this purpose, the Indian state should explore tie-ups with agencies in other countries for women stranded or abandoned there, and while facing legal action by or instituting legal action against the husbands.
3. **Awareness of Society:** The State should disseminate information and generate awareness on the issues related to NRI marriages including the legal rights and entitlements of wives and children of NRI men and launch an active social campaign on these issues.

## CHAPTER III

### Divorce in NRI Marriages in India

Case studies conducted across the country indicate that NRI marriages are plagued by similar issues. The Hon'ble Minister of Overseas Indian Affairs, Shri Vayalar Ravi provided a state-wise breakup of complaints relating to these marriages in a written reply in the Rajya Sabha on 30 June 2012. Specifically on the question on harassment and desertion by husbands of their wives, the figures stand as follows from 2005 to 2012:

Sr. No.	Name of the State/Union Territory	Total
1	Andhra Pradesh	42
2	Assam	5
3	Bihar	4
4	Chhattisgarh	2
5	Delhi	74
6	Gujarat	21
7	Haryana	25
8	Himachal Pradesh	1
9	Jammu and Kashmir (J&K)	8
10	Karnataka	7

11	Kerala	19
12	Maharashtra	21
13	Madhya Pradesh	6
14	Orissa	2
15	Punjab	101
16	Puducherry (U.T)	1
17	Rajasthan	6
18	Tamil Nadu	31
19	Uttar Pradesh	22
20	Uttaranchal	02
21	West Bengal	18
	<b>Total</b>	<b>418</b>

The National Commission for Women, the coordinating agency at the national level to receive and process such complaints relating to Indian women deserted by their overseas husband, received far more complaints than even the Ministry of Overseas Indian Affairs. Until March 2012 they were:

<b>Sl. No.</b>	<b>State</b>	<b>Total number of complaints</b>
1	Delhi	135

2	Uttar Pradesh	68
3	Haryana	56
4	Punjab	53
5	Maharashtra	46
6	Gujarat	39
7	Andhra Pradesh	51
8	Karnataka	23
9	West Bengal	30
10	Tamil Nadu	30
11	Rajasthan	25
12	Madhya Pradesh	18
13	Uttrakhand	11
14	Bihar	10
15	Himachal Pradesh	04
16	Assam	03
17	Jharkhand	04
18	Chhattisgarh	02
19	Orissa	09

20	Kerala	07
21	Goa	02
22	Tripura	02
23	Jammu and Kashmir	04
	Others*	126
	<b>Total</b>	<b>758</b>

However, these numbers seem to represent just the tip of the iceberg. Family lawyers across the country have reported dealing with several more complaints. This fact is also corroborated by the burgeoning case law on the subject. The data nevertheless does acknowledge the problem of desertion and harassment by an NRI husband that forces the woman to leave the matrimonial home.

Often, the NRI husband also initiates divorce proceedings in a foreign court after deserting and harassing the wife. Trends observed in Indian case law suggest that he does this for the following reasons:

- (i) To ensure that the forum for divorce and other ancillary proceedings, such as maintenance or child support, is convenient to him, and inconvenient, or in some cases completely inaccessible, to the wife;
- (ii) To covertly obtain a decree of divorce in the absence of the wife in an attempt to foreclose all her rights;
- (iii) To seek divorce on grounds such as irretrievable breakdown of marriage etc., not currently available under Indian law;

- (iv) To avoid coming to India and facing prosecution for any criminal proceedings initiated by the wife.

Only in a miniscule number of such cases does the wife actually contest the divorce proceedings. Often, she cannot, and does not, contest because she is unable to meet the costs of the case. It is found that frequently, the wife has also been sent to India, or has been deserted by the NRI husband. Thus, often her only option is to initiate legal proceedings in India.

Even so, the divorce procured in a foreign jurisdiction is not fatal to the rights of the wife. This is because the decree will then need to be enforced in India. This can be done only if it satisfies the requirements laid down under domestic law. Under Indian law, there are two ways by which a divorce decree obtained abroad can be enforced in India: either by way of Section 13, or Section 44A, of the Code of Civil Procedure. The former applies to judgments from countries with whom India does not have a treaty or agreement on mutual enforcement of judgments (Non-Reciprocating Territories), and the latter to countries with whom India has reciprocal enforcement agreements (Reciprocating Territories).

### **Section 13, Code of Civil Procedure: When Foreign Judgment not Conclusive**

Here, a foreign judgment will be considered conclusive between the same parties on the same matter, unless the case falls under the far-reaching exceptions stipulated therein.

The Supreme Court in the case of Y Narasimha Rao read Section 13 of the Code of Civil Procedure to address this problem. It laid down circumstances in which such judgments would not be binding on the wife.

Y. Narsimha Rao and Y. Venkata Lakshmi married in Tirupati in 1975 as per Hindu customs. They separated in July 1978. The appellant had filed a petition for dissolution of marriage in the Circuit Court of St. Louis County Missouri, USA on the ground of irretrievable breakdown of marriage. The respondent had sent her reply from India under protest. The Circuit Court passed a decree for dissolution of marriage on February 19, 1980 in the absence of the respondent.

On 2 November 1981, the appellant married another woman. The respondent filed a criminal complaint against him for the offence of bigamy. The Supreme Court refused to accept the divorce decree granted by the court at Missouri, USA, on the ground that irretrievable breakdown of marriage is not a ground of divorce recognized under Hindu Law.

The Court held that “[t]he 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.”<sup>14</sup>

However, in the same breath, the Supreme Court also laid down *three* exceptions to this rule. The proposition may be deviated from in case:

- (i) The matrimonial action is filed in the forum where the respondent is domiciled habitually and resides permanently, and the relief is granted on a ground available in the matrimonial law under which the parties are married;
- (ii) The respondent voluntarily and effectively submits to the jurisdiction of the forum and contests the claim, based on a ground available under the matrimonial law under which the parties are married;
- (iii) 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.

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<sup>14</sup> 1991 SCC (3) 451.



**CASE PRECEDING THE *NARASIMHA* RULE:**

*Narasimha* relied on a previous judgment of the Supreme Court of India, in the case of *Satya v. Teja Singh*.<sup>15</sup>

The parties were married in Jullundur in 1955 according to Hindu rites. Thereafter, the respondent-husband left for USA in 1959, leaving behind his appellant-wife and two children.

In 1965, the appellant applied for maintenance, to which the respondent pleaded that he had no obligation to maintain her, since their marriage had been dissolved pursuant to a decree of the District Court of Nevada in 1964.

The Supreme Court refused to recognise the decree on the narrow ground that courts in Nevada had no jurisdiction over the matter.

The Supreme Court analysed the domicile requirements under *Nevadan* Private International Law rules. It held that the respondent had perpetrated a 'fraud' on the Nevada court by claiming that he was domiciled within its jurisdiction when in fact he was a mere 'bird of passage'. Notably, the Supreme Court extended the meaning of 'fraud' in Section 13(e) of the Code of Civil Procedure to not merely fraud on merits, but also on jurisdiction. As such, the foreign divorce decree was found not conclusive by virtue of Section 13(a) and (e) of the Code of Civil Procedure.

In a recent case March 2012, Sunder and Shyamala tied the knot in Vellore district in 1999, Sunder went to the USA within a year and did not communicate with

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<sup>15</sup> AIR 1975 SC 105.

Shyamala after that. In 2000, she received summons from Superior Court of California, which subsequently granted divorce despite the wife's defence statement. Madras High Court held that the Superior Court of California was not a court of competent jurisdiction to decide the matrimonial dispute in this case.

In *Narasimha*, the Supreme Court acknowledged that it was possible to decide the case on the limited ground laid down in *Satya*. It, however, chose to lay down a much broader holding on Section 13 in relation to divorce decrees obtained abroad. The Court rightly acknowledged the growing practice of husbands resident abroad obtaining divorce against their wives resident in India, often without even their knowledge.

*Narasimha* read the exceptions in Section 13 specifically in relation to foreign divorce decrees. The exceptions, and *Narasimha*'s reading of them, is as below:

**a) Where the judgment has not been pronounced by a Court of competent jurisdiction**

Here, *Narasimha* holds that “*only that court will be a court of competent jurisdiction which the [Hindu Marriage] Act or the law under which the parties are married recognises 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.*”

Reading this with *Satya*, it would appear that if a foreign Court assumes jurisdiction on the basis that the parties were resident within its jurisdiction, then the residence must be actual and genuine, accompanied by the desire to make that place their home, and the parties must not be mere ‘birds of passage’. Such a reading is beneficial, since in most NRI marriages, the wives do not even *live* in

the foreign jurisdiction. They are often left behind in India with the children, leaving them with no opportunity to either know about, or contest the proceedings abroad. These conjoint holdings ensure that the wife at least has access to the divorce proceedings initiated by the husband.

This is best demonstrated in *Veena Kalia v. Dr. Jatinder Nath Kalia & anr.*<sup>16</sup>

The first respondent-husband lived in Canada, where he obtained an ex-parte divorce decree from the Supreme Court of Nova Scotia. The wife discovered that he had remarried, pursuant to which she moved the Court in India, contending that the divorce obtained by the first respondent was illegal and not binding on her. The respondent argued that despite being given notice, the petitioner did not contest the same, thereby demonstrating her acceptance of the jurisdiction of the foreign court.

The Delhi High Court held that the fact that the petitioner did not contest the proceedings in the Court at Nova Scotia would not mean that she conceded to its jurisdiction. She had no means to contest the proceedings there, without any fault of hers, when it was in fact the husband who left her in the lurch. The husband took full advantage of her handicap due to meager resources and therefore, the rules of natural justice had been violated. The petitioner was accordingly granted a decree of divorce and maintenance under the Hindu Marriage Act, 1955 and the husband was deemed to be living in adultery.

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

*Narasimha* stipulated a two-fold requirement to locate cases outside this exception: *one*, the decision of the foreign court should be on a ground available under the law under which the parties are married, and *two*, it should be a result of the

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<sup>16</sup> AIR 1996 Del 54.

contest between the parties. It further stated, adverting to its facts, that the second 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.*”

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

*Narasimha* posited that since marriages which take place in India are either under the customary law or the statutory law in force, therefore, only the law under which the parties married can be applied to the matrimonial disputes.

This holding has been most relevant in cases where the husbands obtain a divorce abroad specifically on the ground of irretrievable breakdown of marriage. This ground is still contested in India, and has not been formally introduced in the Hindu Marriage Act. For instance, *Anubha vs. Vikas Aggarwal*,<sup>17</sup> the Delhi High Court refused to take cognizance of the foreign decree of divorce granted for the irretrievable breakdown of marriage.

**d) Where the proceedings in which the judgment was obtained are opposed to natural justice;**

*Narasimha* read the principles of natural justice widely in the context of matrimonial disputes, to mean “*something more than mere compliance with the technical rules of procedure.*” This requires the foreign court to serve not only processes, but also ensure that the other party is capable of attending and representing herself effectively in the proceedings. The petitioner should thus be

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<sup>17</sup> 100 (2002) DLT 682

required to make provisions for the cost of travel, residence and litigation of the responding party in order to comply with the principles of natural justice for the purposes of this rule. This rule was applied in the Delhi High Court case of *Sheenam Raheja v. Amit Wadhwa*.<sup>18</sup>

Eventually, the Delhi High Court struck down the foreign judgment, since the decision was not the result of a contest between the parties since the wife did not have the wherewithal to contest the impugned proceedings in the USA.

**e) Where it has been obtained by fraud**

Here, too, *Narasimha* requires a conjoint reading with *Satya*, whereby ‘fraud’ is defined not merely as a fraud on the merits of the case, but also on facts related to the jurisdiction question. Fraud vitiates all judicial acts whether in rem or in personam.

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

**CONSEQUENCES OF AN INVALID DECREE FOR DIVORCE**

When the decree for divorce fails the test of Section 13 it becomes an invalid decree for divorce. The consequences that flow from it are as follows:

- i) If he remarries, the husband may be prosecuted for bigamy. There is no time limit for the first wife to file a complaint with the police against the husband in the matter of bigamy. In *Narasimha*, for instance, the man remarried in 1981 and bigamy proceedings were initiated ten years after

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<sup>18</sup> CS (OS) 990/2010 decided on 10.09.2012.

that. Bigamy is punishable under section 494 of Indian Penal Code with imprisonment of seven years.

- ii) Wife (divorced as per foreign law) may file for maintenance.
- iii) In case the man dies intestate, the first wife will have a claim on the property of the husband. The second wife will not have such a claim, because she would not be considered a lawful wife.

### **Section 44A, Code of Civil Procedure: Execution of Decrees Passed by Courts in Reciprocating Territory**

A “Reciprocating Territory”<sup>19</sup> is any country or territory outside India which the Central Government declares as such.

Section 44A allows the enforcement of a judgment passed in a Reciprocating Territory in India as if the said judgment had been passed by a court in India itself. This can be obtained by filing a duly certified copy of the said judgment in the appropriate court, which will then be executed in accordance with the laws on enforcement and execution of Indian judgments and orders.

### **Scheme of the Ministry of Overseas Indian Affairs**

The Ministry of Overseas Indian Affairs has recognized the need to equip women engaged in divorce and other proceedings in foreign countries with sufficient legal and financial support to effectively litigate. In pursuance of the same, the Ministry

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<sup>19</sup> Till date only eleven countries have been notified as Reciprocating Territories under the provisions of Section 44A of the CPC, namely Aden, Bangladesh, the Cook Island, Fiji, the Federation of Malaysia, Hong Kong New Zealand, New Guinea, the Republic of Singapore, Trinidad and Tobago, and the Trust Territories of Western Samoa, Papua, the United Kingdom and the United Arab Emirates.

introduced the Scheme for giving legal / financial assistance to Indian women deserted by their overseas Indian / foreigner husbands.

The Scheme defines itself as “*a welfare measure to support Indian women in distress through the mobilization of the local Indian community in the endeavor and with some financial assistance from the Government.*” It extends to women that are Indian citizens, married to NRIs, in case she is deserted, or divorce proceedings initiated within the first fifteen years of the marriage. The period for the divorce proceedings may extend to twenty years in case the husband has procured an ex-parte divorce decree abroad, when she needs to file a suit for maintenance and alimony. It provides assistance to the extent of US\$ 3000 per case for developed countries and US\$ 2000 per case for developing countries, and extensively engages NGOs and women’s organizations in the process.

Commendably, the Scheme overcomes the problem of domicile faced by several such women, especially when courts have often applied the common law rule that the domicile of the wife follows the domicile of the husband in order to assume jurisdiction over cases.

It, however, imposes an onerous requirement on women by excluding those who have been convicted for any offence (with the exception of parental child abduction). Even offences entirely unrelated to the proceedings at hand are considered in this determination. This can be particularly discriminatory when such convictions pose no hurdle for the husband in filing suits for divorce and custody abroad.

While this Scheme is a step in the right direction, the allowances made are grossly deficient. Litigations abroad are extremely expensive, especially when the wife

may be fighting not only for herself but also for child support payments. Often, they initiate proceedings repeatedly because the husband defaults in payments.

The shortcomings of the scheme is best exemplified by the number of beneficiaries being as few as 84 in four years since its existence.<sup>20</sup> The total number of successful litigants of these few is also unknown. But the scheme creates an option for the wife to contest proceedings abroad or atleast with avail the help of the NGO's and other local organizations for help<sup>21</sup>.

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<sup>20</sup> As per data on the MOIA website, available at [http://moia.gov.in/writereaddata/pdf/Data\\_Legal\\_financial\\_assistance.pdf](http://moia.gov.in/writereaddata/pdf/Data_Legal_financial_assistance.pdf), last viewed on 20.3.2013.

<sup>21</sup> List of NGO's empaneled for providing legal support are available at [http://moia.gov.in/writereaddata/pdf/list\\_indian\\_women\\_17-03-2012.pdf](http://moia.gov.in/writereaddata/pdf/list_indian_women_17-03-2012.pdf), last viewed on 20.3.2013.



## CHAPTER IV

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### MAINTENANCE

Maintenance is an important issue in NRI marriages as the woman is often left alone to fend for herself and her children without any support from her husband or in-laws. She cannot seek relief from a foreign court where her husband resides because of a lack of access and resources. Her best option is to approach the Courts in India. However, even here she faces several obstacles. She is required to serve a notice of her petition on her husband, which takes several months- often even longer. Then she has to fight a long legal battle in court with constant adjournments and long dates between hearings. Finally, even if she does get a decree in her favour, it is difficult to get it executed since India is not a signatory to any Convention dealing with maintenance obligations. India also does not have reciprocating agreements with a large number of countries in which the Indian diaspora is present. It is therefore difficult to get the Indian court orders enforced in any country. In cases where the NRI wife has got maintenance orders from abroad, it is difficult to get orders of that foreign court enforced in India as per Section 44A of the Code of Civil Procedure, 1908.

This chapter discusses cases of maintenance filed by the deserted or separated wives for herself and their children, international Conventions on this issue and the Code of Civil Procedure.

#### INDIAN CASE LAW:

Section 125 of the Code of Criminal Procedure provides for maintenance of wives and children to prevent destitution. Sections 24 and 25 of the Hindu Marriage Act,

1956 also stipulate interim maintenance *pendent lite* and permanent maintenance and alimony to the wife. Sections 18 and 20 of the Hindu Adoption and Maintenance Act, 1956 cast a legal obligation upon the husband to maintain his wife and children, even if, under some circumstances, she is living away from him. The most far-reaching, however, is Section 20 of the Protection of Women from Domestic Violence Act, 2005, which is a secular legislation supplementing maintenance provisions in other laws.

In *Neeraja Saraph v. Jayant V. Saraph and Anr.*,<sup>22</sup> the Appellant, a teacher drawing a salary of Rs. 3000/-, was married to the Respondent No. 1, a Doctor in Computer Hardware and employed in the United States. The marriage had been arranged by her father-in-law, who had approached a common family friend. Within six months of her marriage the Respondent persuaded her to leave her permanent job and join him in the United State. Accordingly she left her job and applied for a visa. Within a few months of these developments, she received a petition for the annulment of her marriage filed by her husband in USA. Her father-in-law only showed sympathy without any financial assistance to her. The wife filed a suit for damages against the husband and father-in-law, in *forma pauperis*. She got a decree in her favour for Rs. 22 Lakh as monetary compensation.

In an appeal by the husband, the High Court stayed the order but directed the Respondent father-in-law to deposit Rs. 1,00,000 with the High Court within one month, and half of this amount was allowed to be withdrawn by the Appellant. On

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<sup>22</sup> (1994) 6 SCC 461

the wife's appeal against this order, the Supreme Court in its wisdom ordered that "...the execution of the decree shall remain stayed if the respondents deposit a sum of Rs. 3,00,000/- including Rs. 1,00,000/- directed by the High Court within a period of two months from today, with the Registrar of the High Court." The court only allowed the wife to withdraw Rs. 1,00,000, originally ordered by the High Court. The rest of the money was ordered to be deposited with a nationalised bank, and the wife was allowed to receive interest on that amount. The Supreme Court further held that if the matter was not decided within a reasonable time, she could file an application with the High Court to remove more money.

The orders of the High Court and of the Supreme Court demonstrated a clear bias against awarding large sums of maintenance even in cases of desertion and monetary loss.

However, the Supreme Court reiterated the importance of enacting legislation for reciprocal enforcement of foreign judgments.

*"Although it is a problem of private International Law and is not easy to be resolved, but with change in social structure and rise of marriages with NRI the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933."*

The judgment included recommendations to safeguard the interests of women through the following provisions:

1. Marriages between an NRI and an Indian woman, which have taken place in India, may not be annulled by a foreign court;
2. Provisions may be made for adequate alimony to the wife in the property of the husband both in India and abroad;

3. The decree granted by Indian courts may be made executable in foreign jurisdictions, both on the principle of comity and by entering into reciprocal agreements, like Section 44A of the Civil Procedure Code which makes a foreign decree executable in the same manner as a decree passed by that court.

Most often, like in all NRI cases, the question of jurisdiction is the most challenging. After the marriage, either the husband alone or the couple together move abroad. In case of dispute, the woman is compelled to stay in India and seek relief from here. However, since jurisdiction is traditionally decided on the basis of the cause of action or location of the defendant or his domicile, Indian courts rarely have jurisdiction. This also applies to maintenance cases which must be in tandem with Section 20 of the C.P.C. The few exceptions to this rule regarding jurisdiction are the Protection of Women from Domestic Violence Act, Section 125 of the Code of Criminal Procedure and cases in which divorce/separation proceedings under Hindu Marriage Act, Special Marriage Act and The Divorce Act have been initiated in India and maintenance is an ancillary relief.

The Courts have found different ways of responding to this challenge regarding jurisdiction. The most significant of these cases is *Satya v. Teja Singh*, which emphasised that though residence requires more than a fleeting visit, it may be a temporary or permanent abode. Pertinently, the Court held that decrees obtained abroad in cases of NRI marriages will not be held conclusive in India under Section 13(e) of the Code of Civil Procedure, if they have been obtained by fraud of facts relating even to jurisdiction, and not only the merits.

*Deepak Banerjee v. Sudipta Banerjee*,<sup>23</sup> in 1987 stressed the proposition that ‘residence’ for the purpose of conferring jurisdiction for maintenance includes the residence of the wife, since she cannot be expected to travel long distances, to foreign jurisdictions to obtain justice when she is claiming destitution. The Court reiterated *Satya v. Tej Singh* to this effect, and also stressed the ratio in *Shah Bano Begum*<sup>24</sup> that Section 125 of the Code of Criminal Procedure is independent of the nationality and personal law of the parties. Accordingly, the suit does not involve a question of conflict of laws at all, even if the husband resides in USA.

*Jagir Kaur and Anr. v. Jaswant Singh*<sup>25</sup> discussed the import of the word ‘resides’ under Section 488 of the Code of Criminal Procedure, 1898, which decides the jurisdiction of courts in maintenance matters.

In *Jagir Kaur*’s case, the respondent lived in Africa. The marriage between the appellant and respondent took place in 1930, after which the respondent returned to Africa without the appellant. He returned after more than a decade and stayed in India for 5 months. Before returning to Africa, he married again, and took his second wife with him to Africa. On his next trip to India, he took the appellant with him, and in Africa she gave birth to a daughter.

Soon, disputes started arising between the appellant and the respondent, due to which respondent sent her back to India, assuring regular maintenance money. However, even though the appellant returned to India, she never received any maintenance. She therefore applied under Section 488 of the Code of Criminal Procedure seeking maintenance for herself and their daughter. The husband challenged the jurisdiction of the Indian court to hear the matter, on the ground that the application could only be filed abroad where the Respondent and the petitioner resided together and that he was not a resident.

<sup>23</sup> (1987) CALLT 491(HC)

<sup>24</sup> Mohd. Ahmed Khan v. Shah Bano Begun AIR 1985 SC 945.

<sup>25</sup> AIR 1963 SC 1521

The Court drew a distinction between ‘residence’ and ‘domicile’, stating that ‘residence’ required a much lower threshold, and even temporary location in an area could be called ‘residence’: *“A person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case.”*

The most notable observation of the court vis-a-vis NRI marriages is as follows: *“...when sub-s. (8) of S. 488 of the Code, prescribing the limits of jurisdiction, speaks of the last residence of a person with his wife, it can only mean his last residence with his wife in the territories of India. It cannot 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 if we held that the district where he last resided with his wife must be a district in India.”*

This observation alleviated some hindrances in the way of wives in NRI marriages from claiming maintenance. They would not be compelled to initiate proceedings abroad, where they would have no resources or means of sustenance anyway. They could instead initiate proceedings in India, away from any domestic violence by the husbands as well.

Now however the law has changed as mentioned above. Sections 125 and 126 are the corresponding maintenance provisions in the new Code of Criminal Procedure, which expressly confer jurisdiction upon Courts where the *wife* is resident herself, and may have moved to after leaving the matrimonial home.

Even so, the Supreme Court in Jagir Kaur’s case awarded maintenance only to the extent of Rs. 100/- per month for the wife and Rs. 50/- per month for her minor child, reflecting judicial trends in awarding conservative amounts for maintenance.

*Paul Tushar Biswas v. Addl. Dist. Judge and Anr.* This case addressed the method by which judgments passed abroad on maintenance can be enforced in India, and vice versa.<sup>26</sup> This case related to an order for child support having been granted in California, which the father challenged in India. The petitioner claimed to be an Indian national, residing at California. He alleged that as other cases related to their marriage were ongoing in Shillong, this should also be heard at the same forum.

The Court held that at Shillong, the matter of maintenance was not sub-judice, and therefore could rightly have been heard by the Californian court.

It further observed that under Section 44A of the CPC, a decree from a reciprocating territory can be enforced by merely filing a certified copy of it, which then will be executed as if it were passed in India. The High Court relied on the judgment of the Supreme Court in *Sankaran Govindan v. Lakshmi Bhurathi and Ors.*<sup>27</sup> wherein the Supreme Court had held that “*the true basis of enforcement of a foreign judgment is that it imposes an obligation upon the defendant and therefore, there must be a connection between him and the forums sufficiently close to make it his duty to perform that obligation.*”<sup>28</sup>

Further the High Court held that for application of Section 45 and execution of Indian decree outside India, the following conditions should be satisfied:

- (1) The decree to be executed is of an Indian Court for execution in a foreign territory.
- (2) The transferee Court should be one established by Central Government in such foreign territory.

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<sup>26</sup> II(2006)DMC59

<sup>27</sup> MANU/SC/0406/1974 : [1975]1SCR57

<sup>28</sup> As referred in *Paul Tushar Biswas v Addl. Dist. Judge and Anr.*

(3) The State Government, by notification, has declared this section to apply to the said foreign Court.

However, in the given case there was no agreement of reciprocity between India and the State of California and any order passed by the court in India would not be enforceable in the State of California, and vice versa. It further held that in absence of either of the abovesaid conditions, an Indian Court has no jurisdiction to send its decree for execution to a Court not situated in India.

In *Satish Mehra v Anita Mehra* the Petitioner NRI husband, a 'man of status', got married to the Respondent wife on 18.2.1980 in India according to Hindu rites and ceremonies. The wife then migrated to USA with the Petitioner where they remarried on 19.05.1982. The couple had two daughters and one son. Matrimonial relations between them were not very cordial. As per the Respondent wife the husband used to give USD 31,200 per year to her for running household affairs. However, as soon as the wife would encash the cheque, the husband would take the entire amount back. The husband would physically, mentally and sexually abuse the wife and also the children.

The wife sought maintenance to the extent of Rs.3,79,500/- for herself and for three her children, keeping in view their status as well. However, the metropolitan magistrate awarded her a sum of only Rs.35,000/- per month for her own upkeep, and that of her four children.

This petition related to an application by the husband to exculpate him from the obligation to pay even this amount. The High Court, while expressing sympathy with the wife for not having received maintenance of even this amount since the order had been passed two years past, struck down the prayer of the



husband. However, in doing so, it nevertheless upheld the paltry amount of maintenance awarded by the MM.

*Sanjay Angad Chaddah v. Deepa Sanjay Chaddah*<sup>29</sup> was a case in which the High Court of Bombay upheld an order on maintenance passed by a court of London binding upon the parties by virtue of Section 13 of the Code of Civil Procedure. After their marriage, both the parties were living in the UK, where they had a child. However, disputes arose between them, due to which they started living separately. They reached a compromise, which was assented to by a court in London. The husband defaulted on his obligations and failed to pay maintenance. The High Court of Bombay held that if the husband paid the wife maintenance monthly and arrears of maintenance at the rate of Rs. 15,000/month, he would be considered to have fulfilled his obligations.

In *Rahul Bhupinder Luthra v. Rashmi/Ria Rahul Luthra*,<sup>30</sup> the husband was originally ordered to pay maintenance to the wife and child at the rate of Rs.12,000/- per month. The wife appealed the order of the trial court, since it refused to grant her the *stridhan* property. She also claimed maintenance at Rs.30,000/- per month, and claim for residence.

The High Court partly allowed the petition and the wife was held entitled to receive maintenance at the rate of Rs. 25,000/- per month for herself and Rs. 5,000/- per month for her daughter.

The High Court of Delhi heard the case of *Anubha v. Vikas Aggarwal*,<sup>31</sup> wherein the wife asked for maintenance under Section 18 Hindu Adoption and Maintenance Act 1956. This was contested by the husband, on the ground that she was not

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<sup>29</sup> AIR2011Bom393

<sup>30</sup> 2010 (5) BomCR 314

<sup>31</sup> I(2003)DMC139

entitled to maintenance under the HAMA since she had been leading an unchaste life. The Court granted maintenance for Rs.10,000/- month, holding that merely fraternizing with members of the opposite sex does not amount to unchastity, and therefore the wife was not disentitled to maintenance.

While refusing to cast the wife's actions as unchaste, the Court nevertheless was guided by the principle enshrined in the HAMA that unchastity disqualifies a woman from maintenance. This is problematic, since maintenance is provided in recognition of the household work done by the woman and compensates her for the loss of her opportunity in obtaining gainful employment and the loss of earning capacity. This is totally unrelated to the conduct and character of the woman, especially if it relates to her conduct after the marriage has come to an end. At that stage, her sexual relations with other men apart from her ex-husband does not threaten the relationship of marriage at all. Other countries around the world, such as Canada, have already delinked entitlement to maintenance from the requirement of chastity, holding it irrelevant to the question of the destitution of the woman.

The Court further held that 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 is neither recognizable nor enforceable in India.

In *Maganbhai Chhotubhai Patel v. Maniben*,<sup>32</sup> the Court attempted to lay down a formula by which the wife would be entitled to maintenance. Here, the husband, after leaving his wife and children in India, went to the United States for further studies. He did not return to India, and also did not maintain his wife and two

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<sup>32</sup> AIR 1985 Guj 187

minor children, even though the wife had obtained an order for a paltry maintenance of Rs. 250 per month. Here, the husband was appealing against the order of maintenance awarded at the trial court, while the wife was seeking enhancement upto Rs.1000.

Furthermore, the husband had previously sought divorce from his wife through a letter from USA. He eventually obtained divorce, in the absence of the wife, from a court in *Mexico*, where he had obtained a residence certificate on account of a brief stay.

The Court struck down the divorce decree on the grounds that it had been obtained by fraud of the facts relating to jurisdiction, under Section 13(e) of the Code of Civil Procedure. It held that a residence certificate, which may be granted even to persons living in hotels for a short while, is insufficient to confer jurisdiction upon the Mexican Courts, since the appellant was domiciled in India, and living in the USA.

The Court also attempted to lay down an objective standard for maintenance, such that “...*if the wife is neglected, who has to maintain two children, the share from the income of the husband to which the wife should be entitled may be considered to the extent from one-third to one-half.*”

Even then, the Court awarded Rs.1000/- to the wife out of the total income of the husband of Rs.12,000/-, presumably because it was bound by the prayer of the respondent herself, in which she had sought Rs.1000/-.

In *Indira Sonti v. Suryanarayana Murty Sonti and Anr.*,<sup>33</sup> the parties solemnised their marriage in USA, and within hours of this the respondent and his family raised further demands for dowry for more gifts and Rs. 10 lakhs. The appellant

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<sup>33</sup> 1(2002)DMC56

was also forced to quit her job before the marriage. The appellant sought maintenance in Delhi, under Section 18 of the HAMA, and also sought interim maintenance *pendent lite*.

This case raised two significant questions. *First*, whether rules relating to jurisdiction enshrined in Section 126 of the Code of Criminal Procedure also apply to applications for maintenance apart from Section 125 of the Code; and *second*, what is the relationship between the earnings of the husbands to the entitlement to maintenance for the wife.

The Court read the jurisdiction requirements beneficially. It stated that Section 126 reflects societal needs better, since they permit a woman to file for maintenance at her place of residence, especially since maintenance is sought by women without adequate means of supporting themselves. Accordingly, Section 126 was also extended to Section 18, HAMA.

The Court further reiterated the line of precedents in several High Courts around the country, including Delhi, where maintenance to the wife is awarded to the extent of half of the husband's net income. Here, the husband was earning US\$65,000 per year, out of which, he claimed, he expended US\$56,000 on taxes, rent and other essential living expenses, and was therefore incapable of paying maintenance out of the meagre savings of US\$9000. The Court rejected this contention, and awarded the wife US\$400 per month as per the formula.

*Abdur Rahim Undre v. Padma Adbur Rahim Undre* is demonstrative of the trend whereby, despite court precedents stipulating an objective formula to calculate maintenance, the courts nevertheless grant ad hoc amounts to the wives.<sup>34</sup> Here, the Court did not even consider the question of the earnings of the husband. Instead, it

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<sup>34</sup> AIR1982Bom341

ordered to physically partition the house according to the plans proposed by the appellant, whereby the wife got less than one-third of the apartment, along with Rs.7000/- as maintenance. The ability of the husband to purchase a house in an upscale area demonstrated that his earnings far exceeded the maintenance he had been ordered to pay.

Cases on maintenance repeatedly expose a trend where Courts decide cases of maintenance in a patriarchal manner. This gets reflected not only in the amounts that are eventually awarded, but also the conditions that are imposed on the entitlement to maintenance. Maintenance is not perceived as compensation to the woman for the loss in her earning abilities by virtue of her role as the 'home-maker' in the family. According to this, the wife is expected to devote her time and energy to the upkeep of domestic chores, at the cost of her economic independence. Even when the woman has a job herself, it does not lessen her responsibility of taking care of the house and this often affect her opportunities for promotion. The husband mostly continues to exercise control over the finances and assets of the family, which are hardly ever acquired in the name of the wife.

Instead, maintenance is perceived as a bare minimum anti-destitution provision. Accordingly, the Courts award meagre amounts for maintenance, even when the wife has to look after the children. While Courts have exceptionally stipulated that maintenance should reflect the earlier standard of living of the wife, and the amount granted should be half of the income of the husband, *courts hardly abide by these requirements*. This further impacts the legal advice that these women receive, wherein lawyers also do not pray for high maintenance amounts on behalf of their clients.

Indian legislation further links the entitlement of maintenance to the wife to her conduct and character, stipulating that unchaste women cannot claim maintenance. This shows a patriarchal bias, since it suggests that the husband has an obligation to provide for the sustenance of the wife only as long as he is able to sustain a monopoly over her. This mandate stretches to absurd conclusions when it is extended to post-divorce maintenance as well. The law, in this manner, enforces a strict code of conduct upon all women, by linking their sustenance to their sexual conduct. Maintenance, in this light, is not perceived in the manner that it should- of compensation for loss of opportunity of economic independence equal to the man, enforced through social norms associated with marriage.

This legal stance then acts as deterrence for women from stepping out of abusive and unhappy marriages, knowing that the cost of living *outside* the marriage is very high. The law compels women to sustain the abuse and prevents them from making a free choice of obtaining divorce or separation.

### **Conventions:**

The Hague Conference on Private International Law has transformed international family law. Now, with over 70 members, the Conference has become a center for international judicial and administrative cooperation, by taking on new roles, implementing and monitoring the Conventions and providing education and assistance for participants. There are several Conventions regulating substantive and procedural matters in international civil litigation under the Hague Conference. These include the Convention on the Law Applicable to Maintenance Obligations Towards Children 1956, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Convention on the Recognition of Divorces and Legal Separations, legalization of public

documents,<sup>35</sup> service of judicial and extra-judicial document abroad,<sup>36</sup> taking of evidence<sup>37</sup> and co-operation regarding inter-country adoption and protection of children<sup>38</sup>.

India, though a member of the Hague Conference, has ratified only four Hague Conventions. These are: Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption.

As discussed earlier, litigation involving NRI marriages suffer greatly from procedural vagaries. Issuing service and summons, recognition and enforcement of judgments are also controversial. The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters addresses these issues. However while ratifying the Convention, India has made a reservation vis-a-vis Article 10 which states the following about methods of service:

*Provided the State of destination does not object, the present Convention shall not interfere with -*

*a) the freedom to send judicial documents, by postal channels, directly to persons abroad,*

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<sup>35</sup> 12<sup>th</sup> Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, the Convention is not into force between India and Germany, available at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=41](http://www.hcch.net/index_en.php?act=conventions.text&cid=41) last visited on 08.03.2013.

<sup>36</sup> 14<sup>th</sup> Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, available at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=17](http://www.hcch.net/index_en.php?act=conventions.text&cid=17) last visited on 08.03.2013.

<sup>37</sup> 20<sup>th</sup> Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, available at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=82](http://www.hcch.net/index_en.php?act=conventions.text&cid=82) last visited on 08.03.2013.

<sup>38</sup> 33<sup>rd</sup> Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, available at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69) last visited on 08.03.2013.

*b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,*

*c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.*

India has assented to the conditions for passing a judgment contained in Article 15 para 2. Further under Article 16 an application for relief against the judgment by the defendant will not be entertained if filed after the expiration of one year following the date of the judgment.

None of these as relate to maintenance obligation and its enforcements, which most commonly relate to child support and spousal support.

The Convention on the Law applicable to Maintenance Obligations towards Children of 24 October 1956 and the Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations and Convention on the Law Applicable to Maintenance Obligations of 2 October 1973 were replaced by the new Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, which is accompanied by Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

**Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance**



Known as the Maintenance Convention, it came into force on 1<sup>st</sup> March, 2013. It makes an explicit reference to the Convention on the Rights of the Child [CRC], emphasizing that the best interests of the child principle is a primary consideration in all actions concerning children. Following the provisions of Article 27 of the CRC, this convention recognizes the right of every child to an adequate standard of living and the primary responsibility of parents or others responsible for the child to secure the conditions of living necessary for the child's development.<sup>39</sup>

The object of this Convention is to ensure the effective international recovery of child support (irrespective of marital status of the parents) and other forms of family maintenance, in particular by –

- a. establishing a **comprehensive system of co-operation between the authorities of the Contracting States**;
- b. making **available applications** for the establishment of maintenance decisions;
- c. providing for the **recognition and enforcement of maintenance decisions**;  
and
- d. requiring **effective measures for the prompt enforcement** of maintenance decisions.

The provisions of this Convention shall apply to children regardless of the marital status of their parents and a State may extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons.

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<sup>39</sup> Ann Laquer Estin, 'Families across Borders: the Hague Children's Conventions and the Case for International Family Law in the United States', *Florida Law Review*, Vol. 62, 55

The Convention has been made applicable to the following –

- a. to maintenance obligations arising from a parent-child relationship towards a child under the age of 21 years (some states may reduce it to 18 years);
- b. to recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim for child maintenance ;  
and
- c. to spousal support with the exception of Chapters II and III (applications through Centralized Authority).

The Convention bases its infrastructure on administrative support authorities already in place. It provides a system of administrative cooperation for processing international child support applications which is specifically designed to handle large volumes of cases.<sup>40</sup>

It provides for a “Central Authority to discharge the duties that are imposed by the Convention on such an authority.”<sup>41</sup> Further it also provides for various other measures relating to this Authority, including the function to be performed by it. Central Authorities shall provide assistance in relation to applications (filed through such authorities in contracting state through similar authority in state addressed) under Chapter III. In particular they shall do the following:

- a. transmit and receive such applications;
- b. initiate or facilitate the institution of proceedings in respect of such applications.

Further, in relation to such applications they shall take all appropriate measures –

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<sup>40</sup> Ibid.

<sup>41</sup> Article 4(1)

- a. where the circumstances require, to provide or facilitate the provision of legal assistance;
- b. to help locate the debtor or the creditor;
- c. to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets;
- d. to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;
- e. to facilitate the ongoing enforcement of maintenance decisions, including any arrears;
- f. to facilitate the collection and expeditious transfer of maintenance payments;
- g. to facilitate the obtaining of documentary or other evidence;
- h. to provide assistance in establishing parentage where necessary for the recovery of maintenance;
- i. to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;
- j. to facilitate service of documents.

The Convention specifically provides for recognition and enforcement of decisions of judicial or administrative authorities in respect of a maintenance obligation as

well as maintenance arrangement.<sup>42</sup> It does not require the state addressed to enter into the merits of the case. It even dispenses with the need of personal appearance of the applicant in the addressed state.<sup>43</sup>

It provides that enforcement should be according to the internal law of the state addressed and there should be no discrimination between the domestic cases of the state addressed and those originating from the state of origin of the maintenance seeker.<sup>44</sup>

Further, it also provides for measure for effective enforcement of maintenance obligations<sup>45</sup>, which are:

- a. wage withholding;
- b. garnishment from bank accounts and other sources;
- c. deductions from social security payments;
- d. lien on or forced sale of property;
- e. tax refund withholding;
- f. withholding or attachment of pension benefits;
- g. credit bureau reporting;
- h. denial, suspension or revocation of various licenses (for example, driving licenses);
- i. the use of mediation, conciliation or similar processes to bring about voluntary compliance.

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<sup>42</sup> Chapter IV inclusive of Articles 19, 20 and 29

<sup>43</sup> Articles 27-29

<sup>44</sup> Articles 32 and 33

<sup>45</sup> Article 34

This Convention faced opposition while in its draft form. While the previous Conventions of 1956 and 1973 merely required participants to recognize foreign support orders, this Convention requires the Central Authorities to provide “effective access to procedures” for child support enforcement. This also includes free legal assistance in most situations. These terms were not readily acceptable to several states, even though some countries, like the United States, were already following similar principles in their domestic child support enforcement system and in their bilateral agreements with other countries. Countries were also conflicted on the jurisdictional rules of participating countries. A large bone of contention was the range of family relationships that may give rise to support obligations- countries objected to children born out of live-in relationships from being brought within the purview.<sup>46</sup>

The Convention also provides for recognition and enforcement of other family maintenance obligations, such as spousal support, parental obligation, by direct request to a Tribunal in another contracting state.

In India, there currently exist no child maintenance enforcement authority mechanisms, which is why the provisions of the Convention provide little assistance. Since the Convention operates through existing authorities, it is more effective in countries like USA and Canada. Nevertheless, it permits Indian women to seek enforcement of maintenance decrees passes in foreign contracting states easily.

### **The Protocol on the Law Applicable to Maintenance Obligations**

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<sup>46</sup> Ann Laquer Estin, ‘Families across Borders: the Hague Children’s Conventions and the Case for International Family Law in the United States’, *Florida Law Review*, Vol. 62, 55

This Protocol was concluded on 23 November 2007 along with the Maintenance Convention. In comparison with the prior Hague Conventions, the Protocol provides three main innovations. First, while retaining the habitual residence of the creditor as the main connecting factor, and extending it to maintenance obligations between spouses and ex-spouses, the Protocol reinforces the role of the *lex fori* (law of the forum). For claims made by certain “privileged” classes of creditors, the *lex fori* is promoted to the rank of the principal criterion, with the law of habitual residence of the creditor playing only a subsidiary role. Next, an escape clause based on the idea of close connection was introduced for obligations between spouses and ex-spouses. Finally, a measure of party autonomy was introduced, in two variations: the possibility of procedural agreements enabling the parties, with respect to any maintenance obligation, to select the law of the forum for the purposes of a specific proceeding; and, an option regarding the applicable law that may be exercised at any time, subject to certain conditions and restrictions.<sup>47</sup>

The scope of maintenance obligations of the Protocol is wider than the 2007 Convention, and it determines the law applicable to maintenance obligations based on any family relationship, including family relationships, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents.<sup>48</sup> A special defence rule has been included in the Protocol to partially mitigate its broad scope. A debtor may contest a creditor’s claim on the basis that there is no such obligation under both the law of the State of the debtor’s habitual residence and if the parties have a common nationality, in the law of that state as well. This defence is applicable to any maintenance obligation

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<sup>47</sup> Art. 4(3), 5, and 7. Also see Outline: Hague Protocol On Law Applicable To Maintenance Obligations, available at: <http://www.hcch.net/upload/outline39e.pdf> last visited on 08.03.2013.

<sup>48</sup> Outline: Hague Protocol On Law Applicable To Maintenance Obligations, available at: <http://www.hcch.net/upload/outline39e.pdf> last visited on 08.03.2013.

other than those to children arising out of a parent-child relationship or those between spouses or ex-spouses.<sup>49</sup>

The highlights of this Protocol are:

1. The term habitual residence in Article 3 has not been defined. This is necessary to know in order to ascertain which law should apply. The law applicable is linked to the creditor's habitual residence so that the existence and the extent of the maintenance obligation can be determined, with regard to the legal and factual conditions of the social environment of the creditor's country.<sup>50</sup>
2. The application of this law can only be refused if it is manifestly incompatible with public policy of the country, and not otherwise.<sup>51</sup> Therefore, there needs to be a blatant contradiction.
3. This Convention provides the scope for application of personal laws of parties which is important in a country like India. If reference is made to the law of the habitual residence of the creditor or debtor, then in such a case reference shall be made to the system designated by the rules in force in that State or, if there are no such rules, to the system with which the persons concerned are most closely connected.<sup>52</sup> It talks about superintendence of personal laws in case of conflict of laws. This is important in case of a country like India which has a myriad of provisions.

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<sup>49</sup> Ibid

<sup>50</sup> Andrea Bonomi , *Explanatory Report on the Protocol Of 23 November 2007 On The Law Applicable To Maintenance Obligations*, 14 Hague: Permanent Bureau, HCCH, October, 2009. Available at [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=3&cid=133](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=3&cid=133) last visited on 09.03.2013.

<sup>51</sup> Article 11

<sup>52</sup> Article 16

4. The Protocol provides for Universal application. Its ratification by a large number of States may be beneficial for creditors, even those who are domiciled in States that have not acceded to it (and which do not contemplate becoming Parties to it): even creditors domiciled in such States will enjoy the benefit, in the course of proceedings initiated in a Contracting State (*e.g.*, in the State of the debtor's domicile), of the application of uniform rules favourable to the creditor, which are laid down in the Protocol.

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This also does away with the requirement of a reciprocating and non-reciprocating territory as envisaged in S.44A of the CPC.

5. Article 5 of the Protocol on the Law applicable to Maintenance obligations, 2007 introduces a special rule with respect to maintenance obligations with respect to spouses and ex-spouses.

In the case of a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled, Article 3<sup>54</sup> shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply. The law of the State of the habitual residence of the creditor shall not apply if the spouse/ex-spouse objects. Thus, in cases where the bride is taken abroad and the marriage is solemnized in a foreign land, there may be a possibility that the law of the foreign land be made applicable. Therefore

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<sup>53</sup> *Supra n.1* at p.7

<sup>54</sup> General rule on applicable law

(1) Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise.

(2) In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs.



it is recommended repeatedly that marriage should take place in India, as a preventive step.

6. The convention also gives the option to the parties to designate one of the following laws as applicable to a maintenance obligation -

- a. the law of any State of which **either party is a national** at the time of the designation;
- b. the law of the State of the **habitual residence** of either party at the time of designation;
- c. the law designated by the parties as **applicable, or the law in fact applied, to their property regime;**
- d. the law designated by the parties as **applicable, or the law in fact applied, to their divorce or legal separation.**<sup>55</sup>

This is akin to the parties willingly submitting to the jurisdiction of a Court, in which case the judgment becomes enforceable. However, this provision requires that parties should be fully aware of the consequences of designating a law, and if the parties signed the agreement without being fully aware of the consequences of their designation, then the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.

7. The 2007 protocol does not permit contracting states to make any reservations.<sup>56</sup> This is a significant departure from the Law Applicable to Maintenance Obligations, 1973, whereby countries could make reservations

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<sup>55</sup> Article 8

<sup>56</sup> Article 27

to exclude certain creditors. Earlier, any Contracting State could reserve the right not to apply this Convention to maintenance obligations between divorced or legally separated spouses, or spouses whose marriage has been declared void or annulled if the decree of divorce, legal separation, nullity or annulment has been rendered by default in a State in which the defaulting party did not have his habitual residence.<sup>57</sup>

8. The Convention allows either spouse to object when it is a question of enforcing maintenance obligations between spouses and ex-spouses. The Convention provides for an exception in case of spouses and ex-spouses.
9. The provision of a special rule for this class of maintenance obligations is based on the observation that application of the law of the creditor's habitual residence is not always suitable for obligations between spouses or ex-spouses. It should be taken into consideration that in certain domestic systems, maintenance is granted to a spouse only with great restraint and in exceptional cases (in Europe, this restrictive attitude is a feature of the law of Scandinavian States in particular). Against that background, indiscriminate application of the rules inspired by *favor creditor* is seen in certain States as being excessive.<sup>58</sup>
10. However, mere objection by one of the spouses is not sufficient, as there also needs to be a close connection with country of last habitual residence.

This implies that the court, pursuant to such a request, will ascertain whether the marriage has closer connections with a law other than that of the creditor's habitual residence. In so doing, it shall have regard to all the connections of the

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<sup>57</sup> Article 14(3), 1973 Convention

<sup>58</sup> Supra n.1 at p.21

marriage with the various countries concerned, such as the spouses' habitual residence and / or domicile during the marriage, their nationalities, the location where the marriage was celebrated and the location of the legal separation or divorce. In addition, it will have to weigh them so as to determine whether they are more or less significant than the current habitual residence of the maintenance creditor.<sup>59</sup>

11. Article 14 of the Convention allows for adjustment of the maintenance obligation with any earlier consideration paid. It refers in particular to cases where, at the time of divorce, one spouse has obtained the payment of a lump sum or the allocation of part of the property (real or personal) belonging to the other spouse (as is the case, for instance, in certain common law jurisdictions) to liquidate all his or her claims, including maintenance. In such case, the subsequent assertion of maintenance claims by one spouse, incompatible with the earlier settlement, on the basis of a law that does not recognise this form of compensation, should be avoided: if the law designated by the Protocol relies on the creditor's current needs, without having regard to the compensation previously received, the result could be unfair.<sup>60</sup>

Therefore, the Convention accommodates the requirements of Indian law by providing for inclusion of personal laws and takes cognizance of public policy. It also unifies the different kinds of maintenance obligations. The Convention further dispenses the need for another country to be a reciprocating territory as it enjoys universal application. In most of the cases where the women are abandoned by their NRI husbands, it is observed that these women are not even taken abroad and

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<sup>59</sup> Supra n.1 at Pg 23

<sup>60</sup> Supra n.1 at Pg 40

are instead left behind. In such cases, the law applicable would be that of the wife's "habitual residence", which ensures protection by Indian laws. However, caution has to be exercised in cases where the woman is taken abroad only to be abandoned after a few months, as this should not be construed as a change in the habitual residence of the wife.

## CHAPTER V

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### CUSTODY DISPUTES

The plight of harassed and tortured women returning home has been highlighted in the preceding chapters. In a large number of these cases, the wife returns to India with the children, often seeking the support of her parents or other friends and family based in India. The NRI husband then initiates custody proceedings in a foreign Court to get the custody of the children. The wife then faces the same challenges relating to jurisdiction, resources and access to proceedings as discussed in the previous chapter. This has caused the Supreme Court to observe the following about the phenomenon:

*“Conflict of laws and jurisdictions in the realm of private international law is a phenomenon that has assumed greater dimensions with the spread of Indian diasporas across the globe. A large number of our young and enterprising countrymen are today looking for opportunities abroad. While intellectual content and technical skills of these youngsters find them lucrative jobs in distant lands, complete assimilation with the culture, the ways of life and the social values prevalent in such countries do not come easy. The result is that in very many cases incompatibility of temperament apart, diversity of backgrounds and inability to accept the changed lifestyle often lead to matrimonial discord that inevitably forces one or the other party to seek redress within the legal system of the country which they have adopted in pursuit of their dreams. Experience has also shown that in a large number of cases one of the parties may return to the country of his or her origin for family support, shelter and stability. Unresolved disputes in such situations lead to legal proceedings in the country of origin as well as*

*in the adoptive country. Once that happens issues touching the jurisdiction of the courts examining the same as also comity of nations are thrown up for adjudication.*<sup>61</sup>

The Supreme Court correctly observes the trend by which the wife is compelled to return to India. Normally, she returns with the children, either before a custody arrangement is resolved abroad, or after, in violation of the arrangement. In both these situations both parties have the right to approach the Indian Courts to have the dispute adjudicated.

In cases where one of the parents takes the children to India in violation of existing custody orders, the parent living in the foreign country may initiate Guardianship proceedings. When he is unaware of the present location of the children, he can file a habeas corpus petition under Section 97 of the Code of Criminal Procedure to trace the children and have them produced before Court.

The habeas corpus petition will be granted if it is proved that a child is in wrongful confinement by a person who is not his/her lawful guardian. Accordingly, the petition itself requires the Court to entertain the question of lawful custody of the child.

In *Syed Saleenmuddin v. Dr. Rukhsana and Ors*,<sup>62</sup> the Supreme Court dealing with a habeas corpus seeking custody of minor children, *inter alia*, observed as under:-

*"...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or*

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<sup>61</sup> Ruchi Majoo vs Sanjeev Majoo AIR 2011 SC 1952.

<sup>62</sup> (2001) 5 SCC 247.

*illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court."*

This was followed by the case of *Paul Mohinder Gahun v. State of NCT of Delhi*<sup>63</sup> [], where the High Court of Delhi held that it was no longer contested that a writ of habeas corpus may be maintained when parents are fighting over the custody of their children. Here, too, the crucial consideration is whether the best interests of the child will be served by the abducting parent, or the one who has filed the petition for the writ.

In *Gaurav Nagpal v. Sumedha Nagpal*,<sup>64</sup> the Supreme Court analysed the writ of habeas corpus in relation to child custody matters. It distinguished the purpose of the writ for minor children from that for majors. This is because for minor children, the writ does not involve a question of personal liberty, since children are supposed to be in the custody of a major. Instead, the purpose is to determine the question of lawful custody itself. The Court held that this remedy, therefore, is of an equitable nature, and is not driven by the rights of either parent, but by the best interests and welfare of the child.

*"In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration."*

Even though these cases arise under a petition for the writ of habeas corpus, the resolution of the question of lawful custody relies on the same principles that are

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<sup>63</sup> 113 (2004) DLT 823.

<sup>64</sup> (2009) 1 SCC 42.

involved in a suit for custody *simpliciter*. The principle of best interests and welfare of the child had been previously approved by the Supreme Court in the case of *Dhanwanti Joshi v. Madhav Unde*.

***Dhanwanti Joshi v. Madhav Unde*** involved a series of litigation not only on the divorce between the parties, but also the custody and guardianship of the minor son, in India and USA.<sup>65</sup> Initially, the US court had granted custody of the child to the appellant immediately after his birth. On this basis, she brought the son to India almost a year later. However, the respondent obtained an *ex-parte* order in USA providing visitation rights to him, which was modified in a few weeks to grant him temporary custody. 2 years later, the Bombay High Court granted full custody to the appellant with visitation rights to the respondent. A few weeks thereafter, the respondent also obtained an *ex parte* order from a US court granting him full custody, despite the order from the Bombay High Court.

The appellant then filed for guardianship under the Guardians and Wards Act and under Section 13 of the Hindu Minority and Guardianship Act, which she obtained in her favour through *ex-parte* proceedings. Respondent applied to have the order set aside at the trial court, which was dismissed. He preferred appeals against the dismissal at the High Court and the Supreme Court, which were also dismissed. The Supreme Court however granted leave to pursue other remedies, on the basis of which the respondent filed for custody afresh before the Family Court.

It was at this stage that he obtained a favourable order, against which the appellant appealed to the High Court. This was dismissed for default, against which the appeal was heard by the Supreme Court.

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<sup>65</sup> (1998) 1 SCC 112.



The Supreme Court considered various important questions in this appeal relating to the phenomenon of international parental child abduction. These include: whether the court of the destination country should hold summary proceedings and repatriate the child on the sole basis of the foreign custody order (with limited exception), or whether the court should consider the merits of the question of custody afresh; what are the principles that govern the question of custody; what is the value of the foreign custody order in the determination of the question; can the abducting parent be considered to take advantage of its own wrong, etc.

The Supreme Court, while reversing the judgment of the High Court, held that the paramount principle in such cases is the best interests and the welfare of the child. It is this principle which decides whether the court must undertake summary proceedings for repatriation, or a full trial to determine the question of custody afresh.

*“The summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the*

*removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child.”*

It is also the best interests of the child principle which governs the issue of custody on merits, *regardless of the rights or the wrongs of the parents*. In this matrix, comity of courts requires only a consideration of the foreign order, and not its enforcement. The most compelling fact for the Court was that the child has been living in India for the past 12 years, and sending him to his father in the USA required uprooting him from his environment in a place where he was quite well-settled.

The Court also analysed the principles of the Hague Convention on the Civil Aspects of International Child Abduction, both, for Non-Convention and Convention countries, and closely followed them in rendering this judgment.

This case was followed in *Sarita Sharma vs. Sushil Sharma*,<sup>66</sup> in which the parties were originally residing in USA along with their two minor children. The US Court granted custody to the respondent, with visitation rights to the appellant, in violation of which, the appellant brought the children to India. Thereafter, the US court granted full custody to the respondent, and no visitation rights to the appellant.

The respondent then filed a writ petition in the Delhi High Court, aggrieved by the order of which, the appellant approached the Supreme Court. She contended that when she came to India with the children, she was their natural guardian. The Court held that

*“... it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that*

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<sup>66</sup> (2000) 3 SCC 14.

*country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children.*

*...Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than daughter, has good feelings for his father also...What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held..."*

The best interests of the child principle has been upheld even in 2011 by the Supreme Court in the case of *Ruchi Majoo v. Sanjeev Majoo*, which extensively considered the question of comity of courts.<sup>67</sup> This analyses the question of whether Indian courts must directly apply the foreign custody orders or instead consider the question afresh in cases when spouses in NRI marriages bring the children back to India in violation of custody orders.

The Supreme Court upheld the best interests of the child principle, and held that comity of courts was a subservient consideration. Even in habeas corpus petitions, which warrant summary proceedings, courts are duty bound to exercise their

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<sup>67</sup> *Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479.

extraordinary jurisdiction to consider the matter on merits, the foreign order being one of the factors that is considered.

Other cases following this line of reasoning include the 2004 Supreme Court case of *Saiha Ali v. State of Maharashtra*,<sup>68</sup> where the Court declined to grant the custody of her children to the mother but at the same time issued directions for visitation rights in the interest and welfare of the minor children; in *Kumar V. Jahgirdar v. Chethana Ramatheertha*<sup>69</sup>, the Supreme Court came to the conclusion that a female child of growing age needs her mother more than the father, and the remarriage of the mother is not a disqualification in safeguarding interest of the child; in *Mandy Jane Collins v. James Michael Collins*,<sup>70</sup> the High Court of Bombay at Goa declined to issue a writ of habeas corpus, thereby refusing the custody of the girl child to the mother, while sending the parties to normal civil proceedings for custody in Goa. The High Court clearly declined the return of the child to Ireland in exercise of its writ jurisdiction and held that this question requires analysis of disputed question of facts.

However, the best interests of the child principle in parental child abduction cases remains controversial, because the Supreme Court and High Courts have given conflicting judgments internally by also holding comity of courts to be the governing consideration. One of these Supreme Court decisions was considered in the case of *Ruchi Majoo* itself, which was *V. Ravi Chandran v. Union of India and Ors.*<sup>71</sup> Even before this, the Supreme Court had also given primacy to comity of courts in the case of *Shilpa Aggarwal v. Aviral Mittal*.<sup>72</sup> In both these cases after

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<sup>68</sup> (2003) 7 SCC 250.

<sup>69</sup> (2004) 2 SCC 688.

<sup>70</sup> *Mandy Jane Collins v. James Michael Collins*, (2006) 2 HLR 446

<sup>71</sup> (2010) 1 SCC 174.

<sup>72</sup> MANU/SC/1887/2009 : (2010) 1 SCC 591.

appreciating the facts of the case the Supreme Court deemed it fit to send the child back to the foreign country.

The case of *Shilpa Aggarwal* can easily be reconciled by the dicta *Dhanwanti Joshi v. Madhav Unde*. This is because the court in the receiving country was moved within one year of the abduction having taken place. This meant that the child had not yet developed roots in the new country, which is why the court held that her best interests need to be determined in her country of residence, and not in India.

Even *V. Ravichandran* discusses the best interests of the child in light of the foreign consent order. Here, the Supreme Court was dealing with a Habeas Corpus petition filed directly before it under Article 32 of the Constitution. Previously, the New York State Supreme Court had passed a consent order granting joint custody of their son, confirmed two years later before the family court of the State of New York. The mother then brought the son to India, informing the petitioner that she will be residing with her parents in Chennai. The petitioner then approached the family court of the State of New York alleging violation of the custody order, which was modified to now grant the petitioner temporary sole custody. It also issued Child abuse Non-bailable warrant against her. It was in this backdrop that the Supreme Court directed the mother to take the child to United States of America as per the consent order.

The Court limited itself to the preliminary question of whether it should undertake summary proceedings and repatriate the child, or whether it should undertake a full inquiry to determine the best interests of the child. It found that it would serve the interests of the child best if the court of its original residence undertakes a detailed consideration of the matter, especially since in this case, the child had not developed its roots in India yet despite the long period of two years of his

residence here. The Court also took note of the fact that it was in pursuance of the best interests of the child that the parties had consensually agreed on a settlement before the foreign courts.

The Court further held that it is equally possible that the courts in the country where the child has been removed may need to undertake a detailed consideration of the custody question themselves. In that case, the best interests of the child shall be paramount, and the order of the foreign court given due consideration. Whether the courts undertake summary proceedings or detailed consideration depends entirely on the facts and circumstances of the case.

In this manner, the Supreme Court in *Ravichandran* closely followed its earlier judgment in the case of *Elizabeth Dinshaw v. Arvand M. Dinshaw*.<sup>73</sup> The limited question before the Court in that case, too, was whether international parental child abduction requires the courts to undertake summary proceedings or a detailed consideration of the best interests of the child. There, the Supreme Court stressed extensively that the best interests of the child principle is paramount, and the legal rights of the parents need not be considered. Specifically, the Court found that the child had not developed his roots in India, and therefore his interests would not be harmed by repatriation to his home country. In the same breath, the Court also noted that the abducting parent cannot be allowed to take advantage of his own wrong- a proposition that has been dismissed by the courts in subsequent cases.

In an earlier Supreme Court judgment, in *Surinder Kaur Sandhu v. Harbax Singh Sandhu* as well, the Court had found itself lacking in jurisdiction to decide the question of the custody of the child, holding that the country from which the child had been abducted had the closest and most intimate connection with his welfare.<sup>74</sup>

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<sup>73</sup> (1987) 1 SCC 42.

<sup>74</sup> 1984 SCR (3) 422.

Therefore, even while absolving itself of the jurisdiction on the matter, the Court nevertheless did so on the basis of the best interests of the child principle.

However, recent cases demonstrate a disturbing reversal in the trend of international custody disputes. Courts have begun to prioritize the principle of comity of courts over the welfare of the child. Judgments after *Ravichandran* have read it in a manner that lends this interpretation. For instance, the recent case of *Arathi Bandi v. Bandi Jagadrakshaka Rao*,<sup>75</sup> decided by the Supreme Court relied entirely on *Ravichandran* to hold that the child must be repatriated to the custody of his father in sole recognition of the principle of comity of courts.

*Arathi Bandi* was decided even after *Ruchi Majoo*, which was a judgment that compared the supposed *Ravichandran* approach with the *Dhanwanti Joshi* approach, and preferred the latter. In any case, it is possible to limit *Ravichandran* and *Arathi Bandi* both to their own facts to hold them in line with *Dhanwanti Joshi*, that if the matter is brought before the Indian courts at such an early stage that the child has been unable to develop roots in India, then his/her best interests may be well served even through repatriation. In this matrix, it is submitted, the orders on custody passed by foreign courts must be considered only one of the factors, and not the most compelling factor in the determination, as held in *Ruchi Majoo*.

In fact, the Delhi High Court in the case of *Surjeet Singh v. State*<sup>76</sup> did extensively discuss *Ruchi Majoo*. This was an interesting case, with very novel facts. This was an international custody battle *without* abduction. Here, the parties brought the children to India together, and not behind the back of the other or without the other's consent. The husband left for New Zealand leaving the wife and children

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<sup>75</sup> CRIMINAL APPEAL NO.934-936 OF 2013.

<sup>76</sup> II(2012)DMC326.

behind, as they were expected to join him there in some time. There was no custody order by any court. The wife and children did not go to New Zealand, pursuant to which the husband filed a habeas corpus petition. Finding the conduct of the father highly abusive, the Court found that it was not in the best interests of the children to send them back to New Zealand, “*even in a case involving principle of comity of courts.*” The Court analysed both, *Ruchi Majoo* and *V. Ravichandran*, and affirmed that the best interests of the child triumph over even the principle of comity of courts. It distinguished *Ravichandran* on the basis that the children there were found fit to be repatriated because there was no indication of any harm to their interests, whereas here, the abusive conduct of the father went against their welfare. The Court also found it most significant that while the parties in *Ravichandran* had obtained consent-based custody orders to preserve the welfare of the children, no such orders existed in this case. Accordingly, the Court rejected comity of courts outrightly in favour of the welfare of the children.

However, the recent case of *Pooja Malhotra v. Pankaj Malhotra*<sup>77</sup> decided by the Allahabad High Court documents the difficulties faced in having a case of this kind adjudicated by the Indian Courts. The parents of the children divorced in New Zealand and entered a consent-based custody arrangement, whereby the children would be in the custody of the mother, while the father had extensive visitation rights. In the exercise of these rights, the father legitimately brought them to India, but refused to send them back on the due date. He, instead, initiated guardianship proceedings here. The Court refused to entertain the petition on the basis that the children were not *ordinarily resident* in the jurisdiction of the Indian courts. They further noted the conduct of the father- in participating in the custody proceedings voluntarily in New Zealand, and then violating the custody orders passed through

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<sup>77</sup> 2012 (7) ADJ 582.



those proceedings through abducting the children and initiating separate guardianship proceedings here. In several respects, therefore, the Court found these facts similar to *Ravichandran*, on the basis of which ordered for the children to be repatriated to New Zealand.

The requirement of “*ordinarily resident*”, as exemplified above, presents another complication in NRI custody disputes. Only those courts where the child is ordinarily resident possess jurisdiction to hear the matter relating to their custody. As observed in *Elizabeth Dinshaw*, courts where the child is ordinarily resident (or habitually resident under the Hague Convention on the Civil Aspects of International Child Abduction) should be entrusted with the task of deciding on the best interests of the child, unless, ironically, the best interests of the child themselves require the courts of the destination country to decide on the question.

*Mst. Jagir Kaur and Anr. v. Jaswant Singh* expounded at length on the meaning of “ordinarily resident” under Section 9 of the Guardians and Wards Act as follows:<sup>78</sup>

*“Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word "resides" thus : a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case.”*

In *Kuldip Nayar and Ors. v. Union of India and Ors.*,<sup>79</sup> the Supreme Court stated:

*“... residence is a concept that may also be transitory. Even when qualified by the word "ordinarily" the word "resident" would not result in a construction having*

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<sup>78</sup> MANU/SC/0242/1963 : AIR 1963 SC 1521

<sup>79</sup> MANU/SC/3865/2006 : 2006 (7) SCC 1

*the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis.”*

Despite these precedents the Courts repeatedly refuse to entertain guardianship petitions, forcing parents removing children to India to evade adjudication of the disputes by Court.

Evidently, there is no homogeneity in the decisions of Indian Courts relating to NRI child custody and guardianship matters. While precedents since the 1980s had prioritized best interests of the child, even to decide the weight to be granted to the principle of comity of courts, recent judgments demonstrate a more patriarchal vein. Here, comity of courts is given greater deference than the welfare of the child.

The uncertainty and unpredictability in Court orders discourages parents from having the dispute adjudicated. Often, the mother violates existing custody orders, whether consent-based or not, due to a change in circumstances and a disability to contest proceedings in the foreign courts. In such cases, counselors and other alternative dispute resolution mechanisms may allow new consent custody arrangements to be put in place. The Family Courts in India were set up with a specific motive of resolving family disputes with the help of specialized staff, such as counsellors. However, summary dismissal of these disputes for lack of jurisdiction comes in the way of the efficient functioning of this new set up. It is clear that some steps are necessary to allow civil adjudication of custody disputes, for which legislative intervention has become necessary.

In any case, these decisions nevertheless shed light on the factors that are relevant to decisions on NRI child custody. These are: the ordinary residence of the child,

for how long the child has been living outside the country of ordinary residence, whether the child has developed roots in the second country, whether there are pre-existing custody orders in the country of ordinary residence, whether the parent has violated those custody orders, whether the parent could *participate* in the foreign custody proceedings at all, etc.

It is these same principles that are discussed in the Hague Convention on the Civil Aspects of International Child Abduction. For the Convention to be applicable, however, there needs to be a pre-existing custody order in favour of some one (parent or otherwise), which is violated. Accordingly, the Convention would be unhelpful in cases such as *Surjeet Singh*. It becomes applicable on the fulfilment of two conditions: *one*, the child is under 16 years of age, and *two*, that the child was habitually resident in a Convention state before the custody order was breached. The Convention provides that the Courts to which the child has been removed must exercise summary jurisdiction to repatriate the child to the person who has lawful custody. While the Convention aims to promote and protect the best interests of the child, it nevertheless primarily advocates the principle of comity of courts.

There are a few situations, however, in which the Court is not obligated to conduct summary proceedings. This is when more than a year has elapsed since the child was brought to the new country, and it is likely that he/she has developed roots there. Furthermore, if on an appraisal of other facts, the court finds that there is a grave risk of harm to the child physically or psychologically.

India is not a signatory to the Convention, even though the Supreme Court in the *Dhanwanti Joshi* case discussed the same extensively, and the 218<sup>th</sup> Law Commission Report<sup>80</sup> recommended acceding to the Convention. This is because

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<sup>80</sup> Law Commission of India, Two Hundred and Eighteenth Report on the Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction, 1980, (March 2009).

the Convention grants only secondary consideration to the welfare of the child, requiring deference to foreign custody orders first. The Courts have rightly distinguished custody battles between parents from other disputes over movable property. The Courts have stated that in ordinary disputes for movable property, where one party has deprived the other of possession and enjoyment of a movable property, the Court can order swift return of the property. However, in a dispute about custody of a child he or she cannot be treated at par with chattel.

Acceding to the Convention will inevitably operate against the interests of most women, since they are incapacitated financially or through other circumstances to participate in foreign custody proceedings. Acceding to the Convention implies that they should either give up on the custody of their children altogether, or further put up with abuse and violence in the foreign country.

Other countries that have signed it include Australia, Canada, the United States of America and the United Kingdom. These are countries where a large Indian diaspora is already present.

## CONCLUSION

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Marriages in India have a close relationship with social status. It is for this reason that the marriage of a woman with a man residing outside India has significant allure for Indian families. This, added to the difficulty in ascertaining the antecedents of the man and his family due to their location abroad, often means that the woman is susceptible to significant illtreatment and hardship at the hands of the NRI husband and his family. Living in strange surroundings, away from home, the woman is entirely dependent on the man for her sustenance and well-being. Thus, when the marriage turns abusive or problematic, women are left with scant or no legal recourse.

It is this helplessness that the law should aim to overcome by empowering the woman. However, the current legal framework compels her to be either rendered remediless or endure the abuse. To the courts empowered to grant her remedy, she lacks access, and the courts that she has access to lack the remedies. The conflict of laws raises a massive problem of jurisdiction of courts, for only those courts possess jurisdiction where the couple or the respondent (often, the husband) is habitually resident- which is the foreign country. The second condition may be the domicile of the parties, which also leads back to foreign courts. The domicile of the husband in the foreign land is easily established due to his status as a resident there, and S.15 of the Indian Succession Act, as also the common law, provide that the wife has no independent domicile, and follows that of the husband. Thus, when women return to India, to their family and familiar surroundings, they do leave marital abuse behind, but they also leave behind their legal rights and entitlements.

To overcome this situation of remedilessness, we propose a overhaul of the legal structure governing NRI marriages. This requires a reworking of the Foreign

Marriages Act, the Guardians and Wards Act, the Code of Civil Procedure and the Code of Criminal Procedure, among others.

**Amendments to the Foreign Marriage Act:**

The Foreign Marriage Act currently governs a very narrow range of marriages—those in which a couple, at least one of whom is an Indian citizen, marry abroad.. The Act is procedural in nature, stipulating only the manner in which the marriage needs to be undertaken. For remedies, it refers to the Special Marriage Act, which too is subservient to any remedies that the law of the foreign jurisdiction provides. Even these remedies are contingent on the requirements of residence and domicile—which are deeply problematic for the woman, as we have mentioned earlier.

We propose that the Foreign Marriage Act should encompass a wider range of marriages within its fold, and also provide for greater access to marital and familial remedies. Other Acts governing marriages are constrained by their operation to largely local marriages, where there are no provisions regarding jurisdiction and processes over persons located abroad. Neither these laws, nor the Foreign Marriages Act provide any safeguards for women in marriages solemnised in India, where the couple intends to reside abroad.

Accordingly, we submit that the Foreign Marriages Act should govern marriages of the following kind:

- a) Marriage between two persons where one spouse is a citizen or a resident of a country abroad;
- b) Marriage between two NRIs;
- c) Marriage between two persons, both of whom are not citizens of India, but one or both of whom are currently residing in India though married abroad

Further, the Act should provide for a wide gamut of remedies, not limited to divorce, judicial separation, maintenance, alimony and custody. It must also entitle the wife to a half share in the husband's share of the immovable property acquired during the period of marriage, and also a half share in the movable properties and damages and compensation for harassment, abuse and abandonment. Access to these reliefs by the wife should not be contingent on her permanent or habitual residence or domicile. Currently, women may avail of remedies under the Act only if they have resided in India for three years preceding the petition for relief. **We submit that this must be amended in line with the other laws for the benefit of women, such as S.125, CrPC, Protection of Women from Domestic Violence Act etc., where jurisdiction vests in a Court on the basis of the *present* residence of the woman.**

In addition to this, the procedure during registration and petitions for relief must also include safeguards to the interests of women and children moving abroad, to ease access to courts and marital remedies. For instance, NRI marriages in India in which the husband is a foreigner/ person resident abroad should be registered under the Foreign Marriage Act along with a declaration/Affidavit giving his full particulars, including:

- His citizenship or permanent residency number
- His place and nature of employment and the details of his earnings
- The listing of his properties in India and abroad

The Act should also provide for attachment of property before judgment and other safeguards to protect the rights of women and children to financial support.

### **Amendments to the Guardians and Wards Act**

Women in NRI marriages are often denied custody of their children, since their departure from the foreign country incapacitate them from participating in the costly custody proceedings abroad. If a woman assumes custody of the children by bringing them to India, she is construed as a ‘wrong-doer’ and a kidnapper. For this reason, we submit that the Guardians and Wards Act should be amended to make the father and the mother of the child both the natural guardians. To ensure access to remedies and legal proceedings, Section 9 should be amended to confer jurisdiction upon courts where the minor is ‘presently residing’. In proceedings for custody, a father who has wilfully refused to pay maintenance and Child Support should be refused visitation rights/custody.

Lastly, India should maintain *status quo* with respect to the Hague Convention on the Civil Aspects of International Child Abduction, and not sign it. Being a gender-neutral Convention, it does not account for the specific experiences of women, and this often acts against them as related in the chapter on Custody.

### **Amendments to the Procedural Laws and other marriage laws:**

Section 13 of the Code of Civil Procedure should either read the exception of violation of principles of natural justice widely, or contain an additional exception where the woman is *unable* to contest litigation abroad. This would exempt them from the hardship of unjustly passed divorce decrees or custody or other orders. These decrees, without enough opportunity for the woman to represent her case, pass unfavourable orders, and also later prevent her from exercising remedies in India. Moreover, akin to Section 126 of the Code of Criminal Procedure, jurisdiction for matrimonial reliefs and marriage related offences should be conferred on Courts in a place where the woman is presently residing.



Secondly, bail conditions for an NRI should provide that he deposit his passport in Court. Also, the provisions of S.10(3)(e) of the Passport Act should be actively enforced. This provides that:

*(3) The passport authority may impound or cause to be impounded or revoke a passport or travel document,-*

*... (e) if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India;*

The law should also state that the NRI provide security in Court for the amount equivalent to the amount of dowry/stridhan claimed. All marriage laws should also be amended to specifically provide for injunctions preventing a husband from selling or alienating property during the pendency of proceedings in a case for maintenance, alimony or property.

Since a major hurdle in claiming matrimonial relief is the difficulty in serving processes on NRI husband and in-laws located abroad, we submit that Lookout Notices should be issued for husbands against whom offences have been registered. In this direction, we further propose that India should sign reciprocal treaties for the service of summons, enforcement of maintenance orders and extradition with all countries with a sizeable population of people of Indian Origin.

These measures will go a long way in securing reliefs to aggrieved women and make their rights and justice more accessible.