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# Conflict of Laws: Jurisdiction of the Court and Choice of Law in Cross-Border Matrimonial Suit in India

Indrani Kundu\*<sup>1</sup>

## Abstract

*Marriage, a civil union between two persons, involves some legal procedures which determine the rights and liabilities of parties in such civil union. Conflict of marriage laws is the conflict of laws governing status and capacity to marry defined by personal laws of parties to the marriage. Rules of Conflict of Laws are set of procedural rules which determine A) which legal system will be applicable to a given dispute, & B) which Court will have jurisdiction to try the suit. In the words of Dicey and Morris, rules of Private International Law do not directly determine the rights and liabilities of persons, rather it determines the jurisdiction of Court and the choice of body of law i.e. whether by the domestic law or by any foreign law, the case will be decided. This paper, by adopting doctrinal approach, seeks to find the criteria for Indian court to exercise jurisdiction in cross border matrimonial suit. Further, it endeavors to find out the difference between term 'domicile' and 'residence'.*

## Introduction

The 219<sup>th</sup> Report of the Law Commission of India (submitted in March 2009) has pointed out the problem that many Indians with different personal laws have already migrated or are still migrating to other countries either to make permanent abode there or for temporary residence. Likewise, there is also a huge immigration from other countries to India as communication and transportation has made it easier to go from one place to another place. In such a situation, it is usual to come across cases where one national marries the national of other country or two nationals from one country contract marriage abroad. Cases in which parties solemnize marriage in India then settle their home abroad or are living separately in any other country also demand special mention. Difficulty arises when there is any dispute between two individuals hailing from different legal systems. A large number of legal issues have been brought forward because of matrimonial disputes both in domestic scenario and in private international law. The issue of maintenance and the issue relating to the status of children have always been involved in any matrimonial suit. In addition to these issues, several other issues are also involved in matrimonial disputes involving foreign element. For examples, jurisdiction of the court, execution of foreign judgment, validity of marriage within the country where the matrimonial suit has been instituted etc. are rest of crucial concerns.

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In Private International Law, the choice of law rule in Conflict of Marriage laws decides i) jurisdiction of court to try the issues relating to marriage, and ii) the choice of body of law to govern such matrimonial issues. Problem regarding conflict of marriage laws at the international level arises due to the application of territorial laws and the solution of the problem is largely dependent upon the law laid down by the sovereigns involved.

In India, various communities, distinct from each other, have retained their own traditions and personal laws to govern the family matter. Due to this fact, it is almost improbable to formulate a uniform policy framework in governing parties to the marriage.

The source of Indian conflict of Laws is largely statutes and decisions of the courts. Several attempts have been made by the Indian Law Commission to provide report on the Indian conflict of Laws rules<sup>2</sup> in different areas of disputes. In India, the very foundation of the Code of Civil Procedure 1908, Indian Penal Code 1860, The Indian Succession Act 1925, The Divorce Act 1869, and The Contract Act 1872 have been laid on the basis of the English law. Hence, in case of Indian Private International law, the influence of Common law is found. It is pointed out by T.S. Rama Rao<sup>3</sup> that while the draftsman of these Codes has mainly followed English law, they deviated to some extent from it where they found that the English law would not suit to Indian context. Since India does not have a uniform law in governing the legal capacity to enter into a valid marriage, the marriage law varies from one religion to another. A marriage, to be legally valid, needs to be materially and formally valid. The material validity of a marriage invokes the question related to the legal capacity of parties to the marriage. The choice of law rule of India is that the legal capacity of a person domiciled in India will be governed by *lex domicilii*. Therefore, the *lex domicilii* of a person domiciled in India regarding legal capacity to marry is his/her personal law.

The conflict of Law is that branch of law of a State that deals with the cases involving any foreign element. Element of a dispute can broadly be divided into two heads i.e. a) parties to the dispute, and b) the subject matter of the dispute<sup>4</sup>. When the parties to the dispute hail from the same country but the subject matter has been arisen as the legal rights and obligation of the parties are to be determined according to the substantive and procedural law of that Country. However, it is not so easy in case where at least one party belongs to different legal system or the cause of action partly/ wholly arises in any other country. The questions that arise in any suit involving foreign element are

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<sup>2</sup> Law Commission of India, 65<sup>th</sup> Report on 'Recognition of Foreign Divorces' 5 April 1976; Law Commission of India; 193<sup>rd</sup> Report on 'Transnational Litigation- Conflict of Laws- Law of Limitation, 7 June 2005; Law Commission of India, 219<sup>th</sup> Report on 'Need for Family Law Legislation for Non Resident Indians, 30 March 2009.

<sup>3</sup> T.S. Rama Rao, 'Conflict of Laws in India', vol. 23(2), *Zeitschrift für Ausländisches und Internationales Privatrecht*, 256, 1958, pp. 259-262.

<sup>4</sup> A suit can be related to matrimonial issue, issues of inheritance, movable and immovable property. These constitute the subject matter of a suit. In the conflict of laws rule there are different principles governing these issues. *Lex Domicilii* & *Lex Patriae* for governing legal capacity of an individual. *Lex Loci Celebrationis* governs the formal validity of a marriage. *Lex situs* governs the immovable property. *Lex Domicilii/ Lex Patriae* governs movable property.

- a) Whether the forum where the case has been instituted has jurisdiction to try the case or not (question as to Jurisdiction).
- b) By reference to which law (both substantive and procedural) the issue involved in the suit will be characterized<sup>5</sup> and determined (question as to choice of law rule).

These two questions along with the question regarding the recognition of foreign judgment, by the domestic court of the country where the parties want to execute the same constitute, are the subject matter of conflict of laws.

The purpose of the Conflict of law rules of any state is threefold, as pointed out by Amit M. Sachdeva<sup>6</sup>:

- a. To define and confine the extent to which the laws of one State may extend extraterritorially.
- b. To resolve the dispute with a foreign element by exercise of international jurisdiction and by application of that law which results in substantial justice between the parties.
- c. To ensure that the outcome of the litigation is least distorted regardless of the State where the litigation is brought and the substantive rights and obligation of the parties are adjudicated in the same manner.

The conflict of Laws rule of any country involves following two questions as to the choice of law:

- a. Choice of law as to the matter of procedure, &
- b. Choice of law applicable to the cause of action arisen in the suit.

### **Jurisdiction of Indian Court in Cross-border Litigation Relating to Status**

To start with the issue of jurisdiction, the major question that arises in conflict of laws is why does someone file a matrimonial suit in a foreign court? Filing suit in a foreign court brings a lot of difficulties. Besides, another question posed is that whether the foreign court has jurisdiction to try the suit. The following could be the answers to the question as to why parties file suit in a foreign court-

- i. The parties might have migrated to another country from the country where the marriage has been celebrated<sup>7</sup>, and/or,
- ii. Parties may live separately in other countries and either of them has filed the suit before the court nearest to him/her for the sake of convenience.

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<sup>5</sup> Characterization in conflict of laws means to identify the problem as to the suit related to person or related to property. The characterization of a problem varies according to the choice of law rules of countries. For example, a suit related to a land may be characterized as a suit related to the person i.e. inheritance, again the same issue may be characterized as the suit related to property i.e. immovable property.

<sup>6</sup> Amit M. Sachdeva, 'Conflict of Laws', in Alian Marciano and Giovanni Battista Ramello (ed/s), *Encyclopedia of Law and Economics*, Springer, New York, 2013, pp. 1-9.

<sup>7</sup> The setting up of matrimonial home in foreign land.

The author now in following paragraphs tries to answer the question as to when a court will assume its jurisdiction over a suit involving foreign element. Jurisdiction is co-extensive with sovereignty as the sovereign assumes its jurisdiction over all the persons & property situated within its territory. Difficulty to the exercise of jurisdiction by a court does not arise till the cause of action arises within the territorial limit of the court. However, the difficulty arises when the cause of action arises outside the territorial jurisdiction of the court where the suit has been instituted or either of the parties is outside the territorial jurisdiction of the court. This is the typical conflict of laws situation. In private international law the question arises that what link, if any, is required by the court to exercise its jurisdiction over the cause of action or the parties to the suit involving foreign element. The jurisdictional limits of Municipal courts are based on the territorial theory<sup>8</sup>. *'Quidquid est in territorio, est etiam de territorio'*<sup>9</sup> is the principle by virtue of which a sovereign exercises its jurisdiction over everything, every person within its territory. The traditional concept of 'territorial factor' of exercising jurisdiction by the court has been called into question in the globalised era when a matrimonial suit may involve any foreign element. Section 20 of the Civil Procedure Code, 1908 has provided a general rule that any suit can be instituted before the court within whose jurisdiction the defendant, at the time of the institution of the suit, resides or carries on business or works for gain. Marriage, being the personal affair of an individual, is governed by the personal laws of each community in India. The personal laws except Muslim law have provided that the jurisdiction to try matrimonial suit lies with the district court. According to the Civil Procedure Code, 1908, the court will exercise personal jurisdiction over a party only when the defendant is within the territorial jurisdiction of the court. However, question arises regarding the exercise of jurisdiction by the court when the defendant has never been within the territory. Section 20 of Civil Procedure Code, 1908 has provided that in case the defendant has never been to the territorial jurisdiction of the court where the suit has been instituted then the court can exercise its jurisdiction if the defendant—

- i. carries on business, or
- ii. works for gain within the territorial limit of the court.

Now a question arises - what will happen if the defendant has neither been within the territorial limit nor carries on business nor works for gain within the territorial limit of the court. The observation of the Bombay High Court in *Mrs. Sucheta Dilip Ghate v. Dilip Shantaram Ghate*<sup>10</sup> (case filed for maintenance under the Hindu Adoption and Maintenance Act, 1956) demands a special mention. The Bombay High Court in this case observed that 'the Hindu Adoption and Maintenance Act, 1956 does not lay down provision for the jurisdiction of the court to which the application for maintenance to be presented. The Provisions of Hindu Adoption and Maintenance Act, 1956 are beneficial and social legislation for the benefit of women and old parents for their maintenance while they are in distress. It cannot be imagined by any stretch of imagination that such person in distress would have

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<sup>8</sup> The territorial theory states that every court has jurisdiction over everything and every person present within its territory.

<sup>9</sup> Whatever is there within the territory is of the territory.

<sup>10</sup> *Mrs. Sucheta Dilip Ghate v. Dilip Shantaram Ghate*, AIR 2003 SC 390.

to run from pillar to post for relief under the provision of the Act'. This view has been taken keeping in mind that the defendant may not submit to the jurisdiction of the court where the suit has been instituted or may keep on changing his residence therefore it is rationale to provide an exception to this rule. This aforementioned observation has been taken into consideration in *Mrs. Indira Sonti v. Mr. Suryanarayan Murty Sonti*<sup>11</sup> by the Delhi High Court. In this case the marriage between the defendant (husband) and the plaintiff (wife) has been taken place at Pittsburgh, U.S.A. The defendant has never been to India even after his marriage with the plaintiff. The plaintiff after her marriage has been subjected to cruelty and asked to bring dowry. On refusing to bring the same she was sent back to her father, who was in India. The plaintiff after coming back to India filed a suit for maintenance before the Family Court, Wilmington, Delaware, USA. However, she was informed that the court cannot proceed with the suit for maintenance since there is no decree for separation filed by her husband<sup>12</sup>. The plaintiff (wife) then filed the present suit for maintenance before the Delhi High Court. The question of jurisdiction in this case arises for two reasons- (i). The marriage has been solemnized outside India, & (ii) the defendant in the suit i.e. the husband has never been to India<sup>13</sup>. The Delhi High Court, while answering the question as to jurisdiction, took into consideration of the observation made by the Division Bench of the Bombay High Court in para 6 of *Mrs. Sucheta Dilip Ghate v. Dilip Shantaram Ghate*. The Delhi High Court in Indira Sonti case has ordered the defendant for the payment of maintenance to the plaintiff.

In *Harmeeta Singh v. Vikramjit Sen*<sup>14</sup> the Delhi High Court again faced the question as to jurisdiction in a matrimonial suit involving foreign element. In this case the plaintiff and the defendant got married in New Delhi, India, according to the Sikh rituals (which come within the Hindu marriage). The plaintiff i.e. the wife moved to U.S.A. right after her marriage along with the defendant since the defendant was employed there. However, the plaintiff had to leave her matrimonial home due to the cruelty on the part of the defendant. She had to come back to India since she had not much resources to maintain herself in U.S.A. the wife, plaintiff in the suit, filed a suit for maintenance before the Delhi High Court. During the proceedings it came to the knowledge of Delhi High Court that the husband had already filed a suit against the wife before the court of Connecticut, U.S.A. The Hon'ble Justice Vikramjit Sen in this case observed that the court of U.S.A. does not have any jurisdiction in the suit since the plaintiff (i.e. the wife) did not submit to the jurisdiction of the court of U.S.A. In the contrary, the Delhi High Court has jurisdiction over the suit filed by the wife despite the fact that the defendant did not submit to the jurisdiction of Delhi High Court & nor was he a domicile of India. The reason provided by Vikramjit Sen J. in this case was that the place of celebration of the marriage was India and the couple tied the knot according to the Sikh rituals which inevitably brought the marriage under Hindu Marriage Act, 1955. Therefore, the Indian court has jurisdiction over any matrimonial suit where the marriage has been celebrated under the Hindu Marriage Act, 1955 and in

<sup>11</sup> *Mrs. Indira Sonti v. Mr. Suryanarayan Murty Sonti*, AIR, 2001, DLT 572.

<sup>12</sup> Ibid, para 4.

<sup>13</sup> This suit involves foreign element.

<sup>14</sup> *Harmeeta Singh v. Vikramjit Sen* , AIR 2003 DLT 822.

India. In this suit Vikramjit Sen J. has ordered for the restraint of the suit instituted before the court of U.S.A.

The courts in common law countries follow *lex domicilii* (law of domicile) principle to exercise personal jurisdiction in any suit while the civil law countries follow *lex patriae* (law of nationality) to exercise personal jurisdiction. Indian court, in cross-border matrimonial suit, has exercised personal jurisdiction on the following grounds-

- i. residence of the defendant,
- ii. place of carrying out business or working for gains, &
- iii. specially in matrimonial suits the residence of the plaintiff.

The choice of law rule of Nepal relating to marriage is that the court of Nepal exercises jurisdiction *in personam* in cross border matrimonial proceeding only when the foreign nationals are residing within the territorial jurisdiction of the court. The court of Nepal also exercises jurisdiction *in personam* in cross border matrimonial suit when either of the parties is Nepalese.<sup>15</sup>

The use of the term 'residence' by section 20 of Civil Procedure Code, 1908 and all other sections of personal laws dealing with the jurisdiction of the court to try matrimonial suit have made it obvious to interpret the term residence.<sup>16</sup> In India,

<sup>15</sup> Srijana Regmi, 'Foreign Judgements in Matrimonial Disputes- Recognition in Nepal and Public Policy Considerations', in Garimella et al. (ed/s), *Private International Law: South Asian State's Practice*, Springer, 2017, p.145.

<sup>16</sup> Section 20. Other suits to be instituted where defendants reside or cause of action arises .- Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

- (a) The defendant, or each of the defendants where there are more than one, at the time of the
- (b) commencement of the Suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (c) any of the defendants, where there are more than one, at the time of the commencement of the
- (d) suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (e) the cause of action, wholly or in part, arises.

Explanation : A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations:

- (a) A is a tradesman in Calcutta, B carries on business in Delhi. B, by his agent in Calcutta, buys
- (b) goods of A and requests A to deliver them to the East India Railway company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.
- (c) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Benaras, B and C
- (d) make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benaras, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court.

the jurisdiction to try matrimonial suit lies with the District court. They can appeal if either of the parties feels aggrieved by the decision of the District Court.

### Interpretation of the Term Residence

The word 'Residence' has been interpreted by the Court time and again as it is a question of fact. The interpretation of the term residence depends and varies from one case to another case. The meaning of residence in Oxford dictionary is 'to dwell permanently or for a considerable period of time, or to live in or at a particular place'.

In *Jagir Kaur & another v. Jaswant Singh*<sup>17</sup>, the petitioner i.e. the wife filed a petition for maintenance before the 1<sup>st</sup> class Magistrate, Ludhiana. The contention of the petitioner was that the petitioner i.e. the wife has been sent back to India along with her child by her husband who was living in Africa and came to India occasionally. The respondent i.e. the husband filed a counter affidavit obtaining exemption from personal appearance during the time of hearing of that petition and left for Africa. In this case the District court Ludhiana has exercised its jurisdiction under section 488 of the Code of Criminal Procedure, 1882<sup>18</sup> on the ground that Ludhiana is the place where the couple resided together for the last time. However, the High Court of Punjab and Haryana rejected the order of the 1<sup>st</sup> class Magistrate on the ground that the 1<sup>st</sup> class Magistrate does not have any jurisdiction to try the suit. Therefore, the appeal was filed before the Supreme Court of India by way of Special Leave Petition. The Supreme Court of India, in this case, observed that 'the Parliament cannot make any law for the territory over which it does not have a control. Therefore, it is clear that section 488 (8) of the Code, 1882, when it speaks of a district where a person last resided with his wife, can only mean where he last resided with his wife in any district in India other than Jammu & Kashmir'.

In *Christopher Neelkantam v. Annie Neelkantam*<sup>19</sup>, the Rajasthan High Court observed that it has jurisdiction over the petition for divorce filed by an Indian domiciled Christian. The petitioner, an Indian domiciled Christian, solemnized marriage with an English domiciled woman in London. She refused to come to India. The husband left England, came to India then filed a petition for divorce under the Special Marriage Act, 1954 before the Rajasthan High Court. The Court observed that it has jurisdiction to try the suit since the Special Marriage Act, 1954 has stipulated that Indian Court can exercise jurisdiction if the petitioner is domiciled in India.

Domicile is the ground on which courts in common law countries exercise personal jurisdiction in any suit. India being one of the common law countries also follows this rule. However, in India matrimonial laws and Civil Procedure Code have used the term 'reside' while mentioning about the personal jurisdiction of the court. Therefore, question arises what is the difference between the terms 'domicile' and 'residence', or is there actually any difference?

<sup>17</sup> *Jagir Kaur & another v. Jaswant Singh*, AIR, 1963, SC 1521.

<sup>18</sup> Now repealed. Section 125 of Criminal Procedure Code, 1973 has replaced the provision of maintenance which was there in section 488 of the Criminal Procedure Code, 1882.

<sup>19</sup> *Neelkantam v. Annie Neelkantam*, 1959, Raj., p.133.



In *Union of India v. Durb Nath*<sup>20</sup>, the Supreme Court has observed that 'etymologically the terms residence and domicile carry the same meaning in as much as both refer to the permanent home. However, in private international law the term 'domicile' carries a little different sense and carries many facets. 'Domicile' may also take many colors; it may be domicile of origin, domicile of choice, domicile by operation of law or domicile of dependence. Domicile and residence are different and yet are related concepts and have to be understood in the context in which they are used having regard<sup>21</sup> to nature and purpose of statute in which these words are used<sup>22</sup>.

From these aforementioned cases, it is clear that residence and domicile are the words used interchangeably. Residence means where a person is located temporarily. When an individual's residence is coupled with intention to stay permanently it is called domicile. A person can have only one domicile but several residences. Therefore, a place of business can also be a residence of a person. Despite being one of the common legal countries, India exercises its jurisdiction on the basis of residence of the defendant. The duration of the stay of a person within the territory of a court has not been mandated to exercise the jurisdiction. Therefore, mere presence of the defendant within the jurisdiction of the court where the suit has been instituted is enough for the court to exercise jurisdiction. In *British India Steam Navigation Co. Ltd. v Shanmughavilas Cashew Industries*<sup>23</sup>, the Supreme Court of India held that the presence of the defendant before the court to submit that the court does not have jurisdiction in the case itself means that the defendant has submitted himself to the jurisdiction of the court. Thus, the reason for presence within the jurisdiction of the court is not important, rather mere physical presence of the defendant is enough to bring him under the jurisdiction of the court. Therefore for any matrimonial suit, where the defendant is of foreign national, Indian court will have jurisdiction over that suit if during the institution of the suit the defendant was present within the jurisdiction of the court<sup>24</sup>. A defendant can be subjected to the jurisdiction of the court if he stays over at airport to board on a connecting flight and it does not matter how long he stays over within the jurisdiction of the court. Mere presence for 5 minutes is also enough for the court to exercise jurisdiction over the defendant'.

## Conclusion

India despite being a common legal country takes into account the residence of the defendant in order exercise its jurisdiction over the same. Since domicile indicates the intention of an individual to reside at a place permanently, it is quite difficult to exercise jurisdiction on the basis of domicile. Therefore, India deviates from the *lex domicilii* rule while exercising jurisdiction in cross-border litigation. However, this deviation is justified since it enables the Indian courts to widen its jurisdiction & exercise it to most of the cross-border cases instituted before it.

<sup>20</sup> *Union of India v. Durb Nath*, AIR, 2000, SC 525.

<sup>21</sup> Difference between the terms 'residence' and 'domicile', available at <http://11r8i71smg9y1w70b64etqrh.wengine.netdna-cdn.com/wp-content/uploads/2016/05/Domicile-vsResidence.pdf>, accessed on 12 April 2017.

<sup>22</sup> *Union of India Case* (n 20), para 4.

<sup>23</sup> *British India Steam Navigation Co. Ltd. v Shanmughavilas Cashew Industries*, AIR 1990 SCC 481.

<sup>24</sup> *Civil Procedure Code*, 1908, Section 20.