MARRIAGE

VALIDITY OF FOREIGN MARRIAGES AND MATRIMONIAL REMEDIES UNDER PRIVATE INTERNATIONAL LAW

INTRODUCTION

Under the present legal system of India the Citizens have a choice between their respective religion based and community specific marriage laws on one hand and on the other hand, the general and common law of civil marriages. While the laws of the first of these categories are generally described by the compendious expression "personal laws", the latter law is found in the following two enactments :

(i) Special Marriage Act 1954; and
(ii) Foreign Marriage Act 1969.

The first of these Acts is meant for those getting married within the country and the latter for those Indian citizens who may marry in a foreign country.

The Special Marriage Act 1954 is not concerned with the religion of the parties to an intended marriage. Any person, whichever religion he or she professes, may marry under its provisions either within his or her community or in a community other than his or her own, provided that the intended marriage in either case is in accord with the conditions for marriage laid down in this Act (Section 4).

The Special Marriage Act 1954 also provides the facility of turning an existing religious marriage into a civil marriage by registering it under its provisions, provided that it is in accord with the condition for marriage laid down under this Act (Section 15).

The Act provides for the appointment of Marriage Officers who can both solemnize an intended marriage and register a pre-existing marriage governed by any other law (Section 3).

The Foreign Marriage Act 1969 facilitates solemnization of civil marriages by Indian citizens outside the country, with another citizen or with a foreigner. This Act also is not concerned with the religion of the parties to an intended marriage; any person can marry under its provisions either within his or her own community or in a different community.

For carrying its purpose the Foreign Marriage Act empowers the Central Government to designate Marriage Officers in all its diplomatic missions abroad.

Numerous marriages take place in India which are outside the ambit of various personal laws but cannot be governed by the Special Marriage Act either for the reason of not having been formally solemnized or registered under it. The question which law would then apply to such marriages remains unresolved.

Both the Special Marriage Act 1954 and the Foreign Marriage Act 1969 are meant equally for all Indian communities. Yet they contain some provisions which greatly inhibit members of certain communities to avail their provisions.

To meet these concerns the present report seeks to suggest certain amendments in both the Special Marriage Act 1954 and the Foreign Marriage Act 1969. The purpose of these suggestions is to make the two Acts available to a larger number of marriages than they now are and to make them widely acceptable to all communities of India.

CONCEPT OF MARRIAGE

Practically all the countries of the world agree that marriage is a union between man and woman. Beyond this there are difference. In the Western countries marriage is considered as a contract, and a monogamous union, through Roman Catholic church (despite the recent Italian legislation conferring power of dissolving marriage on civil courts) still insists that marriage is a sacrament and an indissoluble union. The Muslim world has all along considered marriage as a civil contract, through has, at the same time, recognized limited polygamy.[1] At one time in the East-among Hindus and Buddhists- marriage was considered as a sacrament and indissoluble union; among both the people unlimited polygamy was recognized. Today the Buddhists and Hindus no longer recognize polygamy. The Chinese Buddhists consider their marriage as a contract.[2]Among Hindus marriage is something in between a sacrament and a contract.[3]

English Law

Under the English domestic law marriage is defined as a voluntary union for life between one man and one woman to the exclusion of all others. English courts have adopted this very concept of marriage to the conflict of laws cases, and this has led to much hardship and injustice in respect of polygamous marriages.

In Hyde v. Hyde[4] Lord Penzence observed : "I conceive that marriage, as understood in Christianity, may for this purpose be defined as the voluntary

[1] A Muslim can have four wives simultaneously, and even when he taken a fifth or more, the marriage is not void but merely irregular (fasid). Some Muslim countries like Turkey, have abolished polygamy, while some, life Pakistan have placed restriction on its practice. On the other hand, in countries, like India, Muslims are allowed to practice polygamy Limited to four wives.

[2] See the Chinese Family Law of 1931 and 1949.

[3] See Hindu Marriage Act, 1955. See also author's work, Modern Hindu Law, Codified and Uncodified, (1984) pp 67-69.

[4] L.R. (1866) 1 P.M. 130 at p. 133.

union for life of one man and one woman to the exclusion of all others." Then, it seemed logical for him to express the following view: "Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and is wholly inapplicable to polygamy." In this case a husband of a potentially polygamous Mormon marriage, performed at Utah, petitioned for divorce in an English Court. After renouncing his faith the husband became a Minister of a dissenting chapel at Derby and the wife remarried. The petition was dismissed because the English courts were not prepared to accord recognition to polygamous unions, and they considered that their matrimonial jurisdiction could not be made available to such marriages.

In Harvey v. Farnie[5] the court of Appeal took the extreme position that polygamous marriages could not be recognized for any purpose. Taking the view the nature and incidents of marriage are determined by the lex loci celebration and the characterization of marriage as to whether it is monogamous or polygamous is determined by the lex fori, the English court held that even if there was a possibility of converting a polygamous marriage into a monogamous marriage, the potentially thus be recognized.[6]

THE SPECIAL MARRIAGE ACT 1954

Old Special Marriage Act 1872

The first law of civil marriages in India was the Special Marriage Act 1872 enacted during the British rule on the recommendation of the first Law Commission of pre-independence era. It was an optional law initially made available only to those who did not profess any of the various faith traditions of India. The Hindus, Muslims, Christians, Sikhs, Buddhists, Jains and Parsis were

[5] L.R. (1880) 6 P. & D. 35;
[6] Lee v. Lau, (1967), p. 14.

all outside its ambit. So, those belonging to any of these communities but wanting to marry under this Act had to renounce whatever religion they were following. The main purpose of the Act was to facilitate inter-religious marriages. In Sowa v. Sowa,[7] before the solemnization of his polygamous marriage a Ghanian promised his wife that he would after the marriage, undergo another ceremony (which he was allowed to do under the law of Ghana) converting his potentially polygamous marriage into a monogamous marriage. But he did not fulfil his promise. The English court held that the marriage remained a polygamous union. In the case where person law permitted only monogamy, though allowed concubines, the English court characterized such marriage as a polygamous union.[8]

The Special Marriage Act 1872 contained no provision for dissolution or nullification of marriage. For these matrimonial remedies it only made the Indian Divorce Act 1869 applicable to the marriages governed by it. In 1922 the Special Marriage Act 1872 was amended to make it available to Hindus, Sikhs, Buddhists and Jains for marrying within these four communities without renouncing their religion. As so amended, the Act remained in force until after independence.

Indian Law

In India each religious or quasi-religious community has its own personal law. In personal matters or matters pertaining to family, India has no national or regional (i.e. state law) law. The majority community, the Hindus, have their own family law, so has the biggest minority community the Muslims. Other minorities like Christians, Parsis and Jews too have their own separate personal laws, besides some differences in fundamentals and some variations in details,

[7] (1961) p. 70.
[8] Lee v. Lau, (1964)2 All E.R. 248

Hindus all other India are governed by Hindu law.[9] The Muslims, the largest of them belong to the Sunni sect, and minorities include Shias, Malikis, Shafis and Hanabalis (the last are almost extinct) are governed by Muslim law.[10] Similarly, the Parsis are governed by Parsi law , the Christians by Christian law and Jews by the Jewish law.[11]

The differences and variations in Hindu Law are mainly between the two schools of Hindu law, the Dayabhaga which prevails in Bengal, Assam, Tripura and Manipur, and the Mitakshara which prevails in rest of India. There are also some differences in the Mitakshara jurisdiction represented by its four subschools, the Benaras, the Bombay, the Mithila and the Dravida. The modern and variations exist only in respect of the uncodified law. The codified Hindu law applies to all Hindus uniformly.

Some differences also exist among the different sects of Muslims. The Sunnis, who represent the majority of Muslims, mostly belong to the Hanafi legal system. The Shias, who represent the largest minority sect among Muslims, mostly belong to the Ithna Ashari system. The shafai and the Ismaili are the other minority Muslim sects. Mention should also be made of the three commercial communities of Muslims, the Khojas, the Bohras and the Memons who, before the Sharait Act, 1973 were not governed by Muslim Law, but partly by Hindu law and partly by custom. Now, they are mostly governed by Muslim law, though to some extent custom still governs them. The former two belong to the Shiat Ismaili sect and the last to the Sunnite Hanafi sect. the Mapilla Muslims of South India, another minority community of Muslims, were at one

[9] See Mayne, Hindu Law and Usage (11th ed.) Chapter II; See this author's work, Modern Hindu Law, Codified and Uncodified (IV ed.) Chapter IV: Mulla Hindu Law, (14th Ed.) Chapter II.
[10] See Paras Diwan, Muslim Law in Modern India, Chapter I, Mulla Mohammedan Law, Chapter III.
[11] See Kumud Desai, Indian Law of Marriage and Divorce, (II ed.) Part IV; Paras Diwan Family Law, Chapter

time entirely governed by custom. Today also they are governed in some matters, such as tarvard, by custom and in other by Muslim law. The other communities, the Christians, the Parsis and the Jews have no schools or subschools, though the urban Parsis are governed by a slightly different law than the rural Parsis. Similarly, some minor differences exist between the European Christians and the native Christians.

New Special Marriage Act 1954

In 1954 the first Special Marriage Act of 1872 was repealed by and replaced with a new law bearing the same title. This is an optional law, an alternative to each of the various personal laws, available to all citizens in all those areas where it is in force. Religion of the parties to an intended marriage is immaterial under this Act; one can marry under its provisions both within and outside one's community.

The Special Marriage Act does not by itself or automatically apply to any marriage; it can be voluntarily opted for by the parties to an intended marriage in preference to their personal laws. It contains its own elaborate provisions on divorce, nullity and other matrimonial causes and, unlike the first Special Marriage Act of 1872, does not make the Divorce Act 1869 applicable to marriages governed by its provisions.

For the Hindus, Buddhists, Jains and Sikhs marrying within these four communities the Special Marriage Act 1954 is an alternative to the Hindu Marriage Act 1955. The Muslims marrying a Muslim have a choice between their uncodified personal law and the Special Marriage Act.

The Indian Christian Marriage Act 1872, however, says that all Christian marriages shall be solemnized under its own provisions [4]. The issue of availability of the Special Marriage Act for a marriage both parties to which are Christians thus remains unresolved.

In Ramchandra T. v. Saraswati Ramchandra,[12] If the custom governing the parties or any of them permits a marriage between them, prohibited relationship does not stand in their way to a marriage under the Special Marriage Act.

Inter-Religious Civil Marriages

The Special Marriage Act is available also for inter-religious marriages and does not exempt any community from its provisions in this respect. The Hindu Marriage Act 1955 applicable to the Hindus, Buddhists, Jains and Sikhs does not allow them to marry outside these four communities. So, if any member of these communities wishes to marry a person not belonging to these communities, the only choice available would be the Special Marriage Act 1954.

The Muslim law allows certain inter-religious marriages to be governed by its own provisions. Under this law a man can marry a woman of the communities believed by it to be Ahl-e-Kitab (People of Book) — an expression which includes Christians and Jews and may include followers of any other monotheistic faith. Since Muslim law only permits an inter-religious marriage and does not require that such a marriage must take place under its own provisions, it does not come in conflict with the Special Marriage Act 1954.

The Indian Christian Marriage Act 1872 says that apart from Christian-Christian marriages the marriage of a Christian with a non-Christian must also

[12] AIR 1953 Punj 68 (SB): 54 Punj LR 436.

be solemnized under this Act (Section 4). The Special Marriage Act on the other hand says that any two persons (whatever be their religion) can marry in accordance with its provisions. There is, thus, a conflict-of-law situation in respect of marriage of a Christian with a non-Christian.

Unlike the first Special Marriage Act of 1872 the 1954 Act contains its own elaborate provisions on divorce, nullity and other matrimonial remedies. The Indian Divorce Act 1869 would therefore not apply to marriages governed by it. The Indian Divorce Act, however, says that it will apply even if only one party is a Christian. This is another conflict-of-law situation.

In view of these conflicts of various personal laws, all equally recognized in India, it will be in the fitness of things that all inter-religious marriages [those within the Hindu, Buddhist, Sikh and Jam communities] be required to be held only under the Special Marriage Act 1954. Even if such a marriage has been solemnized under any other law, for the purposes of matrimonial causes and remedies the Special Marriage Act can be made applicable to them. Such a move will bring all inter-religious marriages in the country under uniform law. This will be in accordance with the underlying principle of Article 44 of the Constitution of India relating to uniform civil code.

The word "Special" in the caption of the Act needs reconsideration. In 1872 when the first law of civil marriages was enacted a non-religious marriage could be regarded as "special" as the parties to such a marriage had to denounce their religion. Marriage by religious rites was then the rule and a civil marriage could be only an exception. Now in the twenty-first century calling nonreligious civil marriages "special" has little justification. Being a uniform law which the parties to any intended marriage can opt for irrespective of their religion or personal law, it need not be described as a law providing for a "special" form of

marriage. It projects such marriages as unusual and extraordinary and creates misgivings in the minds of the general public.

THE FOREIGN MARRIAGE ACT 1969

Solemnization of New Marriages

A Foreign Marriage Act was first enacted in India in 1903 during the British rule. It remained in force till 1969 when a new Foreign Marriage Act was enacted on the pattern of the new Special Marriage Act 1954.

Under this Act a marriage may be solemnized, in a foreign country, between two Indians or an Indian and a foreigner, irrespective in either case of the religion and personal law of the parties, if the conditions for marriage laid down in the Act are fulfilled (Section 4).

The Government of India is empowered by this Act to appoint Marriage Officers in foreign countries from amongst its diplomatic and consular staff in those countries (Section 3).

The Act does not have any provision relating to divorce, nullity or any other matrimonial remedy or relief For this purpose the Act makes the relevant provisions of the Special Marriage Act 1954 applicable, mutatis mutandis, also to all marriages solemnized or registered under its provisions (Section 18).

The Act is entirely optional and its provisions do not adversely affect the validity of a marriage solemnized in a foreign country otherwise than under its provisions (Section 27).

In Mayer v. Mayer[13] has given utterance to a dictum that deserves more than passing mention it is as follows:

"Since the validity of marriage is generally determined by the law of the state where the marriage took place, there are cogent reasons why annulment should be sought in the tribunals of that state."

It is the latter part of the statement that we believe merits attention. If the learned Justice in the Mayer case means that a court of the state or country where the marriage was celebrated may set it aside, provided both parties are properly before that court, one may not be tempted to quarrel with his statement, but if he means to give support to the opinion that it should have exclusive jurisdiction to annul such marriage irrespective of the residence or domicile of the parties to the suit, he lends some approval to a highly questionable proposition. Unfortunately that proposition has been championed by a few American writers of great learning and ability, and has been tentatively adopted by the American Law Institute in its Resentment of Conflict of Laws.[14]

It is, we believe, a doctrine that, notwithstanding its distinguished defenders, is without substantial support in adjudicated cases; that rests on no solid reason in theory or convenience; and that is calculated, if it should be given credence, to effect much practical injustice. Though the doctrine has been ably discussed in a recent number of this review,[15] it is sufficient importance, in view of the eminence and ability of its sponsors, to warrant again some discussion of the law respecting the proper jurisdiction for annulment proceedings.

[13] (July 31, 1929) 78 Cal. Dec. 191, 279 Pac. 783.
[14] Conflict of Law Restatement (Am. L. Inst. 1926) No. 2 pp. 121, 122.
[15] Note (1927) 16 Calf. L. Rev. 38.

Registration of Existing Marriages

A marriage solemnized in a foreign country under any other law including the local law of that country can be registered under the Foreign Marriage Act 1969 if it fulfils the conditions for validity of marriages laid down in this Act [17 (1) to (3)].

The procedure for registration of pre-existing marriages under the Act is same as for solemnization of new marriages.

The Foreign Marriage Act, 1969, Modelled on the English statutes of that name and the Foreign Marriage Order, 1964 provides for consular marriages if one of the parties to the marriage is an Indian national. The Act lays down that a consular marriage may be performed abroad when one of the parties to the marriage is an Indian national (the other party may be an Indian national or a foreigner) at the official house of the marriage officer appointed under the Act with open doors between the prescribed hours, in the presence of at least three witnesses in any form which the parties may choose to adopt, but in no case a marriage will be complete and binding on the parties unless each partly declares to the other in the presence of the marriage officer and witnesses, in any language understood by the parties, J, A, take thee, B, to be my lawful wife (or husband).[16] The marriage officer has power to refuse to solemnize of register a marriage which, in his opinion, is inconsistent with international law or the comity of nations.[17]

A marriage solemnized abroad in accordance with the lexloci celebrationis[18] between parties one of whom at least is an Indian national, may also be registered under the Act and once it is so registered it shall be deemed to be a

[16] Section 13.
[17] Sections 11(2) and 17(3)
[18] the law of the place where a contract esp. of marriage is made

marriage under the Act.[19] But if a marriage has not been registered under the Act, a petition for divorce cannot be filed in India.[20] A marriage is solemnized by an Indian with a foreigner even before the comity into force of the Foreign Marriage Act can be registered under the Act.[21] A marriage solemnized or registered under the Act[22] shall be good and valid in law and will be recognized as such in India.

Section 23 of the Act lays down that if the Government of India is satisfied that the law of force in any foreign country for the solemnization of marriages contains provisions similar to those contained in this Act, it may by notification in the Official Gazette declare that marriages thus solemnized shall be recognized by Indian courts as valid. Section 27 lays down that the provisions of the Act in no way affect the validity of the marriages solemnized abroad which are neither celebrated nor registered under the Act.

THE PROHIBITED DEGREES IN MARRIAGE

Every country lays down the degrees of prohibited relationship, and a marriage in violation of them is invalid. There is a great variation in these degrees in the various countries of the world. Since 1839 (Now section 1 Marriage Act, 1949) marriages within prohibited degrees of consanguinity and affinity have been considered void under English Law.[23] Here also the general rule applies, i.e. parties must not be within the prohibited degrees of relationship by their ante-nuptial domicile.

[19] Chapter III of the Act.
[20] Joyce v. Robert, 1982 A.P. 385
[21] Abdul v. Padma, 1982 Bom. 341.
[22] Sections 15 and 17(6).
[23] Although the Marriage (Enabling) Act, 1960 now allows marriages within certain degrees of prohibited relationship, yet the basis principles remains the same.

In Brook v. Brook,[24] and Sottomayor v. De. Barros,[25] the marriage was held void on this basis. The English courts have applied this rule even when one of the parties to the marriage is domiciled in England.

In M Mettee v. Mettee,[26] a German, Domiciled in England, married in Germany, after the death of his wife, his wife's half sister who has domiciled in Germany. The marriage was valid by German law, but void by English law. The English Court held the marriage as void.[27] The English Court have applied the rule in the converse situation also. Even when both the parties are domiciled abroad, and their marriage is void by the ante-nuptial domicile of either party, the English Court have held the marriage void in a situation where the marriage has been solemnized in England where such marriage are valid.[28]

A) Special Marriage Act 1872

The concept of "prohibited degrees in marriage" is recognized by all systems of family law and generally every family law has its own list of relatives with whom one cannot marry. The Special Marriage Act 1872 did not contain any such list and only laid down that:

"The parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal."

Thus, in respect to prohibited degrees in marriage in an intended civil marriage to be regulated by the Special Marriage Act 1872 personal laws of the parties, common or different, remained in force.

[24] (1861)9 H.L.C. 193
[25] (No. 1) (1877) 3 P.D. 1
[26] (1859)1 Sw. & Tr. 416
[27] See also Re Paine, (1940) Ch. 46.
[28] Sattomayor v. De. Barros (No. 1) (1877) 3 P.D. 1

In Khombatta v. Khombatta, [29] where in 1905 an Indian domiciled Muslim male married a Scot domiciled woman in Scotland before a Marriage Registration Subsequently parties came to India and the wife embraced Islam.

In 1922, the husband pronounced divorce on his wife. The wife also obtained a declaration from the civil court that the marriage stood dissolved. Then she underwent a ceremony of civil marriage with one Khambatta under the Special Marriage Act, 1872. After ten years of marriage, the wife petitioned for a declaration of nullity of her marriage with Khambatta on the averment that since her Scottish marriage has been dissolved by any court of law, her second marriage being bigamous was void.

The main question before the court was whether her first marriage was validily dissolved. The court was called upon to decide whether the marriage was governed by the law applicable at the time of the marriage was governed by the law applicable after conversion (or the law of the matrimonial domicile as Cheshire would put it.) The court held that it would be law after conversion that would govern the first marriage was validly dissolved. Blackwell, J. observed that if change of domicile can effect a change in status then there is no reason why the change of religion should not do the same thing.

B) Special Marriage Act 1954

The new Special Marriage Act 1954 wholly changes the situation in respect of prohibited degrees in marriage. One of the conditions for an intended civil marriage to be solemnized under this Act is that "the parties are not within the degrees of prohibited relationship" [4 (d)]. The expression "degrees of prohibited relationship" is defined in Section 2 (b) of the Act as "a man and any of the persons mentioned in Part I of the First Schedule and a woman and any of

[29] 1935 Bom. 5.

the persons mentioned in Part II of the said Schedule." Thus, unlike the first Special Marriage Act 1872 this Act incorporates its own list of prohibited degrees in marriage, separate for men and women.

In each of the two lists of prohibited degrees there are 37 entries. The relations mentioned in the first 33 entries in each list are regarded as prohibited degrees in marriage under all other laws, both codified and un codified. These entries, therefore, do not inhibit any person of whatever religion from opting for a civil marriage. The last four entries in the two lists mentioned below, however, pose a problem for certain communities:

(a) List I (for men,)
34. Father's brother's son
35. Father's sister's son
36. Mother's sister's son
37. Mother's brother's son

(b) List II (for women)
34. Father's brother's daughter
35. Father's sister's daughter
36. Mother's sister's daughter
37. Mother's brother's daughter

Thus all first cousins — paternal and maternal, parallel and cross — are placed by the Special Marriage Act in the category of prohibited marital relationship.

The Special Marriage Act 1954 makes a provision for relaxation of the rule of prohibited degrees in marriage. To the condition that parties to an intended civil

marriage must not be within prohibited degrees of marriage the Act adds the following proviso:

"Provided that where a custom governing at least one of the parties permits a marriage between them, such marriage may be solemnized notwithstanding that they are within the degrees of prohibited relationship." [(d) of Section 4]

The word "custom" as used in this Proviso is defined by the Act in the following terms:

"In this section 'custom' in relation to a person belonging to any tribe community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family." [to Section 4].

The position of first cousins under the Special Marriage Act 1954 is in accord with the Hindu Marriage Act 1955 which also does not allow marriage with any first cousin. Relaxation of the net of prohibited degrees on the ground of custom is also permissible under that Act, but it does not require a gazette notification by the State Government in this regard.

In Muslim law all first cousins both on the paternal and maternal sides are outside the ambit of prohibited degrees in marriage. Personal law of the Jewish and Bahai communities also permit marriage with a cousin. Under Christian law marriage with a cousin may be permitted by a special dispensation by the Church. It is doubtful if the expression "custom" as defined in the Special Marriage Act would include also personal law of the parties. And even if it does, the condition of recognition by the State Government through a gazette notification would have to be satisfied.

Another important point worth noting here is that under the Hindu Marriage Act 1955 marriage with second cousins (father's first cousin's children) is also not allowed due to the restriction known as "sapinda" relationship [5(v)]. The Special Marriage Act 1954, however, does not place any second cousin in its two lists of prohibited degrees in marriage.

The consequence of these legal provisions is that if a Hindu, Sikh, Buddhist or Jain wants to marry a second cousin he can do so under the Special Marriage Act, though his personal law (now contained in the Hindu Marriage Act 1955) does not permit it. On the contrary, if a Muslim wants to marry a first cousin he cannot do so under the Special Marriage Act 1954 although the Muslim personal law unconditionally permits such a marriage. Members of all those other communities whose law allows, or may allow, marriage with a first cousin are also in the same position as the Muslims. The discrimination between various Indian communities inherent in this legal situation is too clear to be ignored.

C) Foreign Marriage Act 1969

The Foreign Marriage Act 1969 says that the parties to an intended marriage to be solemnized under it must not be within prohibited degrees of marital relationship. It does not, however, incorporate any list of such prohibited degrees and only says that the expression "degrees of prohibited relationship" as used under it will have the same meaning as under the Special Marriage Act 1954. Therefore, under the Foreign Marriage Act too all first cousins are deemed to be within the prohibited degrees of marriage.

The Foreign Marriage Act, however, specifically mentions both custom and personal law of the parties as grounds for relaxation of the rule of prohibited degrees in marriage. Also, there is no condition under this provision for

recognition of the rule of personal law or custom in this respect by the Government through a gazette notification.

Execution of Court Decrees

Before the coming into force of the Domicile and Matrimonial Proceedings Act, 1973, it had become fashionable to make a distinction between void and viodable marriages from the point of view of jurisdiction also. In respect of void marriages, domicile[30] residence[31]and solemnization of marriage[32] within the jurisdiction were considered to be the basis of jurisdiction. Common domicile[33]of parties and residence of both the parties in England were considered to be the basis of court's jurisdiction in respect of voidable marriages.[34] Certain statutory grounds were also recognized on the basis of which the wife alone could petition.

The Domicile and Matrimonial Proceedings Act, 1973 has made radical changes in the jurisdiction of court regarding petitions for nullity of marriage. The jurisdictional rules in respect of void and viodable marriages are now the same. The difference in the jurisdictional rules between divorce and nullity has been reduced to a bare minimum. Now, under the Act, the English court will have jurisdiction to entertain a petition for nullity of marriage (in both cases of void and voidable marriages) on the ground that.[35]

[30] White v. White (1937) p. 111.
[31] Ramsay-Fairfax v. Ramsay-Fairfax, (1956) p. 115
[32] Simonin v. Mallac, (1860) 2 Sw. & Tr. 67
[33] De Reneville v. De Reneville, (1948) p. 100
[34] Ross Smith v. Ross Smith, (1963) A.C. 280. laid down that the jurisdiction cannot be assumed on the basis of celebration of marriage within the jurisdiction.
[35] Section 5 (3).

(a) either of the parties to the marriage is domiciled in England on the date when proceedings are begun, or

(b) either of the parties to the marriage was habitually resident in England though out the period of one year preceding the presentation of the petition.

The Act also makes an innovation as it enables a party to petition for nullity after the death of the other party to the marriage.[36] The surviving party to a void marriage may petition to the court for nullity of marriage it.

(i) either party was domiciled in England at the time of the death of the respondent, or

(ii) either party was habitually resident in England throughout the period of one year ending with the date of death of the respondent.

Section 5(5) applies to nullity proceedings as much as it applies to petitions of divorce. This means that if the court has jurisdiction in the main petition, then it will have jurisdiction to entertain and decide cross petitions and supplemental proceedings.

The first two jurisdictional grounds of the nullity are the same as of divorce, therefore, reference may be made thereto.

Since under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 a declaration of nullity of marriage of a void marriage confers a status of legitimacy on the children, some of our High Courts have expressed a view that a petition for nullity of marriage under Section 11, Hindu Marriage Act, 1955

[36] Section 5 (3)©.

can be presented to a court of law even after the death of the parties to the marriage.[37]

In Thulsai Ammal v. Gowri Ammal,[38] it was observed, obiter, "Since the decree of nullity appears in our opinion, to be a declaration of status of a person, we are unable to see why the death one of the spouses should put an end to the right of other surviving spouse to seek for such a declaration.[39] Earlier in this case a single judge of the Madras High Court has expressed, obiter, that such a petition is not maintainable. This obiter observation of Srinivasan, J. in Thusai Ammal v. Gowri Ammal,[40] has been relied upon first by a single judge and then by a Division Bench of the Punjab High Court. The Law Commission has expressed a disagreement with the Punjab view,[41] and the Marriage Laws (Amendment Act, 1976 has overruled these cases by laying down that any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity.

The ecclesiastical courts applied the law of celebrations of marriage to all questions affecting the validity of a marriage. When jurisdiction was transferred to civil courts, the civil courts, after initial adherence to the lex loci celebrationis, made a distinction between the formal validity and essential validity of a marriage.

Subsequent development has been such that annulment of marriage on the grounds of impotency and willful refusal to consummate the marriage has been made a category by itself. In two cases the English Court took the view that

[37] Section 16 of the former and section 26 of the latter
[38] Tulsan v. Krishni, 1973 P & H. 442.
[39] 1964 Mad. 118
[40] Gowri Ammal v. Thulasi Ammal, 1962 Mad. 510
[41] Law Commission's Report, no 59. para 6.1A.

English law determined the matter.[42] For the first time an attempt to apply foreign law was made in Robert v. Robert.[43] This was a petition for annulment of the marriage on the ground of willful refusal to consummate the marriage . parties at all material time were domiciled in Guernsey and the marriage was also solemnized there. The court applied the law of domicile.

Then came De. Reneyille v. De Reneville[44] where a marriage was solemnized between a domiciled Frenchman and a woman domiciled in England. After living with her husband for some time in France, the wife returned to England and petitioned for annulment of marriage on the ground of importency and willful refusal to consummate the marriage. The husband appealed and protested that the England court has no jurisdiction to entertain the petition. The court of appeal expressed the view that the court will have jurisdiction only if she was domiciled in England and whether or not she was domiciled in England depended upon the question whether the marriage was void or voidable, a question which should be decided under the French law.

Since no evidence of French law was given the Court of Appeal determined the question of jurisdiction as the wife will continue to have her English domicile, if the marriage was voidable the English court will have no jurisdiction. On the basis of this decision Chesire taken the view that the material validity (he calls them personal defects) should be determined by the proper law of marriage, i.e. the law of the intended matrimonial home.[45] Dicey and Morris are critical of this judgment.[46].Now that the wife does not take the domicile of her husband on her marriage (i.e. if she desires she can retain her pre-marriage domicile) the capacity to marry in the sense of material validity of the marriage should be

[42] Eastern Book v. Eastern Book, (1944) p 10; Hutter v. Hutter, (1944) p 95.
[43] (1947) p 164
[44] (1948) p 100.
[45] Cheshire, pp. 319-320.
[46] Dicey and Morris, pp. 361-362

determined by the pre-marriage domicile of each party.

OBJECTS

All over the civilized world, marriage is a very important social institution. Practically all the countries of the world agree that marriage is a union between man and woman.

Under the English domicile law marriage is defined as a voluntary union for life between one man and one woman to the exclusion of all others. English courts have adopted this very concept of marriage to the conflict of laws cases, and this has led to much hardship and injustice in respect of polygamous marriages.

In the case where personal law permitted only monogamy, though allowed concubines, the English court characterized such marriage as a polygamous union.

The most vexed question in private international law is under which law should marriage be characterized as monogamous or polygamous? Should it be the personal law of either party or pre-marriage domicile or by the law of matrimonial home or should it be the lex loci celebrationsis?

The character of marriage, whether polygamous or monogamous, should be determined by the law of the matrimonial domicile.

The next question that arises is : whether a valid polygamous marriage is a sufficient first marriage to support an indictment for bigamy. This question was

left undecided in Baindail v. Baindail, in R.V. Sarwan Singh. The court answered the question in the negative.

IMPORTANCE

This may now be treated as settled that the husband wife status of polygamously married persons would be recognized in English law. English decisions also appear to lay down that spouses of a potentially polygamous marriage cannot be guilty of criminal conspiracy and the wife or wives of a citizen of the United Kingdom and Colonies are entitled to claim citizenship thereof. It is now also settled law that wife of a polygamous marriage is entitled to maternity benefit and a widow of such marriage will be entitled to benefits under the national insurance schemes.

Then, the question is : how far the children of polygamous marriages are entitled to succeed to the property of their parents situated in England? A Hindu marriage between persons domicile in India to recognized by our courts, that issues are regarded as legitimate, and that such issues can succeed to property in this country, with a possible exception which will be referred to later.

The last question that remains is relating to mutual rights of succession of the spouses of polygamous unions. It appears to be the position in English law that the surviving spouse of a polygamous marriage can succeed to the property of the other spouse in case of intestacy, irrespective of the fact whether the marriage was potentially polygamous or factually polygamous, and irrespective of the fact whether the intestate died domiciled in England or abroad.

CONCLUSION

Since the validity of marriage is generally determined by the law of the state where the marriage took place, there are cogent reasons why annulment should be sought in the courts of that state. It is the latter part of the statement that we believe merits attention. A court of the state or country where the marriage was celebrated may set it aside, provided both parties are present before that court, one may not be tempted to quarrel with his statement, but if he means to give support to the opinion that it should have exclusive jurisdiction to annul such marriage irrespective of the residence or domicile of the parties to the suit, he lends some approval to a highly questionable proposition.

Unfortunately that proposition has been championed by a few American writers of great learning and ability, and has been tentatively adopted by the American Law Institute in its Resentment of Conflict of Laws.[47] It is, we believe, a doctrine that, notwithstanding its distinguished defenders, is without substantial support in adjudicated cases; that rests on no solid reason in theory or convenience; and that is calculated, if it should be given credence, to effect much practical injustice.

Though the doctrine has been ably discussed in a recent number of this review,[48] it is sufficient importance, in view of the eminence and ability of its sponsors, to warrant again some discussion of the law respecting the proper jurisdiction for annulment proceedings.

[47] Conflict of Law Restatement (Am. L. Inst. 1926) No. 2 pp. 121, 122
[48] Note (1927) 16 Calf. L. Rev. 38.

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