*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ MAT.APP.(F.C.) 101/2020 & CM.APPL. 21530/2020(stay)

Date of decision: 12th October, 2020

IN THE MATTER OF :

MR. KARAN GOEL ..... Appellant
Through: Mr. Prabhjit Jauhar, Advocate

versus

MS. KANIKA GOEL ... Respondent
Through: Ms. Malvika Rajkotia with
Ms. Rytim Vohra, Advocates

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

HIMA KOHLI, J.

1. The appellant/husband who is the respondent in H.M.A. 617/2018, filed by the respondent/wife, has sought to challenge the order dated 14.08.2020, passed by the learned Principal Judge, Family Courts, Patiala House Courts, New Delhi, dismissing an application filed by him under Order VII Rule 11(a) and (d) read with Order XIV Rule 2(2) of the Code of Civil Procedure (for short 'CPC'), praying inter alia for the dismissal of the divorce petition for want of cause of action and on the ground that the same is barred by law.

2. A quick glance at the facts of the case, relevant for deciding the present appeal is necessary. The appellant and the respondent had got married at New Delhi on 31.10.2010, as per the Sikh rites and Hindu Vedic rites and ceremonies. The appellant/husband is a US citizen, having

moved to that country with his parents in the year 1994. After their marriage, the respondent/wife moved to USA, where a civil ceremony of marriage was conducted before a Judge at Illinois, USA on 19.3.2011. The respondent/wife applied for a permanent resident status in the year 2011. The parties were blessed with a baby girl on 15.12.2014. On 07.12.2016 the respondent/wife had also applied to the U.S. authorities for obtaining US citizenship.

3. The appellant/husband and the respondent/wife came to India with their child on 25.12.2016 and according to the appellant/husband, they had pre-booked the return tickets for 07.01.2017. While in India, on 04.1.2017, the respondent/wife filed a petition for divorce under Section 13(1) (i-a) of the Hindu Marriage Act (for short **'the Act'**). The appellant/husband returned alone to USA on 07.01.2017 and filed a divorce petition in Chicago, USA. He was granted an *ex parte* divorce on the ground of irretrievable breakdown of marriage. The appellant/husband also approached the Circuit Court of Cook County, Illinois, USA for the custody of the child which was granted to him vide *ex parte* order dated 13.01.2017.

4. For the sake of completing the narration of facts, it may be mentioned here that the appellant/husband had filed a writ petition in the Delhi High Court for issuance of a writ of habeas corpus for the production and custody of the minor child [W.P.(Criminal) 347/2017] in which certain orders came to be passed by he Division Bench. Aggrieved by the said orders, the respondent/wife approached the Supreme Court in Criminal Appeal No.635-640/2018 which was allowed vide order dated 20.07.2018, with directions to the parties to appear before the learned Family Court, Patiala House for deciding the proceedings instituted by the respondent/wife for grant of the custody of the minor child.

5. Coming back to the divorce petition filed by the respondent/wife in May, 2017, the appellant/husband moved an application under Order VII Rule 11, CPC for seeking rejection of the said petition on the plea that the provisions of the Act would apply to persons who are outside the territory of India only if they are domiciled in India. Since the appellant/husband has been domiciled in the USA from the year 1994 and is a citizen of USA and as on the date of filing the petition, only the respondent/wife was domiciled in India, the Act is not applicable to them. It was contended that vide order dated 13.01.2017, courts in USA have assumed jurisdiction over the matter and having done so, courts in India cannot entertain a petition under the Act on the same subject matter between the same parties. The appellant/husband also stated that the parties had entered into a pre-nuptial agreement and the said agreement would govern them. During the course of arguments advanced before the learned Family Court, the appellant/husband relied on the 'admissions' made by the respondent/wife in the *Habeas Corpus* petition filed by him in the High Court for seeking production and return of the minor child, wherein she had allegedly admitted that she is domiciled in U.S.A.

6. The respondent/wife filed a reply in opposition to the application filed by the appellant/husband contending *inter alia* that the Act would govern the parties. Denying all the submissions made by the appellant, the respondent stated that it was not the intention of both the parties to permanently remain in USA and that she had wanted to return to India.

7. By the judgment impugned before us, the learned Family Court dismissed the application filed by the appellant/husband under Order VII Rule 11 CPC and held that the admissions of the respondent/wife in the *Habeas Corpus* petition filed by the appellant/husband, were made under a misconception and ignorance about the legal position and that she had

consistently maintained that she has no intention to settle down permanently in USA and therefore, the appellant/husband herein cannot be allowed to selectively refer to the pleadings of the respondent/wife. Holding that it is for the court to determine as to whether the facts of a case conclusively establish that the respondent/wife had acquired US domicile, the learned Family Court rejected the stand of the appellant/husband that the divorce petition filed by the respondent/wife is barred by law.

8. On the question as to whether both parties must be domiciled in India for maintaining a petition under Section 13 of the Act, following are the observations made by the Family Court :

> *"32. So far as the present matter is concerned, both the parties have Indian domicile of origin, the marriage was solemnized as per Sikh rites and ceremonies and at that time the intention of the parties was to be governed by their personal law i.e. Hindu Marriage Act. If the proposition put forth by the counsel for respondent/husband that both the parties must be domiciled in India at the time of presentation of petition is accepted, then it will bring us to a situation, where if a spouse after the marriage, deserts the other spouse by going abroad and by acquiring domicile of choice, the spouse in India would be left with no remedy to seek dissolution of marriage even on the ground of desertion. By any stretch this cannot be intention of the legislature. Section 19(iv) of HMA would rescue the said spouse as it confers territorial jurisdiction to the District Courts where the petitioner is residing at the time of the presentation of the petition, in a case, where the respondent is at the time, residing outside the territories to which this Act extends. Needless to say that legal provisions wherefrom parties derive their rights and obligations, need to be interpreted in a manner that inconsistencies are removed and rule of harmonious construction is achieved, to give effect to the legislative intent in its true spirit. It is important to note that provisions of Section 1(2) of the Act does not provide specific time of domicile nor it specifies the nature of the domicile of the parties to a matrimonial dispute under the Act. Both*

parties herein were having Indian domicile of origin and wife at the time of marriage was having Indian domicile although husband had acquired domicile of choice in U.S."

9. The learned Family Court observed that the respondent/wife still holds Indian nationality and citizenship and wants to remain in India and therefore, courts in India will have the jurisdiction to entertain the divorce petition. Rejecting the plea of the appellant/husband that the present case is squarely covered by the judgment of the Supreme Court in Sondur Gopal v. Sondur Rajini, reported as (**2013) 7 SCC 426,** which, according to him, holds that for maintaining a petition under the Act in India, both the parties must be domiciled in the country, the learned Family Court proceeded to dismiss the application of the appellant/husband moved under Order VII Rule 11 (a) and (d) read with Order XIV Rule 2 (2) CPC. Hence, the present appeal.

10. Arguing for the appellant/husband, Mr. Jauhar, learned counsel contended that the impugned judgment runs contrary to the law laid down by the Supreme Court in Sondur Gopal(supra). He particularly relied on para 27 of the said decision to urge that the Act would apply to Hindus outside the Indian territories only if the person is domiciled within the country. He further contended that a reading of Section 1 (2) implies that the Act would apply to the parties only if both the parties are domiciled in India and in circumstances like the present one, where even one of the parties is domiciled outside India, courts in India would not be vested with the jurisdiction to entertain a divorce petition filed under the Act. Learned counsel submitted that the appellant/husband had left the shores of India as a child, in the year 1994 and the respondent/wife had done so on getting married to the appellant in the year 2011 and on becoming a US permanent resident.

11. To substantiate his submission that the respondent/wife had made certain admissions in the divorce petition, learned counsel for the appellant/husband referred to the reply filed by her to the application for rejection of the divorce petition filed by the appellant/husband and her reply to the *Habeas Corpus* petition filed by the appellant/husband particularly extracting the relevant averments in paras 6 to 9 of his application. Learned counsel sought to canvass that when read together, the aforesaid averments would clearly demonstrate that the respondent/wife had admitted in her own words that the parties have been domiciled in USA at all relevant points in time and not in India and that the said fact, asserted by the appellant/husband and admitted by the respondent/wife, did not require to be proved in a trial. In para 12 of the application, the appellant/husband cited certain facts relating to himself and the respondent, described as '*indisputable'* to urge that they clearly showed that the respondent/wife has tried to indulge in forum shopping and that on a meaningful reading of the pleadings, it would be apparent that no part of the cause of action has arisen in India for maintaining the divorce petition here and nor is the said petition maintainable in law and therefore, the learned Family Court ought to have rejected the divorce petition filed by the respondent/wife in exercise of the powers under Order VII Rule 11 CPC.

12. On her part, Ms. Rajkotia, learned counsel for the respondent/wife has supported the impugned judgment and order and submitted that it does not deserve any interference in appeal.

13. We have given our thoughtful consideration to the submissions made by Mr. Prabhjit Jauhar, learned counsel for the appellant/husband and Mr. Malvika Rajkotia, learned counsel for the respondent/wife, examined the documents on the record including the pleadings in the application moved

by the appellant/husband under Order VII Rule 11 CPC and perused the impugned judgment and order.

14. To set the tempo, we may start by referring to the legal position. It is well settled that a plaint can be rejected on any of the grounds enumerated under Order VII Rule 11 of the CPC. It is equally well settled that on going through an application moved under Order VII Rule 11 CPC, the court is required to examine the plaint as a whole and take the averments made therein to be correct. If on a reading of the plaint, a cause of action is made out, then the plaint cannot be rejected. While dealing with an application under Order VII Rule 11 CPC, the court must forebear from going into disputed questions of facts including the defence taken by the defendant in his written statement or his application for rejection of the plaint. ***[Refer:*** *Inspiration Clothes & U. v. Collby International Ltd.*, ***88 (2000) DLT 769***; *Tilak Raj Bhagat v. Ranjit Kaur*, ***159 (2009) DLT 470***; *Bhau Ram v. Janak Singh*, ***V (2012) SLT 536***; *Tilak Raj Bhagat v. Ranjit Kaur*, ***2012 (5) AD (Del) 186***; *Indian City Properties Ltd. v. Vimla Singh]* ***198 (2013) DLT 432***; *and Razia Begum v. DDA* ***215 (2014) DLT 290 (DB)***].

15. It may also be emphasized that for deciding an application filed under Order VII Rule 11 CPC, the court must not be selective in picking upon the averments made in the plaint and read them in isolation. Instead, a meaningful reading of the entire plaint must be conducted for the court to satisfy itself as to whether the averments made therein, if taken to be correct in their entirety, would result in a decree being passed. The manner of examination which a court is expected to undertake for scrutinizing the plaint and the documents filed to decide an application under Order VII Rule 11 CPC, have been discussed by the Supreme Court in a catena of decisions including in T. Arivandandam vs. T.V. Satyapal & Anr., reported

as **1977 (4) SCC 467**, Popat and Kotecha Property vs. State Bank of India Staff Association reported as **(2005) 7 SCC 510** and Hardesh Ores Pvt. Ltd. vs. M/s. Hede & Company reported as **2007 (5) SCC 614**.

16. In Popat and Kotecha Property (supra), the Supreme Court observed as under:

> *"**10.** Clause (d) of Order 7 Rule 11 speaks of suit, as appears from the statement in the plaint to be barred by any law. **Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force**.*
>
> ***19. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint.** If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. **It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense.** The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities."* (emphasis added)

17. In Mayar (H.K.) Ltd. & Ors. v. Owners and Parties, Vessel M.V. Fortune Express and Ors., reported as (**2006) 3 SCC 100**, the Supreme Court held thus:-

> *"**12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made***

by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. *Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature.* ***So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.*** *In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."*(emphasis supplied)

18. In Hardesh Ores Pvt. Ltd. (supra), the Supreme Court has held as follows:-

"25. The language of Order VII Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of Clause (d) of Order VII Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. ***The test is whether the averments***

> ***made in the plaint if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether Clause (d) of Rule 11 of Order VII is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense.*** *As observed earlier, the language of Clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this Court in Liverpool and London S.P. and I Association Ltd. v. M.V. Sea Success I and Anr.* ***(2004) 9 SCC 512*** *and Popat and Kotecha Property v. State Bank of India Staff Association*, ***(2005) 7 SCC 510***." (emphasis added)

19. As can be seen from the aforesaid discussion, a plaint cannot be rejected on the basis of allegations leveled by the defendant in the written statement or for that matter, in an application moved under Order VII Rule 11 CPC. Only the material facts are required to be stated in the plaint without referring to the evidence except in circumstances where the pleadings relate to misrepresentation, fraud, undue influence, willful default, etc. The plaint must be read as a whole to determine as to whether it discloses a cause of action. In undertaking the said exercise, the court is not expected to consider a particular plea. Instead, the averments made in the plaint in entirety, have to be taken to be correct. As long as the court is satisfied that the plaint discloses some cause of action that requires determination, the plaint ought not to be rejected. Since a cause of action comprises of a bundle of facts, the same are required to be proved by the plaintiff only at the stage of the trial. At the end of the day, the court must be mindful of the underlying object of Order VII Rule 11 CPC which is to

nip in the bud, irresponsible and vexatious suits. At the same time, the opinion of the court that the plaintiff may not ultimately succeed in the suit, ought not to form the basis for rejecting the plaint.

20. Applying the above mentioned parameters to the instant case, it has to be seen whether the divorce petition, as filed by the respondent/wife, deserves to be rejected or not. It is the contention of the learned counsel for the appellant/husband that the divorce petition is barred under Order VII Rule 11 (a) and (d), CPC since the appellant/husband is not domiciled in this country. It is his plea that since the Act cannot be extended to the appellant/husband who is a US citizen, the petition for divorce filed by the respondent/wife in Delhi, cannot be entertained by the learned Family Court.

21. We may first examine the relevant provisions of the Hindu Marriage Act, 1955. Sections 1, 2 and 19 of the Act read as under:

> *"**1.Short title and extent**.—(1) This Act may be called the Hindu Marriage Act, 1955.*
>
> *(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories."*
>
> ***2. Application of Act**.—(1) This Act applies—*
>
> *(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,*
>
> *(b) to any person who is a Buddhist, Jaina or Sikh by religion, and*
>
> *(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed."*
>
> *"**19. Court to which petition shall be presented**. -Every petition under this Act shall be presented to the district court*

within the local limits of whose ordinary original civil jurisdiction-

(i) the marriage was solemnised, or

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

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

[(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition, or]

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

22. The Hindu Marriage Act applies to all Hindu domiciled in the territories to which the Act extends. A combined reading of Sections 1 and 2 with Section 19(iiia) contemplates a situation where even if the wife is domiciled in India and the husband is not, remedies under the Act can be availed of by the wife. A glance at Section 19 of the Act shows that it offers multiple options as to the local District Court where a divorce petition can be presented. It includes the place where the marriage of the parties was solemnized or where the respondent resides at the time of presentation of the petition or in case the wife is the petitioner, where she is residing on the date of presentation of the petition or where the petitioner is residing at the time of presentation of a petition in a case where the respondent at that relevant point in time, is residing outside the territories to which the Act extends, as contemplated in Section 1(2).

23. The need for a legislation to protect spouses who have been deserted outside the country was brought to the fore by the Supreme Court over two

and a half decades ago in Neeraja Saraph v. Jayant V. Saraph and Anr, reported as **(1994) 6 SCC 461**, wherein highlighting the issue of protecting the rights of women deserted by NRI husbands and faced with decrees of annulment of marriage obtained from foreign courts, it had observed as under:

> "***4***. *Why the facts of this case have been narrated in brief with little background is to impress upon the need and necessity for appropriate steps to be taken in this direction to safeguard the interests of women. Although it is a problem of Private International Law and is not easy to resolve, but with change in social structure and rise of marriages with NRIs the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament under Section (1) in pursuance of which the Government of United Kingdom issued Reciprocal Enforcement of Judgments (India) Order, 1958. Apart from it there are other enactments such as Indian and Colonial Divorce Jurisdiction Act, 1940 which safeguard the interests so far as United Kingdom is concerned. But the rule of domicile replacing the nationality rule in most of the countries for assumption of jurisdiction and granting relief in matrimonial matters has resulted in conflict of laws. What is this domicile rule is not necessary to be gone into. But feasibility of a legislation safeguarding interests of women may be examined by incorporating such provisions as-*
>
> *(1) No marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;*
>
> *(2) Provision 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 courts both on principle of comity and by entering into reciprocal agreements like Section*

44-A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court."

24. The reasons that had weighed with the legislature for amending Section 19 of the Act and inserting sub-clause (iiia) have been succinctly stated in the following words by a Division Bench of the High Court of Madras in R.Sridharan v. The Presiding Officer, Principal Family Court, Chennai & Ors., reported as **2010 SCC Online Mad 3807** :

> ***"12.*** *The Hindu Marriage Act, as it originally stood besides its coverage to the whole of India, also applied to all Hindus domiciled in India. The Act was subsequently amended and it was given an extended application. Accordingly "domicile in India" was substituted by a new clause "domiciled in the territories to which this Act extends".* ***This amendment was made with a specific purpose to extent the provisions of the Act to all Hindus with such domicile, even though for the time being, they are outside the said territories. Because of this amendment, it was not open to a person governed by Hindu Law to contest the matter on the sole ground that he is residing outside India and as such the Act has no application to him.***
>
> ***13.*** *Section 19 of the Hindu Marriage Act deals with jurisdiction and procedures. Before the amendment made to Section 19 as per Act 50 of 2003, the provision was as under:*
>
> *"19. Court to which Petition shall be presented.— Every Petition under this Act shall be presented to the District Court within the local limits of whose ordinary original Civil jurisdiction—*
>
> *(i) the marriage was solemnized, or*
>
> *(ii) the Respondent, at the time of presentation of the Petition, resides, or*
>
> *(iii) the parties to the marriage last resided together, or*

[(iii-a) in case the wife is the Petitioner, where she is residing on the date of presentation of the Petition, or]

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

14. *It was found that the provision regarding jurisdiction caused serious prejudice to the cause of women. It was not possible for a women to initiate proceedings before the Court in whose jurisdiction she was residing. Because of this rigid provision, women were compelled to approach the Courts in whose jurisdiction the marriage was solemnized or the husband resides or the parties to the marriage last resided together. They have to approach Courts in distant places to resolve their matrimonial disputes. Courts were flooded with transfer petitions to transfer those proceedings on various grounds so as to enable the wife to contest the proceedings before the nearest Court without any kind of difficulties.* ***The jurisdiction clause as it stood originally, was really unfair to the women. Accordingly it was decided to amend Section 19 for the purpose of incorporating a provision to enable the wife to file a Petition before the District Court in whose jurisdiction she is actually residing. This provision was inserted by Act 50 of 2003 with effect from 23 December, 2003. Therefore the wife is now entitled to file a Matrimonial Petition before the District Court in whose territorial jurisdiction she is residing.***

15. The provision regarding jurisdiction as per sub-clause(iv) of Section 19 permits initiation of Matrimonial proceedings before the Court in whose local jurisdiction the Petitioner is residing at the time of presentation of the petition, in a case where the Respondent is, at that time, residing outside the territories to which the Hindu Marriage Act extends. Therefore the fact that the other party to the proceeding is residing outside the territory to which the Hindu Marriage Act extents does not disentitle the Petitioner wife from applying before the local

designated Court to redress her grievances".(emphasis supplied)

25. In Mandeep Kaur v. Dharam Lingam, reported as **2016 SCC Online P&H 10594**, while dealing with a case where the husband was a citizen of Canada who had raised the issue of jurisdiction in a petition for divorce filed by the wife in Ludhiana, Punjab, a Division Bench of the High Court of Punjab and Haryana had observed as under:

> *"**12.** In the case in hand, the respondent was stated to be citizen of Canada. On notice of the petition, he had appeared before learned trial Court but without filing written reply to the petition and raising any objection/pleading relating to his status as domicile of India or jurisdiction of the Court, had walked out of the proceedings. In the absence of pleading on his part, it cannot be assumed that he was not a Hindu domiciled in India by origin and residing outside the territory of India. Issue No. (i) is answered accordingly.*
>
> ***14.** Section 19 of the Act deals with jurisdiction and procedure, which reads as under:*
>
> *"**19. Court to which petition shall be presented**. -Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction-*
>
> *(i) the marriage was solemnised, or*
> *(ii) the respondent, at the time of the presentation of the petition, resides, or*
> *(iii) the parties to the marriage last resided together, or*
> *(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition, or*
> *(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of*

> *seven years or more by those persons who would naturally have heard of him if he were alive."*
>
> ***15. Sub-clause (iii-a) was inserted by Act 50 of 2003. As it was found that the provision regarding jurisdiction caused serious prejudice to the cause of women and the jurisdiction clause as it stood originally, was unfair to the women, necessary amendment was made in Section 19 of the Act for the purpose of incorporating a provision to enable the wife to file a petition before the District Court in whose jurisdiction she is actually residing. Accordingly, the wife is now entitled to file a matrimonial petition before the District Court in whose territorial jurisdiction she is residing."*** (emphasis supplied)

26. A reading of the judgment in Sondur Gopal (supra), would show that the argument advanced by the appellant/husband therein that the domicile of the respondent/wife would automatically follow the domicile of the husband, had not been decided in his favour by the Supreme Court. Nor can the observations made in para 27 of the said judgment and relied upon by the appellant/husband herein come to his aid. Para 34 of the said judgment makes it clear that for proving domicile, it has to be established that there is a manifest intention of the party of abandoning the domicile of origin. For ready reference, the observations made by the Supreme Court in para 34 of Sondur Gopal (supra), is extracted as under:-

> *"**34.** Domiciles are of three kinds viz. domicile of origin, the domicile by operation of law and the domicile of choice. In the present case, we are concerned only with the domicile of origin and domicile of choice. Domicile of origin is not necessarily the place of birth. The birth of a child at a place during temporary absence of the parents from their domicile will not make the place of birth as the domicile of the child.* ***In domicile of choice one is abandoned and another domicile is acquired but for that,***

> ***the acquisition of another domicile is not sufficient. Domicile of origin prevails until not only another domicile is acquired but it must manifest intention of abandoning the domicile of origin****."*
>
> ***35.*** *The right to change the domicile of birth is available to any person not legally dependent and such a person can acquire domicile of choice. It is done by residing in the country of choice with intention of continuing to reside there indefinitely. Unless proved, there is presumption against the change of domicile. Therefore, the person who alleges it has to prove that. Intention is always lodged in the mind, which can be inferred from any act, event or circumstance in the life of such person. Residence, for a long period, is an evidence of such an intention so also the change of nationality.* (emphasis supplied)

27. The captioned judgment refers to Section 1(2) of the Act and states that the said provision applies to Hindus by religion in any form and takes in its fold, sub-sects like Buddhists, Jains, Sikhs and covers all such persons who are domiciled in India, not being Muslims, Christians, Parsis or Jews unless it is proven that they are not governed by the Act. The conclusion drawn was that Section 2 would apply to Hindus domiciled in territories contemplated in Section 1(2) of the Act including those Hindus who are living outside the territories of India.

28. In Kedar Pandey v. Narain Bikram Sah, reported as **AIR 1966 SC 160**, on the aspect of domicile, the Supreme Court held as under:

> *"**10.** The law on the topic is well established but the difficulty is found in its application to varying combination of circumstances in each case. The law attributes to every person at birth a domicil which is called a domicil of origin. This domicil may be changed, and a new domicil, which is called a domicil of choice, acquired; but the two kinds of domicil differ in one respect.* ***The domicil of***

origin is received by operation of law at birth; the domicil of choice is acquired later by the actual removal of an individual to another country accompanied by his animus manendi. *The domicile of origin is determined by the domicile, at the time of the child's birth, of that person upon whom he is legally dependent. A legitimate child born in a wedlock to a living father receives the domicil of the father at the time of the birth; a posthumous legitimate child receives that of the mother at that time.* ***As regards change of domicile, any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely. For this purpose residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material.*** *The state of mind, or animus manendi, which is required demands that the person whose domicile is the object of the inquiry should have formed a fixed and settled purpose of making his principal or sole permanent home….."* (emphasis added)

29. Similarly, in Abdus Samad v. State of West Bengal, reported as (**1973) 1 SCC 451**, the Supreme Court observed as under:

> *"**6.** ….. By domicile is meant a permanent home. Domicile means the place which a person has fixed as a habitation of himself and his family not for a mere special and temporary purpose, but with present intention of making it his permanent home. Domicile of choice is thus the result of a voluntary choice.*
>
> ***7.** Every person must have a domicile. A person cannot have two simultaneous domiciles.* ***Domicile denotes connection with the territorial system of law. The burden of proving a change in domicile is on those***

> ***who allege that a change has occurred**."* (emphasis added)

30. Yet again, on the concept of "*resident*" and "*domicile*", following are the pertinent observations made by the Supreme Court in Union of India v. Dudh Nath Prasad reported as **(2000) 2 SCC 20**:-

> ***"27. .....The classical division of domicile is well known. There are the domicile of origin, the domicile of choice and the domicile of dependence. There has been little change in the essential concept of these three domiciles.....***
>
> ***28. In view of the above, the concept of "domicile" as canvassed by learned counsel for the appellants with reference to change of nationality or change of domicile from one country to another, cannot be imported in the present case. Moreover, "Domicile" and "Residence" are relative concepts and have to be understood in the context in which they are used, having regard to the nature and purpose of the statute in which these words are used."*** (emphasis supplied)

31. To crystallize the law, the aforesaid decisions of the Supreme Court amply demonstrate that the question of domicile of the parties depends on their intention. It is well-settled that strong proof would be required to establish that a person has abandoned the domicile of origin and has acquired a new domicile. Domicile being primarily a mixed question of law and fact, this intention can be determined by the court after the parties get an opportunity to lead evidence. Under Order VII Rule 11, CPC, the court can only scrutinize the contents of the plaint taken as a whole but it cannot consider the evidence, if any, or the pleas taken in the written statement. In Abdus Samad Vs. State of West Bengal reported as **(1973) 1 SCC 451**, it has been categorically held that the burden of proving a

change in domicile is on those who allege that a change has occurred. Since the appellant/husband has asserted that the respondent/wife has changed her domicile, it shall be for him to discharge the said onus by leading evidence. His oral assertion would certainly not suffice.

32. In the present case, the stage of leading evidence has yet to arrive. The question as to whether the respondent/wife is a domicile of India or not, has not been proved. The matter was still at the stage of completion of pleadings, when the application was moved by the appellant/husband for seeking rejection of the divorce petition. The respondent/wife has categorically stated in her petition that she wants to reside in India. To establish as to whether she has abandoned the domicile of origin which is India, evidence will necessarily have to be led. We are therefore of the opinion that after amendment to the Act in the year 2003 and on insertion of sub-clause (iiia) in Section 19, it cannot be said that Family Courts in Delhi are not vested with the jurisdiction to try and entertain the divorce petition filed by the respondent/wife.

33. The contention of the appellant/husband that courts in the State of Illinois have acquired prior jurisdiction premised on the divorce petition filed by him and entertained by the said courts, is also found to be meritless. The facts as they stand today, show that the parties were married in Delhi and the marriage was conducted in accordance with Sikh ceremonies. Once the marriage was solemnized under the Hindu law, the divorce proceedings must also be initiated under the Hindu Marriage Act. The appellant/husband cannot raise an objection to the respondent/wife initiating proceedings of divorce in India under the provisions of the Act only because he is a US citizen and domiciled in USA. [Refer : Y. Narasimah Rao & Ors. Vs. Y. Venkta Lakshmi & Anr. reported as **(1991) 3 SCC 451**].

34. Even assuming for the sake of arguments, that the appellant/husband has abandoned his domicile as asserted by him, the facts as they emerge from a reading of the divorce petition shows that India remains the domicile of choice for the respondent/wife. Unless, it is proven otherwise by leading appropriate evidence, it cannot be stated at this stage that courts in India are divested of the territorial jurisdiction to entertain a petition filed under the Act simply on the say so of the appellant/husband. Once the respondent/wife has averred in clear and unequivocal terms that she has not abandoned the domicile of India, it has to be held that the divorce petition discloses a valid cause of action and cannot be held to be barred under any law.

35. If we accept the contention of the appellant/husband that both the parties must be domiciled in India for a petition to be maintainable in India, it would lead to an absurd and untenable inference that after the marriage, if a wife is abandoned in a foreign land on being deserted by the husband, she will be left with no remedy other than to institute/contest the case in a foreign land where she may have no financial means, wherewithal or support for the same.

36. The marriage between the parties herein having been solemnized under the Hindu Law, can only be dissolved on the grounds set out in Section 13 of the Hindu Marriage Act. Irretrievable break down of marriage is not a ground available under the said provision. It therefore, does not lie in the mouth of the appellant/husband to claim that courts in Illinois, California had acquired prior jurisdiction in the matter merely because he had approached the said courts for seeking divorce against the respondent/wife on grounds that are not even available under the Act. In fact, it will be for the appellant/husband to establish the validity of the decree of divorce granted by the foreign court in his favour on the ground

of irretrievable break down of marriage. [Refer **(1991) 1 SCC 451**, Y. Narasimah Rao & Ors. Vs. Y. Venkta Lakshmi & Anr.].

37. In the instant case, the respondent/wife remains a citizen of India and therefore, is a domicile of India for all intents and purposes. She has chosen to approach the courts in India for obtaining a decree for divorce. Section 19(iiia) read with Section 1 and Section 2 of the Act must be interpreted meaningfully and in such a manner as to confer jurisdiction on courts in India for entertaining a petition under the Act filed by the wife in circumstances where her husband has deserted her to go abroad or invoked the jurisdiction of foreign courts to obtain *ex-parte* orders/decree, leaving her with no efficacious remedy outside the country.

38. It was therefore, too premature a stage for the Family Court to have determined with certainty, the intention of the respondent/wife as to her domicile of choice. That would be a matter of trial and based on the evidence brought on record, the learned Family Court will have to draw an appropriate conclusion. In our opinion, the application filed by the appellant/husband under Order VII Rule 11 CPC for rejection of the divorce petition without taking the matter to trial, has been rightly turned down.

39. To conclude, none of the two grounds invoked for rejection of the divorce petition under Order VII Rule 11 CPC, have been made out by the appellant/husband. The issue as to whether the respondent/wife has abandoned her domicile in India, is a mixed question of law and facts that can be established only in a trial, after evidence is led by the parties. The divorce petition filed by the respondent/wife read as a whole, does disclose a valid cause of action that can be entertained by the learned Family Court in India. Section 19(i), (iiia) and (iv) read with Sections 1 and 2 of the Act confer jurisdiction on courts in India to entertain such a dispute.

40. We, therefore, do not find any infirmity in the impugned judgment. The appeal, therefore, fails and is accordingly, dismissed along with the pending application.

HIMA KOHLI, J.

SUBRAMONIUM PRASAD, J.

OCTOBER 12, 2020
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