

Family and Law

List of the Few Legislations;

- Hindu: Hindu Marriage Act 1955.
- Muslim: Muslim marriage is a contract under Muslim law.
- Christian: Indian Christian Marriage Act 1872 and the Divorce Act 1869.
- Parsi: Parsi Marriage and Divorce Act 1936.
- The Special Marriage Act 1954 applies to all persons of all religions.
- The Guardian and Wards Act 1890, which applies to all communities.
- The Family Court Act 1984
- The Protection of Women from Domestic Violence Act 2005
- Muslim Women (Protection of Rights on Divorce) Act 1989.)
- Hindu Adoptions and Maintenance Act 1956.

Some Relevant Pronouncements;

The Apex Court has acknowledged the concept of domicile as established under English law (*Central Bank of India Ltd v Ram Narain AIR 1955 SC 36*). It held that the two constituent elements that are necessary under English law for the existence of domicile are:

- A residence need not be continuous, but it must be indefinite and not purely fleeting.
- An intention must be a present intention to permanently reside in the country where the residence has been taken up.

An intention of permanent residence proves a change of domicile (*Kedar Pandey v Narain Bikram Sah [1965] 3 SCR 793*). The test for establishing change of domicile is that a person acquires a new domicile when he/she settles in a new country with the intention of making it his/her permanent home and continuing to reside there permanently (*Louis De Raedt v UOI and others (1991) 3 SCC 554*).

The Supreme Court has held that residence, for the purposes of the application of Indian matrimonial statutes, does not mean a temporary residence but a habitual residence or a residence which is also intended to be permanent (*Smt Satya v Teja Singh [1975] 2 SCR 1971*).

In the landmark judgment in *Y Narasimha Rao and others v Y Venkata Lakshmi and others (1991) 3 SCC 451*, it was held that marriages that take place in India can only be dissolved under either the customary or statutory law in force in India, the one under which the parties are married.

The Supreme Court of India has held that even where a foreign court has taken a particular view on any aspect concerning the welfare of a minor, the Indian courts should objectively and independently review the matter. In *Ruchi Majoo vs Sanjeev Majoo (2011) 6 SCC 479*, it was held by the Supreme Court of India that the judgment by a foreign court should only be taken as input for its final adjudication. In this case, the Apex

Court allowed the trial court in India to hear the mother's application for custody of the child.

In *Modi Entertainment Network and Anr V WSG Cricket PTE Ltd (2003) 1SCR 480*, the Supreme Court of India laid down the guidelines which should govern the determination of forum issues. These guidelines provide that:

- The defendant, against whom the injunction is sought, is amenable to the court's personal jurisdiction.
- If the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated.
- The principle of comity (respect for the court in which the commencement or continuance of an action/proceeding is sought to be restrained) must be borne in mind.

In cases of multiple forums, the court considers the appropriate forum to be *forum conveniens*, having regard to the convenience of the parties and can grant an anti-suit injunction in relation to proceedings that are oppressive or vexatious, or in a *forum non conveniens*.

Section 7(1)(d) of the Family Courts Act provides that the family Court has jurisdiction over a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship (*Jasmeet Kaur v Navtej Singh (2018) 251 DLT 233*).

When seeking an anti-suit injunction, an independent case for mandatory injunction can be filed under section 39 of the Specific Relief Act. The applicant must satisfy the conditions set out in section 41.

In *Dinesh Singh Thakur vs Sonal Thakur (2018) 17 SCC 12*, the Supreme Court held that a foreign court cannot be presumed to be incorrectly exercising its jurisdiction even where one party can prove that the parties in the present case continue to be governed by Indian (Hindu) laws in the matter being disputed.

In *Vivek Rai Gupta vs Niyati Gupta, (2018) 17 SCC 21*, a wife sought to execute the final decree of divorce and other reliefs passed by a court in Ohio in the US against any other movable/immovable property in India. The Supreme Court held that it was open to the husband to resist the execution petition on any grounds available to him in law when taking

the position that such a decree is not executable.

These decisions are in line with the landmark 2003 judgment in *Modi Entertainment Network v WSG Cricket Pte Ltd*, (2003) 4 SCC 341, where the Supreme Court held that the courts in India, like courts in England, are courts of law and equity.

The principles laid down by the Supreme Court in *Modi Entertainment Network* have been applied in the following case:

- *Magotteaux Industries Pvt Ltd and others v AIA Engineering Ltd* 2008 SCC OnLine Del 1232/ 155 (2008) DLT 73.

The Supreme Court has held that Indian courts will not recognise a foreign divorce decree if the divorce petition is not based on the substantive and jurisdictional grounds provided for divorce under the Hindu Marriage Act 1955 and one of the nine grounds of divorce which must be satisfied (*Y Narasimha Rao and others v Y Venkata Lakshmi and others* (1991) 3 SCC 451).

The Supreme Court held that a foreign divorce decree will not be recognised by the Indian courts where all of the following apply (*Y Narasimha Rao and others v Y Venkata Lakshmi and others* (1991) 3 SCC 451):

- A party only technically satisfies the requirement of residence in a foreign country with only the purpose of obtaining the divorce.
- That party is neither domiciled in that state nor has an intention to make it their home.
- There is no substantial connection with the forum.

In *Smt Satya v Teja Singh* [1975] 2 SCR 1971, the Supreme Court derecognised the decree of divorce of the foreign country on the ground that one party obtained the divorce decree by fraud on the foreign court by representing incorrect jurisdictional facts. The Apex Court held that the concept of residence does not include temporary residence for the purpose of obtaining a divorce.

The Supreme Court has also held that “the jurisdiction assumed by the

foreign court as well as the grounds on which the relief is granted, must be in accordance with the matrimonial law under which the parties are married.

The Supreme Court in a recent landmark decision by five judges in the case of *Shayara Bano vs Union of India* (2017) 9SCC 1 (with a majority of 3:2) held that the act of divorce by a Muslim man by way of uttering the words *talak* three times is unconstitutional and illegal. It was held that triple talaq “is not integral to religious practice and violates constitutional morality”.

The Supreme Court in the judgment of *Danial Laitifi v Union of India* AIR 2001 SC 3958, held that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife, which obviously includes her maintenance.

There is no set formula for fixing the amount of maintenance. The award of maintenance will therefore depend on the facts and circumstances of each case. The court is required to consider certain specific factors, however, such as the status of the parties, the parties’ respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and to those the husband is to provide (both in relation to payments he is legally obliged to make as well as any involuntary payments or deductions) (*Jasbir Kaur Sehgal v District Judge, Dehradun and others* (1997) 7 SCC 7).

However, the amount fixed cannot be excessive or extortionate (*Jasbir Kaur Sehgal v Dist Judge, Dehradun* (1997) 7 SCC 7).

In the recent case of *Aishwarya Atul Pusalkar v Maharashtra Housing & Area Development Authority and Others* (Civil Appeal No 7231 of 2012), decided on 27 April 2020, the Supreme Court recognised the woman’s right to reside in her matrimonial home and held that such right has a legitimate basis.

Such right is also implicit in section 18 of the Hindu Adoption and Maintenance Act 1956 where such statute is applicable.

The right to residence has also been recognised under the Protection of Women from Domestic Violence Act 2005 and by the Supreme Court in *SR Batra v Taruna Batra* (2007) 3 SCC 169.

In *Shamima Farooqui v Shahid Khan (2015) 5 SCC 705*, the Supreme Court of India held that the husband is under a higher obligation cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

In *Jagdish Jugtawat v Manjulata and others (2002) 5SCC 422*, it was held that a female child has a right to be maintained by her parents even after she attains majority.

In *Amarendra Kumar Paul v Maya Paul and others (2009) 8 SCC 359*, the Supreme Court held that an application for grant of maintenance under section 125 of the CrPC, can be continued up until the child reaches majority. Therefore, once the child attains majority, section 125 would cease to apply.

Dr V Ravi Chandran v Union of India and others (2010) 1 SCC 174 is a groundbreaking case in which the mother and father lived in the US and litigated in the US court, leading to a consent order regarding their child. Subsequently, the mother came to India with the child in violation of the US court order and was untraceable. In this case, the Supreme Court directed the Central Bureau of Investigation (CBI) to find the child as the mother had been fleeing from the course of justice. The Supreme Court of India held that the US court was the only competent court to adjudicate any disputes relating to the child and, if the mother had any grievance, she could seek modification of the consent order in the US court. The Supreme Court explicitly ordered that if the parties did not return to the jurisdiction of the US courts within the stipulated time to settle their disputes regarding child custody, the child would be handed over to the petitioner father. However, the case continued. The mother sought an extension of time to return to the jurisdiction of the US courts for obtaining her visa, but thereafter was untraceable. The Supreme Court again directed the CBI to trace the child. This time after the child was traced, the Supreme Court directed the CBI to hand over the child to the father. The child was recovered by CBI in Chennai and handed over to the father and they returned to the jurisdiction of US courts.

In *Arathi Bandi V Bandi Jagadrakshaka Rao and others (2013) 15 SCC 790*, the Supreme Court followed its ratio in the judgment of *Dr V Ravi Chandran*. In this case, it was held that no relief could be granted to the

parent whose conduct involves removing the child from the foreign country to India in defiance of the orders of the court of competent jurisdiction. The Supreme Court specifically approved the modern theory of conflict of laws, which prefers the jurisdiction of the state which has the most intimate contact with the issues arising in the case.

In *Nithya Anand Raghavan v State of NCT* (2017) 8 SCC 454, the Supreme Court dismissed a petition seeking the child's return to the foreign country.

In *Lahari Sakhamuri v Sobhan Kodali* (2019) 7 SCC 311, the Supreme Court of India reiterated the importance of the best interest and welfare of the child, and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

In India, surrogacy is permitted for lack of legislation on the subject yet.

In the landmark case of *Baby Manji Yamada v Union of India* (2008) 13 SCC 518, the view of the Supreme Court was not only pro-surrogacy, but also extremely pro-contract.

By means of a progressive judgment by the Supreme Court, judicial guidelines were laid down in *Lakshmi Kant Pandey v Union of India* (UOI) 1985 Supp SCC 701, under which foreign persons could become guardians of Indian children and adopt them in accordance with the laws of their home country.

In *Craig Allen Coates v State and another* 2010 (8) SCC 794 it was held that for inter-country adoptions the procedure followed could include a reference to an expert committee on the lines constituted in the present case, to ensure that inter-country adoptions are allowed only after full and proper satisfaction is recorded by all the agencies (including a committee of experts wherever reference to such a committee is considered necessary).

While the Juvenile Justice Act 1986 dealt with the care and protection of juveniles, it did not deal with adoption.

The Supreme Court of India held in *Savitaben Somabhai Bhatiya v State of Gujarat and others* (2005) 3 SCC 636 that a relationship “in the nature of marriage” is akin to a common law marriage.

In *D Velusamy v D Patchaiammal* (2010) 10 SCC 469, the Supreme Court observed that a “relationship in the nature of marriage” is akin to a common law marriage.

The Supreme Court in *Indra Sarma v VKV Sarma* AIR 2014 SC 309 set out some guidelines for testing under what circumstances, a live-in relationship will fall within the expression “relationship in the nature of marriage” under section 2(f) of the Domestic Violence Act.

In *Navtej Singh Johar v Union of India* (2018) 10 SCC 1, the Supreme Court decriminalised section 377 of the Indian Penal Code. It was held that section 377 insofar as it criminalises voluntary sexual relations between lesbian/gay/bisexual/transsexual (LGBT) persons of the same sex in private, discriminates against them on the basis of their sexual orientation. This is a violation of their fundamental rights guaranteed by Articles 14, 19, and 21 of the Constitution.

In the recent judgment of the Supreme Court in *Santhini v Vijaya Venketesh* (2017) 4 SCC 150, it was held that in view of the scheme of Family Courts Act 1984 and in particular section 11, the hearing of matrimonial disputes may have to be conducted in camera.