

PGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE**

Writ Petition No.1242 of 2010

Ms.Kashmira Kale Petitioner
 v/s.
Mr.Kishorekumar Mohan Kale Respondent

Ms.Kokila Kalra with Mr.Abhijit Sarawate for Petitioner.

Mr.Sanjiv A. Sawant for Respondent.

CORAM : SMT.ROSHAN DALVI, J.

Date of reserving the order : 24th February, 2010

Date of pronouncing the order : 4th March, 2010

ORDER :

1.Rule, returnable forthwith.

2.This Writ Petition challenges the order of the learned Judge, Family Court No.4, Pune, dated 14.9.2009 holding that the Court has jurisdiction to try the Petition for divorce filed by the Respondent-husband herein, upon the finding that the parties matrimonial home was at Aundh, Pune, where the parties last resided together whilst they lived in India. It is the contention of the Petitioner-wife that parties are domiciled in the United States of America (the U.S.) and not in India and hence are outside the applicability of the Hindu

Marriage Act, 1956 itself.

3. Section 1(2) of the Hindu Marriage Act applies only to Hindus domiciled in the territories to which the Act applies and the Act applies to the whole of India except the State of Jammu and Kashmir.
4. It is also the wife's case that the matrimonial home of the husband has been in the U.S. and hence the Pune Family Court could have no territorial jurisdiction to try the Petition.
5. It is further the wife's case that in a Divorce Petition filed by her in the Court of Oakland, State of Michigan, U.S., a judgment of divorce has already been passed on 13th January 2009 and which is conclusive between the parties with regard to the matter directly adjudicated upon therein.

6. The applicability of the Act must be first considered from admitted facts. The parties lived in the U.S.A. prior to their marriage. The wife took education in Texas, U.S. since August 2003. The husband was employed in Onward Technologies Limited Pune, and was sent on further assignment in the U.S. in February 2000. Thereafter he joined Quantum Consultants Inc. /

Quantech Global Services in November 2001 to further his career opportunities. That Company merged with Wipro Technologies in June 2006. The husband served as an employee of Wipro Technologies in US working onsite with Nissan Technical Center of America (NTCNA), Farmington Hills, Michigan, U.S.A.

7. The parties married on 25th December 2005. At the time of their marriage, they both were residing in the US. They, of course, married in Mumbai according to Hindu rites. The husband left for the US on 14th January 2006 within a month of the marriage. The wife joined him on 22nd January 2006 also within a month of the marriage. Thereafter they resided in the US until the wife came to her parents home in Mumbai on 9th December 2006. When her husband came to India the wife joined him at Pune, but immediately left the Pune residence and stayed with her parents in Mumbai. The husband left for the US on 15th January 2007 and the wife in February 2007. They lived together in the US until December 2007. The wife came to India in the first week of December 2007 and the husband came in the last week of December 2007. Admittedly, for a single night the wife lived with the husband in the husband's parents / brother's house in Pune. The husband again left for America to attend his official duty on 17th January 2008. The wife joined the husband on 27th

February 2008 in the U.S. and lived with him in the U.S. until September 2008.

8. The husband has been issued a Green Card. He is, therefore, required to live at-least 180 days in each year in the US. The wife has been issued the Employment Authorisation Document (EAD). She is permitted to work in the U.S.
9. The wife filed the divorce proceedings in the US in September 2008. The summons was served upon the husband on 27th September 2008. He returned to India and then replied to the Petition on 13th October 2008. He also filed his own Divorce Petition in the Pune Family Court under Section 13(1)(i)(a) of the Hindu Marriage Act on 24th October 2008 claiming the jurisdiction of the Court at Pune, on the ground that the Pune residence was their matrimonial home and they ordinarily resided there.
10. The parties resided in the US since prior to their marriage. The husband was sent initially by the Company in which he served in Pune, India. He left that Company and joined another Company in the US to further career opportunities. He is, therefore, not on deputation in the US from his employment in India; he has his own independent personal employment

in the US chosen by himself. He has been serving in such employment since November 2001 i.e. 4 years prior to his marriage. The wife, who was first a student, is now allowed to be employed in the US and is concurrently employed.

11.The domicile of the parties would require to be seen based upon the aforesaid facts.

12.**Black s Law Dictionary, 8th Edition at page 523** defines domicile thus :

domicile. The place at which a person has been physically present and that the person regards as home; a person s true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.

13.**Black s Law Dictionary, 8th Edition at page 524** defines domicile of choice thus :

domicile of choice. A domicile established by physical presence within a state or territory, coupled with the intention to make it home.

14.It further defines matrimonial domicile thus:-

A domicile that a husband and wife, as a married couple, have established as their home.

15.Domicile is defined in **Advanced Law Lexicon, 3rd Edition Vol.2** as :

The place where one has permanent residence to which, if absent, he has the intention of returning.

A person is domiciled in that country in which he either has or is deemed by law to have his permanent home.

The place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.

It has been described as a permanent home by Lord Cranworth in the case of **Whicker v. Hume, (1858) 7 HLC 124 at 160**, the definition which has deceptive simplicity .

16. It is further explained :

That place is properly the domicile of a person in which he has voluntarily fixed his abode not for a mere special or temporary purpose but with a present intention of making it his permanent home.

Domicile of choice is that which the individual has elected and chosen for himself to displace the domicile previously obtained.

Domicile by operation of law as the domicile of a wife following that of the husband is brought about by reason of marriage.

Domicile connotes the place in which a man has voluntarily fixed the habitation of himself and his family, not for a special or temporary purpose, but with the intention of making a permanent home until some unexpected event shall occur to induce him to adopt some other permanent home.

Every person at birth acquires a domicile of origin. A person may change his domicile by choice. The domicile of origin is retained until one of choice is acquired by a combination of residence and intention. Two things are in fact essential to constitute a domicile of choice in a new country, viz., residence in that country

without any animus revertendi to the country of origin and the intention of making a permanent home in a new country. Domicile of choice is, in fact, a mixed question of intention and fact. (AIR 1933 Rang 193) .

17. It is easy to see that both the parties have had the intention of making the US their permanent home even prior to their marriage. Since their parents reside in India, they came to India to be married as per Hindu rites. They immediately left India after the marriage. They did that twice thereafter once in each succeeding year. Even on the last return to India, they lived together at not the husband's house, but his parents' / brother's house in Pune for a single night. Both the parties left for the US thereafter and remained in the US until the husband returned after the wife filed her Divorce Petition and he was served the summons, only to file his own Petition in India. The parties are domiciled in the US and not in India.

18. To show that the husband was domiciled in India, the husband has produced xerox copies of certain documents as follows:-

(i) Xerox copy of his ration card which was issued on 14.11.2001 prior to his marriage which showed the

earlier ration card issued on 28.11.2000. This was before or at the time he left for the US on deputation of the Company in which he then served. Thereafter he took up a fresh new independent employment in the US and remained there since.

(ii) Xerox copy of his driving licence on 30.10.1999, which was obtained prior to his initial departure to the US.

(iii) Voter s card issued on 8.1.1995 even prior to the above documents.

(iv) Passport which was initially issued on 5.8.1999 prior to his initial departure to the US which has been extended until 2019.

None of these documents shows his intention to reside in India permanently; his Green Card shows his intention to reside in the US.

19. Consequently, it is seen that since the parties were domiciled in the US, the Hindu Marriage Act cannot apply to them.

20. The jurisdiction of the Court under Section 19 of

the Hindu Marriage Act would be where the marriage was solemnised where the Respondent, at the time of the presentation of the Petition resided or where the parties to the marriage last resided together. The aforesaid chronology shows that the parties to the marriage last resided together in the US, after the husband left for the US on 17th January 2008 and the wife joined him on 27th February 2008 until September 2008. In fact, it is the case of the husband in his Petition that the parties resided for a single night stay in his parents house at Pune before he left for his official duties on 17th January 2008. It is also his case in his Petition that his wife left for the US on 27th February 2008 and joined the Petitioner (husband) .

21. Consequently, it is seen that the parties last resided together in the Michigan, US and, therefore, that Court has territorial jurisdiction to decide their divorce dispute.

22. The wife's application for divorce in the US was filed on 25th September 2008. The husband was served the notice / summons on 27th September 2008. The husband was to appear and answer the wife's claim in the Court at Oakland, Michigan, US on 26th October

2008, before which he came to India and filed his own Petition on 24th October 2008. The husband filed his answer to the complaint for divorce in the Court at Oakland, Michigan, US on 3rd October 2008. He filed a detailed Written Statement challenging the jurisdiction of the Court as well as the case of the wife on merits on 13rd October 2008. Thereafter he filed his own Divorce Petition No.1020 of 2008 in the Family Court on 24th October 2008. The husband failed to attend the Court to challenge the jurisdiction or to otherwise defend the wife's Divorce Petition in Oakland Michigan, US on the date of hearing.

23.A judgment of divorce came to be passed on 13th January 2009. The judgment considered the break down of the marriage and the various properties which were to be divided between the husband and the wife. It held that neither party was entitled to spousal support. It extinguished the rights of either party in any Insurance Policy. It ordered that each party would have his or her own separate property clear from the other and extinguished all the rights of either party in the properties of the other. The wife has been awarded all the properties in her name and her Bank Accounts and all personal properties in her possession as also a sum of US \$ 42119.75 as her share of the funds the husband transferred from the parties joint account totalling

to USD 87,000/-. The judgment also awarded the husband various movable properties, including his car, television, etc. as well as the balance in the joint account of the parties except for US\$ 42119.76. It granted costs of US\$ 2,000/- to the wife.

24.It is seen that the judgment has been passed on merits of the claim of the wife. It has been passed after due service of the summons upon the husband. The husband has accepted the service of the summons and filed his Written Statement. He thereafter did not appear but instead came to India and filed his own Petition within a week of filing his Written Statement in the US.

25.The husband claims that the judgment of the Court of Oakland, Michigan, US, is not conclusive as to the matter adjudicated upon between him and his wife because it was an ex-parte judgment and hence excluded under Section 13 of the Civil Procedure Code (CPC). Section 13 of the CPC runs thus :

13. When foreign judgment not conclusive. - A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom

they or any of them claim litigating under the same title except-

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in India.

It can be seen seen that the judgment is given on the merits of the case since it has granted the properties equitably to both the husband and the wife and extinguished

liability as against one another as also the spousal support. Since the husband did not appear to contest the claim as shown in his Written Statement, his opposition to the jurisdiction of the Court could not be considered. It is, therefore, not a judgment which refuses to recognise the law of India in cases which the law is applicable. Upon seeing the admitted facts in paragraphs 1, 3, 4 and 5 of the Petition and the reply of paragraph 6 in the Written Statement of the husband, it could be discerned that the parties being resident in the USA that Court would have jurisdiction. Besides, it could be seen from the Defendant-husband's Written Statement that the parties resided together until one week before he filed the Written Statement. That would be until the end of September 2008. The jurisdiction of that Court was, therefore, seen not only from the wife's Petition but also from the husband's Written Statement, since their home was in Michigan, US, where they last resided together until the Petition was filed and until one week prior to the filing of the Written Statement.

26. The judgment is, therefore, not ex-parte as claimed by the husband; it is given on the merits of the case.

27. The term ex-parte has been defined in **Black's Law Dictionary, 8th Edition at page 616** thus :

Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other.

28.It is further explained in **Advanced Law Lexicon 3rd Edition Vol.2 at page 1680** thus:

Ex parte. (Lat.) From, of, or by one side, or one party; hence partial, done for or by one party; On the application of one party.

From one side.

(On behalf of), a proceeding by one party in the absence of other. (*Wharton*).

29.It can, therefore, be seen that if an order is obtained by a party without notice to the other side, it would be an ex-parte order or judgment. If a notice is given and a detailed reply is filed on merits, it is for the parties to appear before Court, whether or not the party submits to the jurisdiction of the Court. It is only upon such appearance that the husband can challenge the jurisdiction of the Court which he has sought to do in writing. If he fails to that and

allows an order to be passed, it cannot be an ex-parte order. In any case, it cannot be an order without seeing the merits of the case. The order itself read with the pleadings of the parties would reflect consideration of merits. The judgment for divorce dated 13th June 2009 is, therefore, conclusive between the parties.

30. The aforesaid admitted chronology and the aforesaid admitted acts of the parties show :

(a) that the parties were domiciled in the USA; the Hindu Marriage Act did not apply.

(b) The parties last resided together in Oakland Michigan, US. The Court in Oakland, Michigan, US had territorial jurisdiction to try their divorce dispute. The parties resided for but one night in Pune after which the parties left for the U.S.A. to reside together for several more months until they finally parted. Hence the Pune Court was not the Court in the jurisdiction of which the parties last resided together.

(c) The judgment of divorce passed by the Court of Oakland Michigan, US, as a foreign judgment, is

conclusive as to the rights between the parties, it having been decided on merits after the Written Statement of the husband was filed and after which he absented himself and resorted to a second parallel proceeding.

31.The order of the learned Judge of the Family Court, Pune, concluding that the parties last resided together in Pune and even though their residence is for a single day it would give the Court jurisdiction based upon the judgments cited in the impugned order suffers from a material irregularity and is required to be interfered with, since it assumes territorial jurisdiction not vested in it and since the Act itself does not apply to the parties consequent upon their domicile in the US and also because the rights between the parties have been settled by a judgment conclusive between them. The husband may be entitled to challenge the judgment in the Court in which it is pronounced following the due legal process required in that jurisdiction consequent upon his absence, if need be. However, the husband cannot confer jurisdiction on the Court in Pune in which the parties never resided together for any length of time in their own matrimonial home, they having had their matrimonial home in the US.

32.Consequently, the order of the learned Judge, Family

Court No.4, Pune, dated 14.9.2009 is set aside. Accordingly, the Writ Petition is allowed. Rule is made absolute.

33. There shall be no order as to costs.

This order is stayed for 6 weeks.

(SMT.ROSHAN DALVI, J.)