SUPREME COURT OF INDIA

Sondur Gopal

Vs.

Sondur Rajini

C.A.No.4629 of 2005

(Chandramauli Kr.Prasad and V.Gopala Gowda JJ.)

15.07.2013

JUDGMENT

CHANDRAMAULI KR. PRASAD, J.

1. Appellant-husband, aggrieved by the judgment and order dated 11th of April, 2005 passed by the Division Bench of the Bombay High Court in Family Court Appeal No. 11 of 2005 reversing the judgment and order dated 1st of January, 2005 passed by the Family Court, Mumbai at Bandra in Interim Application No. 235 of 2004 in Petition No. A-531 of 2004, is before us with the leave of the Court.

2. Shorn of unnecessary details, facts giving rise to the present appeal are that the marriage between the appellant-husband and the respondent-wife took place on 25th of June, 1989 according to the Hindu rites at Bangalore. It was registered under the provision of the Hindu Marriage Act also. After the marriage the husband left for Sweden in the first week of July, 1989 followed by the wife in November, 1989. They were blessed with two children namely, Natasha and Smyan. Natasha was born on 19th of September, 1993 in Sweden. She is a down syndrome child. The couple purchased a house in Stockholm, Sweden in December, 1993. Thereafter, the couple applied for Swedish citizenship which was granted to them in 1997. In June, 1997, the couple moved to Mumbai as, according to the wife, the employer of the husband was setting up his business in India. The couple along with child Natasha lived in India between June, 1997 and mid 1999. In mid 1999, the husband's employer offered him a job in Sydney, Australia which he accepted and accordingly moved to Sydney, Australia. The couple and the child Natasha went to Sydney on sponsorship visa which allowed them to stay in Australia for a period of 4 years. While they were in Australia, in the year 2000,

the husband disposed of the house which they purchased in Stockholm, Sweden. The second child, Smyan was born on 9th February, 2001 at Sydney. The husband lost his job on 7th July, 2001 and since he no longer had any sponsorship, he had to leave Australia in the second week of January, 2002. The couple and the children shifted to Stockholm and lived in a leased accommodation till October, 2002 during which period the husband had no job. On 2nd of October, 2002, the husband got another job at Sydney and to join the assignment he went there on 18th of December, 2002. But before that on 14th of December, 2002, the wife along with children left for Mumbai. Later, on 31st of January, 2003, the wife and the children went to Australia to join the appellant- husband. However, the wife and the children came back to India on 17th of December, 2003 on a tourist visa whereas the husband stayed back in Sydney. According to the husband, in January, 2004 he was informed by his wife that she did not wish to return to Sydney at all and, according to him, he came back to India and tried to persuade his wife to accompany him back to Sydney. According to the husband, he did not succeed and ultimately the wife filed petition before the Family Court, Bandra inter alia praying for a decree of judicial separation under Section 10 of the Hindu Marriage Act and for custody of the minor children Natasha and Smyan.

3. After being served with the notice, the husband appeared before the Family Court and filed an interim application questioning the maintainability of the petition itself. According to the husband, they were original citizens of India but have "acquired citizenship of Sweden in the year 1996-1999 and as citizens of Sweden domiciled in Australia". According to the husband, the wife along with the children "arrived in India on 17th of December, 2003 on a non-extendable tourist visa for a period of six months and they had confirmed air tickets to return to Sydney on 27th of January, 2004" and therefore, "the parties have no domicile in India and, hence, the parties would not be governed by the Hindu Marriage Act". According to the husband, "the parties by accepting the citizenship of Sweden shall be deemed to have given up their domicile of origin, that is, India" and acquired a domicile of choice by the combination of residence and intention of permanent or indefinite residence. The husband has also averred that the domicile of the wife shall be that of the husband and since they have abandoned their domicile of origin and acquired a domicile of choice outside the territories of India, the provisions of the Hindu Marriage Act shall not apply to them. Consequently, the petition by the wife for judicial separation under Section 10 of the Hindu Marriage Act and custody of the children is not maintainable. According to the husband, he did not have any intention to "give up the domicile of choice namely the Australian domicile nor have the parties acquired a third domicile of choice or resumed the domicile of origin" and, therefore, provisions of the Hindu Marriage Act would not

be applicable to them. In sum and substance, the plea of the husband is that they are citizens of Sweden presently domiciled in Australia which is their domicile of choice and having abandoned the domicile of origin i.e. India, the jurisdiction of the Family Court, Mumbai is barred by the provisions of Section 1(2) of the Hindu Marriage Act.

4. As against this, the case set up by the wife is that their domicile of origin is India and that was never given up or abandoned though they acquired the citizenship of Sweden and then moved to Australia. According to the wife, even if it is assumed that the husband had acquired domicile in Sweden, she never changed her domicile and continued to be domiciled in India. The wife has set up another alternative plea. According to her, even if it is assumed that she also had acquired domicile of Sweden, that was abandoned by both of them when they shifted to Australia and, therefore, their domicile of origin, that is, India got revived. In short, the case of the wife is that both she and her husband are domiciled in India and, therefore, the Family Court in Mumbai has jurisdiction to entertain the petition filed by her seeking a decree for judicial separation and custody of the children.

5. The husband in support of his case filed affidavit of evidence and he has also been cross-examined by the wife. According to the husband "even before the marriage he visited Stockholm, Sweden in Spring, 1985" and "immediately taken in by the extraordinary beauty of the place and warmth and friendliness of the people". According to the husband, the first thought which occurred to him was that "Stockholm is the place where" he "wanted to live and die". According to his evidence, at the time of marriage in 1989, he was a domicile of Sweden. From this the husband perhaps wants to convey that he abandoned the domicile of his birth, that is, India and acquired Sweden as the domicile of choice. He went on to say that "keeping in mind wife's express desire to be in English speaking country" he "accepted the offer to move to Sydney, Australia". His specific evidence is that "parties herein are Swedish citizens, domiciled in Australia", hence, according to the husband, "only the courts in Australia will have the jurisdiction to entertain the petition of this nature". The husband has further claimed that "on 5th of April, 2004, the day wife had filed the petition" he "had acquired domicile status of Sydney, Australia". As regards domicile status on the date of cross-examination, that is, 17.11.2004, he insisted to be the domicile of Australia. It is an admitted position that the day on which husband claimed to be the domicile of Australia, that is, 05.04.2004, he was not citizen of that country or had ever its citizen but had 457 visa which, according to his own evidence "is a long term business permit and it is not a domicile document".

6. The family court, after taking into consideration the facts and circumstances of the case, allowed the application filed by the husband and held the petition to be not maintainable. While doing so, the family court observed that "it cannot be held" that "the husband has never given up his domicile of origin, i.e., India." However, in appeal, the High Court by the impugned order has set aside the order of the family court and held the petition filed by the wife to be maintainable. While doing so, the High Court held that "the husband has miserably failed to establish that he ever abandoned Indian domicile and/or intended to acquire domicile of his choice". Even assuming that the husband had abandoned his domicile of origin and acquired domicile of Sweden along with citizenship, according to the High Court, he abandoned the domicile of Sweden when he shifted to Australia and in this way the domicile of India got revived. Relevant portion of the judgment of the High Court in this regard reads as follows:

> "15.4………It is against this factual matrix, we are satisfied that the respondent has miserably failed to establish that he ever abandon Indian domicile and/or intended to acquire domicile of his choice.
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> 16. Even if it is assumed that the respondent had abandoned his domicile of origin and acquired domicile of Sweden alongwith citizenship in 1997, on his own showing the respondent abandoned the domicile of Sweden when he shifted to Sydney, Australia. Therefore, keeping the case made out by the respondent in view and our findings in so far as acquisition of Australian domicile is concerned, it is clear that the domicile of India got revived immediately on his abandoning Swedish domicile……"

7. It is against this order that the husband is before us with the leave of the court.

8. We have heard Mr. V.Giri, learned Senior Counsel for the appellant and Mr. Y.H. Muchhala and Mr.Huzefa Ahmadi, learned Senior Counsel on behalf of respondent. Mr. Giri draws our attention to Section 1 of the Hindu Marriage Act (hereinafter to be referred to as 'the Act') and submits that the Act would apply only to Hindu domiciled in India. He submits that the parties having ceased to be the domicile of India, they shall not be governed by the Act. Mr. Muchhala joins issue and contends that the benefit of the Act can be availed of by Hindus in India irrespective of their domicile. He submits that there is no direct precedent of this Court on this issue but points out that a large number of decisions of different High Courts support his contention. In this connection, he draws our attention to a judgment of Calcutta High Court in Prem Singh v. Sm.Dulari Bai & Anr. AIR 1973 Cal. 425, relevant portion whereof reads as follows:

"On a fair reading of the above provisions, it seems clear from the first section that the Act is in operation in the whole of India except in 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. This section read with Section 2(1)(a)(b) makes it equally clear that as regards the intra-territorial operation of the Act it applies to all Hindus, Buddhists, Jains or Sikhs irrespective of the question whether they are domiciled in India or not."

9. Reference has also been made to decision of Gujarat High Court in Nitaben v. Dhirendra Chandrakant Shukla & Anr. I (1984) D.M.C.252 and our attention has been drawn to the following:

"Apparently looking, this argument of Mr.

Nanavati is attractive. But it would not be forgotten that section 1 of the Act refers to the extension of the Act to the whole of India except the State of Jammu and Kashmir and also to the territories to which the Act is applicable, and further to all those persons who are domiciles of those territories but who are outside the said territories."

10. Yet another decision to which reference has been made is the judgment of the Rajasthan High Court in Varindra Singh & Anr. v. State of Rajasthan RLW 2005(3) Raj. 1791. Paragraphs 13 and 17 which are relevant read as follows:

"13. Clause (a) of Sub-section (1) of Section 2 of the Act of 1955 makes the Act of 1955 applicable to all persons who are Hindu by religion irrespective of the fact where they reside.

xxx xxx xxx

17. Therefore, Section 2 of the Act of 1955 is very wide enough to cover all persons who are Hindu by religion irrespective of the fact where they are residing and whether they are domiciled in Indian territories or not"

11. Lastly, learned Senior Counsel has placed reliance on a judgment of the Kerala High Court in Vinaya Nair & Anr. v. Corporation of Kochi AIR 2006 Ker. 275 and our attention has been drawn to the following passage from Paragraph 6 of the judgment which reads as follows:

> "A conjoint reading of Ss. 1 and 2 of the Act would indicate that so far as the second limb of S. 1(2) of the Act is concerned its intra territorial operation of the Act applied to those who reside outside the territories. First limb of sub-section (2) of S. 1 and Cls. (a) and (b) of S.2(1) would make it clear that the Act would apply to Hindus reside in India whether they reside outside the territories or not."

12. Rival submission necessitates examination of extent and applicability of the Act. Section 1(2) of the Act provides for extent of the Act. The same reads as follows:

> "1. Short title and extent.-
>
> (1) xxx xxx xx
>
> (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."

13. From a plain reading of Section 1(2) of the Act, it is evident that it has extra-territorial operation. The general principle underlying the sovereignty of States is that laws made by one State cannot have operation in another State. A law which has extra territorial operation cannot directly be enforced in another State but such a law is not invalid and saved by Article 245 (2) of the Constitution of India. Article 245(2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. But this does not mean that law having extra-territorial operation can be enacted which has no nexus at all with India. In our opinion, unless such contingency exists, the Parliament shall be incompetent to make a law having extra-territorial operation. Reference in this connection can be made to a decision of this Court inM/s.Electronics Corporation of India Ltd. v. Commissioner of Income Tax & Anr. 1989 Supp (2) SCC 642 in which it has been held as follows:

> "9.But the question is whether a nexus with something in India is necessary. It seems to us that unless such nexus exists Parliament will have no competence to make the law. It will be noted that Article 245(1) empowers Parliament to enact law for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to sub-serve the object, and that

object must be related to something in India. It is inconceivable that a law should be made by Parliament in India which has no relationship with anything in India.“

14. Bearing in mind the principle aforesaid, when we consider Section 1(2) of the Act, it is evident that the Act extends to the Hindus of whole of India except the State of Jammu and Kashmir and also applies to Hindus domiciled in India who are outside the said territory. In short, the Act, in our opinion, will apply to Hindus domiciled in India even if they reside outside India. If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra-territorial operation has no nexus with India. In our opinion, this extra-territorial operation of law is saved not because of nexus with Hindus but Hindus domiciled in India.

15. At this stage, it shall be useful to refer to the observation made by the High Court in the impugned order which is quoted hereunder.

> "It is, thus, clear that a condition of a domicile in India, as contemplated in Section 1(2) of H.M.Act, is necessary ingredient to maintain a petition seeking reliefs under the H.M.Act. In other words, a wife, who is domiciled and residing in India when she presents a petition, seeking reliefs under H.M.Act, her petition would be maintainable in the territories of India and in the Court within the local limits of whose ordinary civil jurisdiction she resides."

16. Now, we revert to the various decisions of the High Courts relied on by the Senior Counsel for the respondent-wife; the first in sequence is the decision of Calcutta High Court in the case of Prem Singh (supra). In this case, the husband submitted an application for restitution of conjugal rights inter alia pleading that he had married his wife according to Hindu rites in India. After the marriage, they continued to live as husband and wife and a daughter was born. The grievance of the husband was that the wife had failed to return to the matrimonial home which made him to file an application for restitution of conjugal rights. The trial court noticed that the husband was a Nepali and he was not a domicile in India and therefore, he could not have invoked the provisions of the Act. While interpreting Sections 1(1) and 2(1) of the Act, the Court held that as regards the intra-territorial operation of the Act, it is clear that it applies to Hindus, Buddhists, Jaina and Sikhs irrespective of the question as to whether they are domiciled in India or not. Having given our most anxious consideration, we are unable to endorse the view of the Calcutta High Court in such a wide term. If this view is accepted, a Hindu

living anywhere in the world, can invoke the jurisdiction of the Courts in India in regard to the matters covered under the Act. To say that it applies to Hindus irrespective of their domicile extends the extra-territorial operation of the Act all over the world without any nexus which interpretation if approved, would make such provision invalid. Further, this will render the words "domiciled" in Section 1(2) of the Act redundant. Legislature ordinarily does not waste its words is an accepted principle of interpretation. Any other interpretation would render the word 'domicile' redundant. We do not find any compelling reason to charter this course. Therefore, in our opinion, the decision of the Calcutta High Court taking a view that the provisions of the Act would apply to a Hindu whether domiciled in the territory of India or not does not lay down the law correctly. One may concede to the applicability of the Act if one of the parties is Hindu of Indian domicile and the other party a Hindu volunteering to be governed by the Act.

17. As regards the passage from the judgment of the Gujarat High Court in Nitaben (Supra) relied on by the wife, it does not lay down that the Act applies to all Hindus, whether they are domiciled in India or not. In fact, the High Court has held that it extends to all those persons who are domiciles of India, excluding Jammu and Kashmir.

18. So far as the decision of the Rajasthan High Court in Varindra Singh (supra) is concerned, it is true that under Section 1(2) of the Act, residence in India is not necessary and Section 2 also does not talk about requirement of domicile for its application. This is what precisely has been said by the Rajasthan High Court in this judgment but, in our opinion, what the learned Judge failed to notice is that the application of the Act shall come into picture only when the Act extends to that area. Hence, in our opinion, the Rajasthan High Court's judgment does not lay down the law correctly. For the same reason, in our opinion the judgment of the Kerala High Court is erroneous.

Section 2(1) provides for the application of the Act. The same reads as follows:

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. This section contemplates application of the Act to Hindu by religion in any of its forms or Hindu within the extended meaning i.e. Buddhist, Jaina or Sikh and, in fact, applies to all such persons domiciled in the country who are not Muslims, Christians, Parsi or Jew, unless it is proved that such persons are not governed by the Act under any custom or usage. Therefore, we are of the opinion that Section 2 will apply to Hindus when the Act extends to that area in terms of Section 1 of the Act. Therefore, in our considered opinion, the Act will apply to Hindu outside the territory of India only if such a Hindu is domiciled in the territory of India.

20. There is not much dispute that the wife at the time of presentation of the petition was resident of India. In order to defeat the petition on the ground of maintainability, Mr. Giri submits that the wife will follow the domicile of the husband and when Sweden has become the domicile of choice, the domicile of origin i.e. India has come to an end. According to the husband, the parties had India as the domicile of origin, but in 1987 the husband moved to Sweden with an intention to reside there permanently and acquired the Swedish domicile as his domicile of choice. After the marriage, the wife also moved to Sweden to reside permanently there and both of them acquired Swedish citizenship in 1996-97 thereby giving up their domicile of origin and embracing Sweden as their domicile of choice. Further, on account of express desire of the wife to move to an English speaking country, the family moved to Australia in June, 1999 with an intention to reside there permanently and initiated the process to acquire the permanent resident status in Australia. On these facts, the husband intends to contend that they have acquired Swedish domicile as domicile of choice. Mr. Muchhala, however, submits that the specific case of the husband is that he is a Swedish citizen domiciled in Australia and, therefore, the appellant cannot be allowed to contend that he is domiciled in Sweden. He points out that the husband is making this attempt knowing very well that his claim of being the domicile of Australia is not worthy of acceptance and in that contingency to contend that the earlier domicile of choice, i.e. Sweden has revived.

21. We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Muchhala. In certain contingency, law permits

raising of alternative plea but the facts of the present case does not permit the husband to take this course. It is specific case of the appellant that he is a Swedish citizen domiciled in Australia and it is the Australian courts which shall have jurisdiction in the matter. In order to succeed, the appellant has to establish that he is a domicile of Australia and, in our opinion, he cannot be allowed to make out a third case that in case it is not proved that he is a domicile of Australia, his earlier domicile of choice, that is Sweden, is revived. In this connection, we deem it expedient to reproduce the averment made by him in this regard:

> "22……..In the instant case, it is submitted that in the year 1996 the applicant acquired citizenship as well as domicile of Sweden and is presently domiciled in Australia. Thus, the Hindu Marriage Act is not applicable to the parties herein and the Family Court Mumbai has no jurisdiction to proceed in the matter and the petition is not maintainable under Section 10 of the Hindu Marriage Act, 1955."
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> The appellant has further averred that the parties never acquired a third domicile of choice, the same reads as follows:
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> "19…..In the instant case, there is no intention to give up the domicile of choice namely the Australia domicile and nor have the parties acquired a third domicile of choice or resume the domicile of origin………"
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> Further, the husband in his evidence has stated that at the time of marriage in 1989, he was a domicile of Sweden, but it is not his case that he shall be governed by the Swedish law or Swedish courts will have jurisdiction. His specific evidence in this regard reads as follows:
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> "7……as the parties herein are Swedish citizens, domiciled in Australia, and hence it is only the Courts in Australia that have the jurisdiction to entertain a petition of this nature……."

22. From the aforesaid, it is evident that the appellant does not claim to be the domicile of Sweden but claims to be the domicile of Australia and, therefore, the only question which requires our consideration is as to whether Australia is the husband's domicile of choice.

23. Domicile 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. In order to establish that Australia is their domicile of choice, the husband has relied on their residential tenancy agreement dated 25.01.2003 for period of 18 months; enrollment of Natasha in Warrawee Public School in April,2003; commencement of proceedings for grant of permanent resident status in Australia during October-November, 2003; and submission of application by the husband and wife on 11.11.2003 for getting their permanent resident status in Australia.

24. The right to change the domicile of birth is available to any person not legally dependant 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.

25. In the aforesaid background, when we consider the husband's claim of being domicile of Australia we find no material to endorse this plea. The residential tenancy agreement is only for 18 months which cannot be termed for a long period. Admittedly, the husband or for that matter, the wife and the children have not acquired the Australian citizenship. In the absence thereof, it is difficult to accept that they intended to reside permanently in Australia. The claim that the husband desired to permanently reside in Australia, in the face of the material available, can only be termed as a dream. It does not establish his intention to reside there permanently. Husband has admitted that his visa was nothing but a "long term permit" and "not a domicile document". Not only this, there is no whisper at all as to how and in what manner the husband had abandoned the domicile of origin. In the face of it, we find it difficult to accept the case of the husband that he is domiciled in Australia and he shall continue to be the domicile of origin i.e. India. In view of our answer that the husband is a domicile of India, the question that the wife shall follow the domicile of husband is rendered academic. For all these reasons, we are of the opinion that both the husband and wife are domicile of India and, hence, shall be covered by the provisions of the Hindu Marriage Act, 1955. As on fact, we have found that both the husband and wife are domicile of India,

and the Act will apply to them, other contentions raised on behalf of the parties, are rendered academic and we refrain ourselves to answer those.

26. In the result, we do not find any merit in the appeal and it is dismissed accordingly but without any order as to costs.

CIVIL APPEAL NO.487 OF 2007

In view of our decision in Civil Appeal No. 4629 of 2005 (Sondur Gopal vs. Sondur Rajini) holding that the petition filed by the appellant for judicial separation and custody of the children is maintainable, we are of the opinion that the writ petition filed by the respondent for somewhat similar relief is rendered infructuous. On this ground alone, we allow this appeal and dismiss the writ petition filed by the respondent.