IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT
&
THE HONOURABLE MRS. JUSTICE M.C.HARI RANI

FRIDAY, THE 5TH JUNE 2009 / 15TH JYAISHTA 1931

Mat.Appeal.No. 364 of 2007()

AGAINST THE ORDER DATED 21/05/2007 IN ORDER IN OP.691/2004 of FAMILY COURT,THRISSUR

.....

APPELLANT/RESPONDENT IN THE FAMILY COURT:

JAMES K.AVARAN, S/O.KUNJUVAREED,
DOMICILED IN POSTFACH, 4013 BASEL, SWITZERLAND,
NOW REMAINING AT REST HOUSE, IRINJALAKUDA BY POWER
OF ATTORNEY HOLDER A.K.JOSE, AVARAN,
S/O.KUNJUVAREED, NOW RESIDING AT MAR THEMOTHEUS ELDERS
HOSTEL, MAR THEMOTHEUS HOSPITAL COMPOUND, THRISSUR

BY ADV. SRI.M.RAMESH CHANDER

RESPONDENT: PETITIONER IN THE FAMILY COURT

JANCY RITAMMA GEORGE @ JANCY AVARAH,
ALIAS FRAU JANCY AVARAN PANACKAPARAMBIL ALIAS
J.AVARAN, D/O.THOMAS P.GEORGE, PANACKAPARAMBIL
HOUSE, PERMANENTLY RESIDING AT ST.JOHANN SRING
143, 4056, BASEL, SWITZERLAND.

ADV. DR.SEBASTIAN CHAMPAPPILLY
SMT.ANNIE GEORGE

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 05/06/2009, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.1438/08 IN MA.NO.364/07

//DISMISSED//

5.6.09 SD/- R.BASANT, JUDGE.
SD/- SD/-M.C.HARI RANI, JUDGE.

C.R.

R.BASANT & M.C. HARI RANI,JJ

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MAT.A. NO. 364 OF 2007

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DATED THIS THE 5TH DAY OF JUNE 2009

JUDGMENT

Basant,J.

What constitutes domicile under Section 2 of the Indian Divorce Act? Who is to plead and prove that domicile of birth/origin has been abandoned and a fresh domicile of choice has been acquired by the spouses? Does long residence in an alien country where one is employed with prospects of continued residence for a further long period in connection with such employment lead to a ready inference of change of domicile? Should both spouses (and not either) be domiciled in India for the Family court to assume jurisdiction in a Divorce application? Is the expression of intention of one spouse in the course of proceeding to acquire domicile by choice in an alien country sufficient to divest Indian courts of their jurisdiction in matrimonial proceedings for divorce under Section 2 of the

Indian Divorce Act? These interesting questions are thrown up for consideration in this appeal.

2**.** This appeal under Section 19 of the Family Courts Act is directed against an order passed under Section 10 of the Indian Divorce Act dissolving the marriage between the appellant/husband and the respondent/wife on the ground of cruelty.

3. Marriage is admitted. Separate residence is also admitted. Allegations of mental and physical cruelty are raised by the wife. It is alleged that the husband has been tormenting the wife perpetually raising allegations of unchaste and adulterous conduct. It is further alleged that physical cruelty was also inflicted on the wife by the husband while they were residing together raising such allegations.

4. The matrimonial discord has a long history behind it. Sans unnecessary details, crucial skeletal facts can be narrated thus:

5. The marriage took place on 26-11-1989. The marriage

was solemnized in accordance with the Christian religious rites at Thrissur District in Kerala. The wife was employed as a Nurse in the Indian Army at that time. The wife went to Switzerland on 5-9-1990. The brother of the husband was employed and living there at that time. Long later, the husband who was a lawyer practising in Kerala also left for Switzerland and joined the wife on 13-11-1993. Matrimonial discord developed and admittedly separate residence commenced on 17-8-2002. There were certain proceedings initiated before the courts at the place where the spouses reside – in Switzerland. The wife contends that the court had granted police protection for her peaceful separate residence whereas the husband claims that such police protection was granted in his favour. Be that as it may, there is no dispute that the parties are residing separately from 17-8-2002 and that a court in Switzerland has afforded police assistance for them to reside separately. The wife has permanent employment as a Nurse there whereas the husband does not appear to have any such permanent employment. He lives on social security which is

available for persons residing in Switzerland. In the proceedings before the Switzerland Court, maintenance/support has been ordered to be paid by the wife to him. There is, of course, the assertion and evidence that he is employed for some newspapers in Kerala as their local correspondent in Switzerland.

6. The wife claimed divorce under Section 10 of the Indian Divorce Act on the ground of cruelty. As stated earlier, she alleged that the husband has been guilty of mental cruelty he having incessantly raised false allegations of unchaste and adulterous behaviour. He had also assaulted her physically and verbally. These acts of his amounted to matrimonial cruelty, it was alleged. The claim for divorce was made on the plank of these allegations of matrimonial cruelty.

7. The husband entered appearance and resisted the claim for divorce. It would appear that the husband is not in principle against the dissolution of the marriage. He denies the allegations of cruelty but asserts unambiguously that the wife has been

guilty of adultery and unchaste behaviour as also licentious conduct even before and after the marriage. Specific allegations to that effect are raised in the objections filed. However, the husband asserted that he was also interested in getting the matrimonial tie dissolved. But according to him not the courts in India but the Courts in Switzerland alone have jurisdiction to entertain such plea for divorce. He also wants divorce, which is not in dispute. According to him, the parties were not domiciled in India at the time of presentation of the application for divorce and consequently courts in India have no jurisdiction to entertain the claim for divorce. According to him, the wife had approached the courts in Switzerland for a decree for separation, and having approached the courts in Switzerland for a decree for separation, her subsequent conduct of rushing to India and filing an application for divorce was not justified. It is calculated to avoid the fiscal liability for payment of support to the dependent husband which under the law in Switzerland, the claimant wife would be exposed to. Preliminary objection was

raised against maintainability of the petition for divorce before Indian Courts.

8. The husband denied the allegations of physical and mental cruelty but asserted unambiguously that the wife was guilty of adulterous and unchaste behaviour after marriage. He raised allegations of licentious behaviour and conduct on the part of the wife prior to marriage also.

9. We cut a long story short. We are not referring to the acrimonious proceedings between the parties after the filing of the application for divorce. Before the court below, the claimant wife examined herself as PW1 and her father as PW2. The respondent-husband examined himself as RW1. Exts.A1 to A31 were marked on the side of the claimant-wife whereas Exts.B1 to B16 were marked on the side of the respondent-husband. We note that Ext.B series are not marked properly by the Family Court. Registry shall ensure that this inadequacy is rectified immediately by the Family Court.

10. The learned Judge of the Family Court on an anxious

consideration of all the relevant material came to the conclusion that it cannot be said that the parties were not domiciled in India on the date of presentation of the application. The contention of the husband that the parties were domiciled in Switzerland was not accepted by the Family Court. The Family Court did not proceed to consider in detail the allegations of physical cruelty, but came to the conclusion that the allegations of mental cruelty and torture by the husband by raising unsubstantiated allegations of adulterous, unchaste and licentious conduct are sufficient by themselves to justify the plea for divorce on the ground of mental matrimonial cruelty. Accordingly, the Family court proceeded to pass the impugned order.

11. Before us, the learned counsel for the appellant-husband and respondent-wife have advanced detailed arguments. The learned counsel for the appellant assails the impugned order on the following three specific grounds:

(1) The court below erred grossly in coming to the conclusion that the parties were domiciled in India at the time

when the petition was presented.

(2)The learned Judge of the Family Court did not advert properly to the allegations of matrimonial cruelty and the finding that cruelty to justify dissolution of marriage is proved is not acceptable.

(3)The impugned order is bad for the reason that no counselling has been attempted by the Family Court before permitting the parties to lead evidence.

12. **Ground No.1.** Counsel points out that under Section 2 of the Indian Divorce Act, a decree for dissolution of marriage cannot be passed "except where the parties to the marriage are domiciled in India at the time when the petition is presented". We extract Section 2 of the Act for the purpose of easy reference.

> "Section2: **Extent of Act**.-This Act extends to the whole of India except the State of Jammu and Kashmir.
>
> **Extent of power to grant relief generally.**- Nothing hereinafter contained shall authorise any

Court to grant any relief under this Act, except where the petitioner [or respondent] professes the Christian religion.

and to make decrees of dissolution.- or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented.

or of nullity.-or to make decrees of nullity of marriage except where the marriage has been solemnized in India, and the petitioner is resident in India at the time of presenting the petition

or to grant any relief under this Act other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.

(emphasis supplied)

13. The learned counsel for the petitioner points out that no

relief whatsoever can be granted except where either the petitioner or the respondent professes the Christian religion. No decree for nullity can be granted unless the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition. But so far as the decrees for dissolution are concerned,a different stipulation is made that such petition for dissolution can be filed only when the parties to the marriage are domiciled in India at the time of presenting the petition.

14. The learned counsel contends that this stipulation is made in the interest of the parties and to enable them to adduce proper evidence before the courts. Unless parties are domiciled in India, it would be difficult for the parties to adduce evidence about the ground for dissolution of marriage. If they are domiciled elsewhere, it would be hazardous to insist that they must adduce evidence before the court at a place where they are not residing. This is the reason why the requirement of domicile is insisted, contends the learned counsel.

15. We are unable to agree. The insistence is not that the parties must be residents in India when the petition is presented or at the time where the grounds for dissolution arose. The insistence is only on domicile of the parties. The concept of domicile is distinct and different from residence.

16. That takes us to the larger question as to what is domicile to attract jurisdiction under Section 2 of the Indian Divorce Act.

17. The relevant precedents have been brought to our attention. There is no litmus test to decide the question of domicile, when rival contestants conveniently assert contra. After having perused all the relevant precedents and decisions which have been placed before us, it appears to be easy to state generally that "residence with the intention of permanent or indefinite residence constitutes domicile". The principle generally so stated may not help the court to find out with felicity and ease as to what is the domicile of either of the contestants.

18. The concept of residence, permanent residence,

nationality, citizenship and domicile are definitely over lapping concepts. These will have to be approached carefully in a matter like this where the very jurisdiction of this court is challenged on the ground of domicile.

19. Before proceeding to advert to the question in detail it will only be apposite to note that every person must have a domicile of birth/origin. It is usually easier to ascertain the domicile of birth/origin as there could be little scope for dispute on that concept of domicile of birth/origin. That makes our task easy as both sides unambiguously concede that their domicile of birth/origin is India and no other country at all. For generations from the known past the parties are Indians, domiciled in India following the laws of India**.** It is one of the accepted principles relating to the law of domicile that the burden rests squarely and heavily on the shoulders of the party who asserts and pleads that he as well as his spouse have abandoned the domicile of birth/origin and have embraced another domicile of choice. The burden must, in these circumstances, heavily rest on the

appellant-husband to show that the domicile of origin in India has been abandoned and the domicile of choice has been acquired by both spouses at Switzerland.

20. We shall straight away deal with the contention that there is no specific assertion of the domicile of the parties in the petition for divorce filed by the wife. A reading of the petition clearly shows (and that crucial circumstance is not denied or disputed) that the domicile of birth/origin of both parties is India. In these circumstances, it must certainly be held that if the appellant-husband has a case that the admitted domicile of birth/origin has subsequently been abandoned and a domicile of choice has been acquired, the burden is on him to plead, prove and establish that fact. The alleged inadequacy of pleadings does not impress us at all as sufficient circumstances indicating the undisputed domicile of birth/origin are clearly averred in the petition**.** Reliance on Order VII, Rule 1(f) of the Code of Civil procedure and the decision in **Murphy v. Murphy, A.I.R.1929 Lahore 419** cannot be of any help to the appellant in this

context. We repeat that the domicile of birth/origin is clearly brought out in the pleadings. That is admitted also. An insistence on specific pleadings of domicile as held in the Full Bench decision of the Lahore High Court (supra) is definitely not there in the relevant rules and precedents applicable to Kerala. In these circumstances we are satisfied that the maintainability cannot be disputed on the ground of want of sufficient averments regarding domicile in the petition.

21. The starting point of the discussion must be the undisputed domicile of birth/origin. Is there any pleadings, evidence or circumstances to suggest that the domicile of birth/origin has been abandoned and a domicile of choice has been acquired by the parties to justify the contention that they were both domiciled in Switzerland and not in India on the date of presentation of the petition? As held by the supreme court in **Sankaran Govindan v. Lakshmi Bharathi, AIR 1974 S.C.1764** no single circumstance can be held to be conclusive. No litmus paper or touch stone is available to the Court to answer

that question. All the relevant circumstances have to be taken into consideration to come to a conclusion as to what is the domicile of the parties. The Supreme Court through Justice K.K.Mathew spoke thus in **Sankaran Govindan's** case(supra).

> *"Domicile is a mixed question of law and fact and there is perhaps no chapter in the law that has from such extensive discussion received less satisfactory settlement. This is no doubt attributable to the nature of the subject, including as it does, inquiry into the animus of persons who have either died without leaving any clear record of their intentions, but allowing them to be collected by inference from acts often equivocal, or who, being alive and interested, have a natural tendency to give their bygone feelings a tone and colour suggested by their present inclinations. The traditional statement that, to establish domicile, there must be a present intention of permanent residence merely means that so far as the mind of the person at the relevant time was concerned, he possessed the requisite intention. The relevant time varies with the nature of the inquiry. It may be past or present. If the*

inquiry relates to the domicile of the deceased person, it must be ascertained whether at some period in his life he had formed and retained a fixed and settled intention of residence in a given country. One has to consider the tastes, habits, conduct, actions, ambitions, health, hopes and projects of a person because they are all considered to be keys to his intention to make a permanent home in a place. It is impossible to lay down any positive rule with respect to the evidence necessary to prove intention. All that can be said is that every conceivable event and incident in a man's life is a relevant and an admissible indication of his state of mind. It may be necessary to examine the history of his life with the most scrupulous care, and to resort even to hearsay evidence where the question concerns the domicile that a person now deceased, possessed in his life-time. Nothing must be overlooked that might possibly show the place which he regarded as his permanent home at the relevant time. No fact is too trifling to merit consideration. Nothing can be neglected which can possibly indicate the bent of a

person's mind. His aspirations, whims, prejudices and financial expectation, all must be taken into account. Undue stress cannot be laid upon any single fact, however impressive it may appear when viewed out of its context, for its importance as a determining factor may well be minimised when considered in the light of other qualifying event. It is for this reason that it is impossible to formulate a rule specifying the weight to be given to particular evidence."

22. It is in this context that we first noted that the admitted domicile of origin/birth of both parties is India. It is true that the wife had shifted to Switzerland on 5-9-1990 and the husband had followed her to that country on 13-11-1993. Admittedly, she has been employed as a Nurse there and the employment does appear to be lucrative going by the undisputed evidence. For the past about two decades, the wife has been there. She had worked and studied there. She had acquired better qualification there. She had secured a lucrative employment there. Her

husband had followed her to Switzerland. But in these days where employment opportunities abroad are many, the mere taking up employment in a country outside India cannot certainly be assumed lightly to lead to the conclusion that such employment seeker has lost his claim for permanent residence in India or that such person has abandoned the domicile of origin/birth. Lack of employment opportunities in India and the availability of greener pastures abroad may prompt many an Indian to take up employment outside the country. In connection with such employment, he will be compelled to remain abroad. Many may be nostalgic and may entertain the desire to return to India as quickly as possible, but the lure of lucrative employment and the want of equivalent or comparable opportunities at home may compel such person to postpone the date of his return. He may opt to continue to live there and be employed there until law and circumstances in which he is placed permit him to continue such employment. But according to us, it would be puerile, premature and myopic from such circumstance of

continued residence in connection with ones employment alone to assume that he has given up his claim for permanent residence in India much less that he has abandoned the domicile of birth/origin and has opted for a different domicile of choice. Strong and clinching evidence must be placed before court to prove abandonment of the domicile of origin/birth.

23. The wife as PW1 asserted that she has no intention to permanently settle down at Switzerland or abandon her domicile of birth in India. We have no reason not to take her seriously. Several other circumstances are also pressed into service by the respondent-claimant to assert that her domicile of birth/origin in India continues and has not been abandoned notwithstanding the fact of her long residence in Switzerland and probability of her continued residence in Switzerland for such further period that she can be employed there.

24. Nationality and domicile may be subtly different. Citizenship and domicile may also not be synonymous. But in a situation like this no court can ignore the fact that the

respondent as well as the appellant herein are both holders of Indian passports. They continue to reside in Switzerland on the basis of visas issued to them. They have not so far acquired citizenship in Switzerland. There is an interesting claim of half citizenship but except to show that work permit has been issued to the claimant wife entitling her to work in Switzerland, there is nothing to indicate that she has abandoned Indian citizenship, nationality or domicile. Where a person has acquired citizenship of another country that may be a compelling indication of abandonment of domicile of birth and acquisition of a domicile of choice. By the same reasoning, continuance of Indian citizenship and holding of the Indian passport must be held to be indicative of the desire of the parties to cling on to the domicile of birth/origin in India. The evidence shows that her parents are living in India. Evidence confirms that she has been visiting her parents as frequently as possible. Evidence reveals that her name even now continues to be held in the ration card issued to her parents. She claims and her father,PW2 asserts that

ancestral property is available and the father intends to set apart the property for her eventual return and residence in India. It is interesting, though that is not the specific case of the claimant-wife, that the husband asserts that the claimant-wife had purchased properties in India in the name of her father. No one has a case and at any rate such a case has not been substantiated that the wife has acquired any landed property or real estate in Switzerland. She was born here; she was educated here; she took up employment here; she proceeded to Switzerland to take up an employment, that employment opportunity is still available; she continues there; she intends to continue until such opportunity for employment is available; she asserts that she wants to return to India; she has properties here and there is nothing to show that she has severed her connection with her home land**.** We have no hesitation in these circumstances to hold that the available indications do not suggest that she has so far abandoned her domicile of birth/origin in India and has accepted any domicile of choice in

Switzerland. The wife cannot by any stretch of imagination be held to have lost her claim for domicile in India.

25. As against this, the learned counsel for the appellant contends that the wife has initiated proceedings before the courts in Switzerland and has made crucial and vital admissions in such proceedings about her present domicile. We are unable to secure authentic material about the nature of the proceedings initiated or the nature of the specific pleadings raised.

26. From the materials available what is gatherable safely is that the wife had alleged improper behaviour on the part of her husband and had claimed separation and police protection to secure her interest. Though there is a contention that such a relief would not have been available unless the wife had admitted domicile in Switzerland, no authentic material is placed before us to come to such a conclusion. At any rate, nothing has been brought to our notice to show that she had specifically asserted before any authority in Switzerland that she has abandoned her domicile of origin/birth and has opted for her domicile in

Switzerland. Counsel points out that a statement has been filed by her lawyer on her behalf in which the lawyer had made statements which, according to the counsel for the appellant, amounts to an unambiguous admission of her domicile at Switzerland. We extract the same which is available in Ext.B5. It reads as follows:

> "She has a permanent job, is very well integrated here in Switzerland and she has absolutely no intention to leave this country."

We shall assume for the sake of arguments that this is part of her judicial pleadings though Ext.B5 shows that it is only a note made by her counsel. But we are unable to find any crucial admission on the question of domicile from the statement extracted above. That a person has a permanent job or is residing in Switzerland in connection with that job is not synonymous with domicile. That a person has well integrated in Switzerland which is a claim made by the lawyer in the submissions made by him cannot also amount to any crucial admission about the abandonment of the

domicile of birth and the acquisition of a domicile of choice. The statement that she has absolutely no intention to leave the country cannot also be reckoned as any admission about the domicile. She has a permanent job and the statement that she has no intention to leave the country cannot be assumed or reckoned as an admission to continue indefinite or permanent residence in that country or to abandon and give up the domicile of birth/origin. That statement made by the lawyer in the submissions before court cannot in these circumstances be construed as any vital admission on the question of domicile as to offset or displace the circumstances referred above.

27. That she has sought relief from the Swiss courts to save herself from her husband while both were residing in Switzerland at the relevant time cannot also be held to amount to any abandonment of the domicile of birth. She was residing there. She needed assistance from the local authorities to enable her to live in peace and pursue her employment. For this, she sought separation and police assistance for peaceful residence.

Indian Courts could not have granted her that relief. We are unable to agree that, that conduct of hers – of approaching the Swiss court to secure peaceful residence in Switzerland can be reckoned as indication of an intention to give up her domicile of birth and acquire a new domicile of choice.

28. We now come to the case of the husband. His parents are no more. He has a brother here in India. The father had properties. We have no clue as to what has happened to those properties, though the husband asserts that he has no properties in India. He has a permanent address in India and that appears to be indisputable in the light of the sequence of events that has taken place. In the vakalath filed by him, his address, (we assume that to be his permanent address) shown is that at his ancestral home at Irinjalakuda. He also does not have any properties acquired in Switzerland. Nay, he cannot even claim that he has any permanent, durable or reasonable employment in Switzerland as it is his very contention that under law he will be able to claim support from his wife consequent to his inferior

financial status and position of dependence on his wife**.** He also continues to be an Indian national having Indian citizenship. He holds an Indian Passport and lives in Switzerland on the basis of visa secured by him as an Indian national. He asserts that he has given up his domicile of birth and has acquired the domicile of his choice in Switzerland. There is nothing to show to the satisfaction of the Court, such abandonment of the domicile of origin and acquisition of a new domicile of choice.

29. It is true that he has asserted in the pleadings in this case that he is not domiciled in India. Too much significance and importance cannot be attached to such assertions made by him after the initiation of proceedings. He is engaged in a desparate bid to contend that the courts in India have no jurisdiction and the Courts in Switzerland alone have jurisdiction. Even his conduct of having filed an application for divorce before the court in Switzerland after admitted commencement of the instant proceedings before the Family Court (and after his knowledge of such proceedings) knocks the bottom out of his

claim for significance for his own assertion in the course of the proceedings about abandonment of domicile of birth and acquisition of domicile of his choice. That assertion made by him is obviously with an intention to frustrate the claim filed by the claimant/wife for divorce before the Indian courts and to drive her to Switzerland Courts where the appellant/husband expects to secure a better decree for support/maintenance as per the personal laws applicable to citizens/persons of domicile of that country. We are in these circumstances of the opinion that the appellant has not succeeded in showing that even he has lost or given up his domicile of birth and has acquired the domicile of choice on the date of presentation of the petition as to non-suit the claimant/wife in this proceedings.

30. The learned counsel for the respondent/wife contends that even if it be found that the domicile of the husband is not in India it would be hazardous to hold that the wife domiciled in India cannot seek relief from the Indian Courts. The counsel contends that the expression 'parties to the marriage' in Section

2 of the Indian Divorce Act should not be read in any pedantic or hyper technical manner. To advance the interests of justice the expression, 'parties to the marriage' in Section 2 must be read and understood to mean "either party to the marriage", contends counsel. Counsel argues that High Court of Madras has already taken a view in this matter and this Court may be pleased to adopt a similar approach to that question.

31. That question does not really arise for consideration in the light of the conclusion that we have reached already that both spouses continue to be domiciled in India notwithstanding their residence abroad for a long period of time and their probable future residence there until the opportunity for continuing the present employment there ceases. But, we make it clear that if we were to choose to take a view on the question, we would have definitely concurred with the decision of the Madras High Court dated 17-11-2008 in W.P.No.12816 of 1995 (**Indira Rachel v. Union of India and another**) and the views expressed there in paragraph 5 which we extract below.

"*5. Though the provisions of the Act can be interpreted in a literal manner, to conclude that both parties must be domiciled in India at the time of presentation of the petition, in our considered view, to effectuate the present intention of the Act, which had come into force in the year 1869, possibly, when such contingencies were not in contemplation, a purposive interpretation can be given to make it reasonable and more consistent with the principles enshrined in the Constitution. If the aforesaid provision is construed to mean that a petition would be maintainable if at the time of presentation of the petition either party is domiciled in India, the difficulty projected by the petitioner would not arise and on the other hand, object can be achieved. Therefore, according to us, such provision should be interpreted to mean that the Courts in India shall be entitled to entertain petition for dissolution of marriage where either of the parties to the marriage is domiciled in India at the time when the petition is presented and such provision need not be construed as if both the parties must be domiciled in India at the time of*

presentation of the petition. In our considered view, such an interpretation would bring it in consonance with the philosophy of the Constitution. Moreover, we feel to suggest that in order to avoid any further controversy in the matter in different parts of the Country, the Ministry of Law, the fist respondent, may consider the question of making suitable amendment to the provisions in so far as Section 2 of the Act is concerned in the light of other provisions, if any, containing similar laws relating to Divorce.

32. Counsel for the respondent/wife has placed before us materials to show that suggestion of the High Court of Madras in paragraph 5 of that decision is being pursued by the Law Commission to avoid unnecessary hardship and difficulty, if any court were to take a technical and literal view of the expression - "parties" to the marriage. Singular expressions in a statute can take in the plural and vice versa, it is trite. The expression "the marriage" in the third part of Section 2 must be held to refer to the marriages sought to be dissolved and the "parties to

the marriage" must include the petitioning party to the marriage. Wives residing and domiciled in India and who have not ever moved out of India cannot be forced to undertake hazardous trips to alien lands merely for securing divorce from their husbands, who mischievously assert that they have taken up domicile of choice in such alien lands. That injustice was certainly not intended while enacting Section. The stipulation in Section 2 of the Indian Divorce Act a pre-constitutional law intended to ensure justice for the wife in England – to ensure that she is not dragged to the Indian court to contest a plea for divorce must receive a reasonable interpretation in the post constitutional era. The text, in the new context,must receive an interpretation with emphasis on the Indian spouses and not on the spouses left behind in their home nation by alien soldiers or personnel who had come to India for service in the bygone imperial era. The expression "parties to the marriage"must hence be held to refer only to the parties (including the singular party) to the marriage sought to be dissolved. 'marriage' there

refers only generally to the marriages sought to be dissolved and not the marriage between the spouses to the given marriage. One of the parties to the marriage domiciled in India can hence seek divorce under Section 2 of the Indian Divorce Act. We concur with the Madras High Court on the need to adopt a liberal interpretation.

33. We do in these circumstances uphold the finding of the court below that the court has jurisdiction to consider the claim of divorce as both parties to the marriage were domiciled in India at the relevant time; i.e; on the date of presentation of the petition.

Ground No.2

34. We now come to ground No.2. It is perhaps crystal clear that both parties do not want to continue the marital tie. The respondent has filed a petition here claiming divorce whereas the appellant also has subsequently filed a petition for divorce before the Switzerland Courts. That the marriage continues in its shell only and not in its substance is transparently evident

from the totality of circumstances.

35. It is in this context that the plea of the wife that physical and mental cruelty was inflicted on her has to be considered. We shall deal with the question of physical cruelty first though the Family Court does not appear to have considered that question in great detail. Wife had made specific allegations of infliction of physical cruelty consequent to allegations of unchaste and adulterous behaviour. Her evidence on that aspect remains virtually unchallenged. Specific contra assertions or denials of such allegations are not decipherable in the evidence tendered by the husband. If a prudent mind were to choose between the rival contentions on the basis of the evidence available, the conclusion appears to be inevitable that the alleged physical cruelty must also be held to be clearly proved. It would be puerile for any court to expect specific ocular corroboration for the matrimonial physical cruelty. More often, than not, that question has to be decided by evaluating the rival evidence tendered by the spouses. To corroborate the evidence

of the wife, we have the admitted circumstance that the husband persists and goes on making allegations of adultery, matrimonial infidelity as also licentious behaviour prior and subsequent to the marriage on the part of the wife. We have also the circumstance that the wife had been compelled and driven to courts in Switzerland to seek separation and police protection to save herself from the matrimonial cruelty allegedly heaped on her by her husband. On the evidence available, the alleged physical cruelty must also be held to be satisfactorily established.

36. On the aspect of matrimonial mental cruelty, according to us, there is ample evidence for a conclusion beyond doubt . The wife alleged that the husband was making reckless allegations of pre-marital licentious behaviour and post marital adulterous and unchaste behaviour. We find no reason not to accept her evidence on that aspect. We have convincing support for such evidence of hers from the objections filed by the husband before the Family Court. He continues to make assertions of such licentious behaviour pre-marital and post-

marital on the part of the wife and significantly, it is not even attempted to substantiate those allegations before court. Except his vague evidence, there is absolutely nothing even to indicate, suggest or probabilise such allegations of improper marital conduct and behaviour on the part of the wife.

37. It is trite and it is unnecessary to go to precedents on that aspect that unsubstantiated allegations of unchaste and adulterous behaviour by a husband against the wife in the Indian context do amount to matrimonial cruelty. The learned counsel for the appellant contends that even the wife states that she was prepared to condone such allegations raised by him and she had invited him to join her in Switzerland after he allegedly made the allegations initially. Therefore, such alleged act of cruelty has been condoned by her, contends the learned counsel for the appellant. We find absolutely no merit in this theory of condonation of matrimonial cruelty. We will assume that she had once condoned such alleged earlier indiscretion. But what has come out in evidence is that after such alleged condonation

also, the husband goes on making reckless allegations. The alleged prior condonation of such past indiscretion cannot in any way be assumed to cover all prospective allegations of such unchaste behaviour.

38. Going by the version of the husband he was aware of the alleged improper behaviour, pre-marital and post-marital. He had chosen in spite of all that to continue to live with her. If he persists and continues to make such allegations afresh after they decide to live together ignoring such allegations, that must certainly be held to amount to fresh acts of matrimonial cruelty. In that view of the matter also the plea that the wife has condoned all such matrimonial mental cruelty cannot be sustained at all.

39. The learned counsel for the respondent submits that the doctrine of revival applies and even assuming that the wife has chosen to condone such reckless allegations made earlier, the repetition of such allegations after the alleged event of condonation must give rise to a revived cause of action. We

agree with the learned counsel for the respondent.

40. We are in these circumstances unable to find any error, discrepancy or fault in the finding of the court below that sufficient cruelty has been established to justify a prayer for dissolution of marriage under section 10 of the Indian Divorce Act. The challenge on the second ground must also fail.

Ground No.3

41. It is pointed out that no attempt to conciliate was undertaken by the Family Court. Indications galore to show that it was the husband who did not co-operate. Even ignoring that, the fact remains that the parties went to trial with the full awareness that attempt at conciliation had not allegedly taken place. They did not object to the trial progressing. Even otherwise the mere fact that attempt for conciliation or sufficient attempt for conciliation had not taken place cannot in law be held to be a sufficient or valid reason to invalidate the verdict of the Family Court in such a contested proceedings. The challenge on

the third ground must also hence fall to the ground. No other contention is urged.

42. In the result, this appeal is dismissed. No costs.

R. BASANT, JUDGE

M.C. HARI RANI, JUDGE

ks.