GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

Amendment of Section 2 of Divorce Act 1869 Enabling Non-domiciled Estranged Christian Wives to seek Divorce

Report No. 224

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(REPORT NO. 224)

Amendment of Section 2 of Divorce Act 1869 Enabling Non-domiciled Estranged Christian Wives to seek Divorce

Submitted to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on the 25th day of June, 2009.

The 18th Law Commission was constituted for a period of three years from 1st September, 2006 by Order No. A.45012/1/2006-Admn.III (LA) dated the 16th October, 2006, issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.

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D.O. No. 6(3)/158/2009-LC (LS) 25 June, 2009

Dear Dr Veerappa Moily ji,

Subject: Amendment of Section 2 of the Indian Divorce Act 1869
Enabling Non-domiciled Estranged Christian Wives to seek Divorce

I am forwarding herewith the 224th Report of the Law Commission of India on the above subject.

The Law Commission was requested by the Government of India in the Ministry of Law and Justice (Department of Legal Affairs) to examine the suggestion of the Madras High Court contained in its Order dated 17.11.2008 in *Indira Rachel* v. *Union of India* [W.P. No. 12816 of 1995] that suitable amendment of Section 2 of the Divorce Act 1869 be considered, *vide* their DO letter No. A-60011/25/2009-Admn.III(LA) dated 30.03.2009.

The Divorce Act 1869 can also be invoked to dissolve Christian marriages performed outside India. However, this Act does not confer jurisdiction on the Indian courts to dissolve Christian marriages of non-domiciled parties. Further, in determining the domicile of the parties in a proceeding for dissolution of marriage it is the domicile of the husband alone which is to be considered inasmuch as a wife takes the domicile of her husband upon her marriage.

It was for the Law Commission's consideration as to whether Section 2 of the Divorce Act needed suitable amendment to enable the Indian courts to entertain a petition for dissolution of a Christian marriage where husband has changed his Indian domicile and his wife is resident in India at the time of presenting the petition.

The Law Commission has come to the conclusion that Section 2 of the Divorce Act 1869 insofar as it concerns the jurisdictional rule in regard to petitions for divorce is not only not in tune with the present times but is also harsh upon Christian women in India.

The Law Commission has, therefore, recommended that Section 2 of the Divorce Act 1869 should be suitably amended in order that the Indian courts shall be entitled to entertain a petition for dissolution of a Christian marriage where either of the parties to the marriage is domiciled in India at the time when the petition is presented. However, this suggestion would also need simultaneous change in the rule of Private International Law as to a wife's domicile, that is, abolition of wife's dependent domicile, as done in England through the Domicile and Matrimonial Proceedings Act 1973. In the alternative, following the Marriage Laws (Amendment) Act 2003, the said provision may be amended to provide that a petition for divorce may be filed by a Christian wife at the place where she is residing on the date of the presentation of the petition.

With warm regards,

Yours sincerely,

(Dr AR. Lakshmanan)

Dr M. Veerappa Moily,
Union Minister of Law and Justice,
Government of India,
Shastri Bhawan,
New Delhi – 110 001.

Amendment of Section 2 of Divorce Act 1869 Enabling Non-domiciled Estranged Christian Wives to seek Divorce

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I. INTRODUCTION

1.1 The Law Commission was requested by the Government of India in the Ministry of Law and Justice (Department of Legal Affairs) to examine the suggestion of the Madras High Court contained in its Order dated 17.11.2008 in *Indira Rachel* v. *Union of India* [W.P. No. 12816 of 1995] that suitable amendment of Section 2 of the Divorce Act 1869 be considered, *vide* their DO letter No. A-60011/25/2009-Admn.III(LA) dated 30.03.2009.

1.2 Section 2 of the Divorce Act 1869, which provides for the extent of the Act as well as the power to grant relief generally, reads:

> "This Act extends to the whole of India except the State of Jammu and Kashmir.
>
> 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 of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,
>
> 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."

1.3 The Divorce Act 1869 can also be invoked to dissolve Christian marriages performed outside India.[1] However, this Act does not confer jurisdiction on the Indian courts to dissolve Christian marriages of non-domiciled parties.[2] Further, in determining the domicile of the parties in a proceeding for dissolution of marriage it is the domicile of the husband alone which is to be considered inasmuch as a wife takes the domicile of her husband upon her marriage.[3]

1.4 Paragraphs 4 and 5 of the aforesaid Order of the Madras High Court read:

> "4. The learned counsel appearing for the petitioner submitted that if Section 2 of the Act is given a literal interpretation, it would mean that the courts in India will be unable to entertain the proceedings for dissolution of the marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented. He apprehends that if a literal meaning is given, it would mean that unless both the parties are domiciled in India at the time of presentation of the petition, the Courts shall be unable to entertain such matter, which would result in grave injustice to either of the parties and it would defeat the very purpose of the Act. To amplify the said submission, the learned counsel for the petitioner pointed out that if in a given case, either of the

[1] A. G. Gupte, *Law of Marriage and Divorce*, 1st edition, Premier Publishing Company, Allahabad (2007), p. 1049
[2] H. K. Saharay, *Laws of Marriage and Divorce*, 5th edition, Eastern Law House, Kolkata (2007), p. 368
[3] *R. E. Attaullah v. J. Attaullah*, AIR 1953 Cal 530

spouse migrates to another country on permanent basis and the question arises at that stage, such party can be considered as 'domicile' of a foreign country and therefore the party left behind in India would be left with no legal remedy. The petitioner therefore prays that in order to avoid such difficulties, section 2 of the Act has to be declared ultra vires.

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 suggest that in order to avoid any further controversy in the matter in different parts of the country, the Ministry of Law, the first 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."

1.5 Thus, it was for the Law Commission's consideration as to whether Section 2 of the Divorce Act needed suitable amendment to enable the Indian courts to entertain a petition for dissolution of a

Christian marriage where husband has changed his Indian domicile and his wife is resident in India at the time of presenting the petition.

II. **DOMICILE** vs. **RESIDENCE**

2.1 Domicile of a person is his permanent home. No person can be without a domicile and no person may have more than one operative domicile. National boundaries do not constitute a hindrance in one's choice of domicile. This implies that a person may be national of one country, but his domicile may be another country. Domicile denotes the connection of a person with a territorial system of law. The importance of domicile lies in the fact that a person's family matters, like marriage and divorce, are generally determined by the law of the place of his domicile, besides his religion. The domicile of a married woman is the same as her husband's by virtue of marriage.

2.2 There are two main classes of domicile: domicile of origin and domicile of choice. Domicile of origin is communicated by operation of law to each person at birth. Domicile of choice is acquired by a person of full age in substitution for that which he at present possesses. There are two requisites for acquisition of a fresh domicile: residence and intention. It must be proved that the person

in question established his residence in a certain country with the intention of remaining there permanently. These two elements of residence and intention must concur, but this is not to say that there need be unity of time in their concurrence. The intention may either precede or succeed the establishment of the residence.[4]

2.3 Domicile generally constitutes the basis of jurisdiction of courts for entertaining petitions for divorce. Although the matrimonial law in India differs from community to community, the jurisdictional rules differ only slightly.[5] The time at which domicile is to be determined is the time when proceedings are commenced.[6] In England, the Domicile and Matrimonial Proceedings Act 1973 changed the position of the jurisdictional rule in regard to petitions for divorce and now the English courts have jurisdiction to entertain a petition for divorce if either of the parties to the marriage is domiciled in England on the date when proceedings are commenced, as now after 1st January 1974 a married woman can have her own separate domicile. The said Act not only provides for abolition of wife's dependent domicile, but also adopts 'habitual residence' as the second basis of jurisdiction: if either party to the marriage was habitually resident in England throughout the period of one year ending on the date when the proceedings are commenced, the English courts have jurisdiction to entertain a petition for divorce.

2.4 In India, although there has not been enacted any law for abolition of wife's dependent domicile, the jurisdictional rule in regard

[4] Cheshire and North's *Private International Law*, 13th edition, Butterworths, London (1999), p. 137
[5] Paras Diwan, *Private International Law*, 4th edition, Deep & Deep Publications, New Delhi (1998), p. 284
[6] *Leon v. Leon*, [1966] 3 All E R 820

to petitions for divorce (being linked with domicile of the parties) has been relaxed in various ways in certain matrimonial legislations. For example, under the Hindu Marriage Act 1955 and the Special Marriage Act 1954, a petition for divorce may be filed by a wife at the place where she is residing on the date of the presentation of the petition, *vide* the Marriage Laws (Amendment) Act 2003. Sub-section (2) of section 31 of the Special Marriage Act 1954 even before the said 2003 Act provided that a petition for divorce by a wife could be filed here if she had been ordinarily resident in India for a period of three years immediately preceding the presentation of the petition irrespective of the husband's residence being outside.

2.5 The above amendment brought about by the Marriage Laws (Amendment) Act 2003 was prompted by the recommendations of the Law Commission of India[7] and the National Commission for Women. The Law Commission had expressed the view that such an amendment would give a wife, deserted or thrown out, the choice of court, including where she is residing, to file a petition, relieving her of unbearable burden of expense and inconvenience as well as advancing the cause of gender justice.

2.6 Thus, her residence may well constitute the basis of jurisdiction for a petition for divorce by a wife irrespective of her domicile.

2.7 Residence means the place where one actually lives, as distinguished from a domicile. Residence must be *bona fide*

[7] 178th Report on *Recommendations for amending Various Enactments, both Civil and Criminal* (2001)

residence.[8] A Full Bench of the Kerala High Court in *T. J. Poonen v. Rathi Varghese*[9] after considering various decisions gave the following propositions:

(1) To constitute 'residence' it is not necessary that the party or parties must have his or their own house.

(2) To constitute 'residence' the stay need not be permanent; it can be temporary, so long as there is *animus manendi* or an intention to stay for an indefinite period.

(3) 'Residence' will not take in a casual stay in, or flying visit to a particular place; a mere casual residence in a place for a temporary purpose, with no intention of remaining, is not covered by the word 'reside'.

(4) 'Residence' connotes something more than stay; it implies some intention to remain at a place, and not merely to pay it a casual visit.

(5) As emphasized by the Supreme Court, by staying in a particular place, in order to constitute 'residence', the intention must be to make it his or their abode or residence, either permanent or temporary.

(6) The expression 'last resided' also means the place where the person had his last abode or residence, either permanent or temporary.

(7) Where there has been residence together of a more permanent character, and a casual or brief residence together, Courts have taken the view that it is only the

[8] *Sumathi Ammal v. D. Paul*, AIR 1936 Madras 324 (FB)
[9] AIR 1967 Kerala 1 (FB)

former that can be considered as 'residence together' for determining the jurisdiction.

(8) The question as to whether a particular person has chosen to make a particular place his abode, is to be gathered from the particular circumstances of each case.

2.8 The jurisdiction of the courts in India to exercise authority under the Divorce Act 1869 was varied by an amending Act of 1926. Prior to the amendment of the Divorce Act 1869 in the year 1926 which came into force from 25th March 1926, the jurisdiction conferred on the courts in India under the Divorce Act 1869 to make decrees of dissolution of marriage on the basis of residence was not restricted to the cases of persons domiciled in India.[10] A court could pass a decree of divorce if the parties to the action resided within the jurisdiction of the court at the time of the presentation of the petition. In other words, residential test of the parties was enough and domicile was not essential to confer jurisdiction on the courts in India under this Act. Two conditions were required to be satisfied prior to the amendment of 1926 for the purpose of exercising jurisdiction by the courts in India at the time of presenting the petition in the court. But in the case of *Keyes v. Keyes*[11] it was held that the court had no jurisdiction where the respondent had foreign domicile. In *Isharani's case*[12] the test laid down in *Keyes' case*[13] was not followed. But accepting the test of the latter case the Indian Divorce Act 1869 was amended in 1926. By the amendment the courts in India are not

[10] *Isharani Nirupoma Devi v. Victor Nitendra Narain*, AIR 1926 Cal 871
[11] [1921] P. 204
[12] *Supra* note 10
[13] *Supra* note 11

empowered to pass any decree for dissolution of marriage except in cases where the parties to the marriage are domiciled in India professing Christian faith at the time of presenting the petition. The domicile of the wife is the domicile of the husband. It is in accord with the rule of Private International Law.[14]

III. 15th REPORT OF THE LAW COMMISSION (1960)

3.1 The 15th Report of the Law Commission of India deals with the law relating to marriage and divorce amongst Christians in India. The Commission gave its proposal in the form of a draft Bill titled *The Christian Marriage and Matrimonial Causes Bill 1960*. The Commission recommended that the proposed legislation should apply to all marriages solemnized within the territories of India whatever the domicile of the parties thereto, and that it should leave no vacuum therein. It followed the scheme adopted in the Special Marriage Act 1954 and the Hindu Marriage Act 1955 and also the pattern of similar legislation in England which binds all persons within the kingdom. Clause 35 (a) of the said Bill specifically deals with the jurisdiction of the Indian courts to grant divorce and reads:

[14] *Supra* note 2, pp. 368-369

"Nothing contained in this Act shall authorize any court –

(a) to make any decree of dissolution of marriage, except where-

(i) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(ii) the petitioner, being the wife, was domiciled in India immediately before the marriage and has been residing in India for a period of not less than three years immediately preceding the presentation of the petition." (underlined for emphasis)

3.2 The above Bill proposed by the Law Commission was not enacted.

IV. CONCLUSION AND RECOMMENDATION

4.1 Section 2 of the Divorce Act 1869 insofar as it concerns the jurisdictional rule in regard to petitions for divorce is not only not in tune with the present times but is also harsh upon Christian women in India.

4.2 We, therefore, feel that Section 2 of the Divorce Act 1869 should be suitably amended in order that the Indian courts shall be entitled to entertain a petition for dissolution of a Christian marriage where either of the parties to the marriage is domiciled in India at the time when the petition is presented. However, this suggestion would also need simultaneous change in the rule of Private International

Law as to a wife's domicile, that is, abolition of wife's dependent domicile, as done in England through the Domicile and Matrimonial Proceedings Act 1973. In the alternative, following the Marriage Laws (Amendment) Act 2003, the said provision may be amended to provide that a petition for divorce may be filed by a Christian wife at the place where she is residing on the date of the presentation of the petition.

4.3 It is further felt that for uniformity, similar position should prevail in regard to all other matrimonial statutes, including the Special Marriage Act 1954, the Parsi Marriage and Divorce Act 1936, the Dissolution of Muslim Marriages Act 1939 and the Hindu Marriage Act 1955.

4.4 We recommend accordingly.

(Dr Justice AR. Lakshmanan)
Chairman

(Prof. Dr Tahir Mahmood)
Member

(Dr Brahm A. Agrawal)
Member-Secretary