

(2005) 11 GAU CK 0037

In the Gauhati High Court

Case No : Writ Petition (C.) No. 278 of (SH) of 2003

Paul Tushar Biswas

APPELLANT

Vs

Addl. Dist. Judge and Another

RESPONDENT

Date of Decision : 21-11-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 13, 14, 38, 39
Constitution of India, 1950 — Article 227
Divorce Act, 1869 — Section 10, 3(4), 43, 55
Penal Code, 1860 (IPC) — Section 2(5)

Citation : (2006) 2 DMC 59 : (2006) 1 GLT 489

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : A. Paul and K. Paul, for the Appellant; P.D.B. Baruah, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.—The matrimonial alliance between the parties though conclusively determined by a decree of divorce, the issue pertaining to maintenance of their minor son has kept them belligerently engaged in Courts of law. The instant application witnesses a challenge by the petitioner/husband to the judgment and order dated 9.4.2003 passed by the learned District Judge, Shillong, in (Civil) Miscellaneous Application 7(H)/2002 arising out of matrimonial case No. 6(H)/ 2000 u/s 43 of the Indian Divorce Act, 1869 (hereafter referred to as the Divorce Act), rejecting his application to allow him to provide child maintenance to the offspring, Timothy Biswas.

2. I have heard Ms. A. Paul, Advocate assisted by Mr. K. Paul, Advocate for the petitioner and Ms. P.D.B. Baruah, Advocate for the respondent No. 2.

3. The prefatory facts building up the factual edifice would be essential. The petitioner claims to be an Indian National presently residing at California in the United States of America and is serving the Sheriffs Department of the County of

Fresno, California. The petition before this Court is through his legally constituted attorney. The parties who profess Christian faith were married on 4.10.1990 at All Saints Church, Shillong, under the Christian Marriage Act, 1872 (hereafter referred to as the Marriage Act). The child, a son named hereinabove was born to them. He is a minor and is presently residing with the mother, respondent No. 2. The petitioner in the year 1999 filed an application u/s 10 of the Divorce Act in the Court of the District Judge at Alipore, West Bengal, praying inter alia for a decree for divorce which was registered as Matrimonial Suit No. 388/1999. While the summons in the said proceedings were yet to be served on the respondent No. 2, she also filed an application u/s 10 of the Divorce Act before the learned Additional District Judge, Shillong, seeking dissolution of the marriage. It was amongst others alleged therein that the petitioner had deserted her from the year 1994 and had been living in adultery since February, 1993. The divorce proceeding initiated by the respondent No. 2, registered as Matrimonial Case No. 6(H)/2000, was eventually disposed of by the judgment and order dated 5.7.2002 granting the relief prayed for. The decree of divorce was sanctioned. The petitioner, however, failed to contest the proceedings. While the petition for divorce was pending before the learned Court below at Shillong, on the initiative of the respondent No. 2, a proceeding for child support for the maintenance of the minor son was commenced before the Superior Court of California, County of Fresno being Case No. 01CEFS03419 of 2002, County of Fresno/Petitioner v. Paul Tushar Biswas/Respondent, wherein by an order dated 4.2.2002, the Fresno County Superior Court directed the petitioner to pay a monthly support amount of \$ 500 payable w.e.f. 1.2.2002 in favour of the minor child.

4. The Court of the District Judge at Alipore in the meantime, on an application filed by the petitioner in Matrimonial Suit No. 388/99 (renumbered as Matrimonial Suit No. 27/2001 of the Court of the 5th Additional District Judge, Alipore) by order dated 13.2.2001 allowed his prayer for visitation rights to meet the minor child subject to the conditions set out therein. The respondent No. 2 thereafter filed an application for vacating the said order. She also filed an application under Order 7 Rule 11, CPC for rejection of the plaint. The learned 5th Additional District Judge (to whose file the case was in the meantime transferred) finally by order dated 16.1.2002 rejected the plaint in the Matrimonial Suit 27/01 and vacated all interim orders passed. In doing so, the learned Court took note of a letter written by the petitioner to the Officer-in-Charge, Park Street Police Station mentioning inter alia that he had already obtained a decree of divorce from a Court in the United States of America. It was held that the petitioner in view of the above was guilty of suppression of material facts. Besides, it observed that in view of the admission of annulment of the marriage by a decree of divorce of foreign Court, the matrimonial suit was per se not maintainable.

5. As the matter rested at that, the petitioner, on 2.11.2002, submitted an application u/s 43 of the Divorce Act in the Court of the Additional District Judge at Shillong in Matrimonial Case No. 6(H)/2000 to assess the amount of child

maintenance to be paid by him for the sustenance and education of the minor son. He also prayed for an interim order to permit him to pay a sum of Rs. 5,000 per month pending final adjudication of the issue. In the application sworn by the Attorney of the petitioner, it was stated on oath that he had been residing in the United States of America and that being deeply concerned about the welfare of his son and to ensure that his requirements, educational and otherwise, are well taken care of, he wished to make adequate provision therefore by providing maintenance to him till he attained majority. It was alleged that the petitioner's efforts to meet the child and arrange for the maintenance having otherwise failed in spite of his best endeavours, intervention of the Court was warranted.

6. The learned Court below fixed 25.11.2002 directing service of notice of the proceedings on the respondent No. 2 in the meantime. On the next date, an interim order was passed permitting the petitioner to deposit a sum of Rs. 5,000 as maintenance allowance for the child pending final orders. Leave was granted to the respondent No. 2 to file her written objection.

7. In the show cause submitted by the respondent No. 2, she, amongst others, questioned the jurisdiction of the learned Court below to entertain and decide the prayer for maintenance contending that the application was barred by the principles of *res judicata*, waiver, acquiescence and estoppel. Apart from the fact that the respondent No. 2 and her son were residing in Calcutta since January, 1997, and were thus beyond the territorial jurisdiction of the learned Court at Shillong, it was asserted that in view of the order dated 16.1.2002, passed by the learned 5th Additional District Judge, Alipore, rejecting the plaint of Matrimonial Suit No. 27/ 2001 and vacating all interim orders passed therein, the application was not maintainable in law, the order dated 16.1.2002 as above being unchallenged having become final and binding on the parties. The respondent No. 2 further pointed out the pendency of the child support case before the Superior Court of California, United States of America and the order for monthly maintenance passed therein. It was asserted that the petitioner was a citizen of the United States of America and in absence of reciprocity between India and the State of California, USA, within the meaning of Section 44A, CPC, any order passed by the learned Court below would not be enforceable in the State of California and a fortiori against the petitioner, a resident thereof. A copy of the proceedings of the Superior Court of California was also produced.

8. The learned Court below after hearing the parties and on a consideration of the pleadings on record concluded that the California Court had already passed an order directing payment of monthly child maintenance or child support to the tune of \$ 500 and that the petitioner had also made some payments on 6.12.2002, 20.12.2002 and 3.1.2003 of \$ 230.77 on each occasion. The learned lower Court held the view that there was no reciprocity between India and the State of California and, therefore, in terms of Sections 44A and 45 of the CPC, any order passed by it would not be enforceable in the State of California. Recording that the welfare of the child, having regard to the issue involved, was

a paramount importance, the learned Court below opined, in the attending facts and circumstances, that the petitioner's application was only an endeavour to avoid the maintenance payable under the orders of the California Court. The application was thus rejected.

9. Ms. Paul has assiduously argued that the dissolution of the marriage between the parties having been applied for and granted by the learned Court below under the Divorce Act, it is the only Court to adjudicate upon the claim for maintenance of the minor child in view of Section 43 thereof and, therefore, the learned lower Court failed to exercise its jurisdiction under the above provision of the Act in rejecting the petitioner's application. She contended that the respondent No. 2 being fully aware of the Divorce Act under which she had pursued her remedy for dissolution of marriage, she was guilty of misrepresentation of facts in asserting absence of any law empowering the Indian Courts to grant child support/maintenance and in that view of the matter, the proceedings before the California Court being in ignorance or disregard of the relevant law in force in India is non est and thus cannot be a bar for entertainment of the petitioner's request for providing maintenance to his minor son. She urged without prejudice to the above that the support order passed by the California Court directing payment of monthly allowance by the petitioner being temporary in nature and subject to the adjudication by a competent Indian Court, the learned Court below acted against the fundamental principles of law in passing the impugned order warranting interference by this Court under Article 227 of the Constitution of India. The proceedings before the California Court being based on incorrect and misguided facts, any order passed therein is not binding on the parties and for that matter any Indian Court. Relying on the proviso to Section 10, CPC. Ms. Paul argued that having regard to the interim nature of the support order passed by the Superior Court of the State of California, there was no interdiction for the learned Court below to entertain the petitioner's application on merits. Further, according to her, in terms of Section 13, CPC as well, the support order of the California Court was not conclusive and the learned Court below in refusing to adjudicate upon the issue of child maintenance raised by the petitioner before it failed to exercise a jurisdiction vested in law. She maintained that not only the California Court in the attending facts and circumstances lacked jurisdiction in initiating a proceeding for child support at the instance of the respondent No. 2, it also omitted to recognize the relevant Indian law having a bearing thereon. Further the proceedings before the California Court were also opposed to natural justice and being structured on misrepresentation of facts was afflicted by fraud as well.

The learned Counsel questioned the bona fide of the respondent No. 2 asserting that the only purpose of approaching a foreign Court in preference to the Indian Courts was to vest higher amount of maintenance at the cost of the petitioner by projecting distorted facts. She maintained that the instant application before the learned Court below was not conceived of to avoid the support order of the California Court as alleged, the petitioner having earlier approached the Court of

the District Judge at Alipore, Calcutta, (subsequently 5th Additional District Judge, Alipore) praying for visitation rights and custody of his minor son. The application for divorce filed by the petitioner before the Calcutta Court not having been dismissed on merits, the order dated 16.1.2002 would not attract the bar of res judicata to the application filed before the Shillong Court, she urged. Ms. Paul placed reliance on the decision of the Apex Court in *Y. Narasimha Rao and Others Vs. Y. Venkata Lakshmi and Another*, .

10. Ms. Barua in reply, firstly questioned the maintainability of the petitioner contending that the petitioner's attorney was not authorized to file the same before the Shillong Court. Further, as all the pages of the petition did not contain the signature of the attorney, the same was liable to be rejected in limine being in contravention of the procedure prescribed. According to her, the petitioner being a citizen of the United States of America and a permanent resident of California, the Superior Court of California, County of Fresno, had the jurisdiction to initiate and conduct the proceedings of child support registered on the request of the respondent No. 2. Further as the petitioner participated in the said proceeding without any demur, it was not open for him at this stage to insist on the plea of lack of jurisdiction of that Court. She submitted that though at the first instance challenge was made by the petitioner to the proceedings before the California Court based on the doctrine of *Forum Non Conveniens*, the objection was over ruled by the said Court upon hearing the parties. The petitioner also did not question the said order or the support order passed by the California Court before any higher forum.

11. Ms. Barua maintained that as none of the clauses enumerated in Section 13, CPC was attracted in the facts of the instant case, the support order was conclusive and, therefore, the petitioner's application before the Shillong Court was neither sustainable nor bona fide. The learned Counsel also referred to Section 14, CPC raising presumption of jurisdiction of a foreign Court to buttress the above plea. Drawing the attention of this Court to Sections 44A and 45, CPC, the learned Counsel urged that as there was no reciprocity between India and the State of California, any order passed by an Indian Court was neither enforceable nor executable in the State of California and, therefore, the learned Court below was justified in declining to entertain the petitioner's application for child maintenance. Referring to the pleadings of the parties, the learned Counsel contended that the petitioner's sudden concern for the child's well-being and his urge to provide maintenance for his adequate upbringing plainly lack bona fide, he having maintained a slightest indifference towards the respondent No. 2 and the minor child for all these years. The endeavour before the Shillong Court was clearly to avoid the support order of the California Court, she contended. The learned Counsel submitted that there being no discernible error on fundamental principles of law or procedure, the impugned order does not merit any interference of this Court. Ms. Barua rested her submission on the following decisions. *Said-ul-Hamid v. F.I. Assur Co.* AIR 1951 SC 255; *Mohammed Abdulla Vs. P.M. Abdul Rahim*,

12. Ms. Paul in her reply argued that the power of attorney produced before the Court does not limit the authority of the attorney to file cases on behalf of the petitioner and to take steps in connection therewith only before the Courts in Calcutta and that there being no requirement under the Gauhati High Court Rules of all the pages of the petition being signed by the petitioner's attorney, the preliminary objections on the maintainability are *per se* untenable. She insisted that both the parties are citizens of India and though the petitioner is presently a resident of California and the respondent No. 2 of Canada, they are not governed by the laws of California. She reiterated that as the divorce proceeding initiated by the respondent No. 2 before the learned Court below under the Divorce Act was pending at the time of initiation of the proceedings before the California Court the support order dated 4.2.2002 passed by it in face of Section 43 of the Divorce Act was clearly unsustainable in law.

13. I have lent my anxious consideration to the rival arguments. Before dealing with the contentions appertaining to the proceedings of the California Court and the support order passed by it and the tenability of the learned lower Court's view on the aspect of reciprocity *qua* executability of its order in the State of California, it would be appropriate to clear the deck of the other fringe assertions referred to above.

14. The special power of attorney executed by the petitioner on 16.8.2002 in favour of Ms. Nimmi Karim reveals that the letter was authorized, amongst others, to act, appear and defend and to take all necessary steps in the Court of law on his behalf and under her signature. She was empowered to file, verify and present documents, pleading, etc. in the Court. The recital in the deed proceeding the aforementioned empowerment, however, discloses the willingness of the petitioner to file cases in the Courts at Calcutta against the respondent No. 2. The authorization was because of the petitioner's inability to do so personally for his permanent residence in the United States of America. The plea of want of authority of the attorney raised on behalf of the respondent No. 2 is understandably based on the above recital. A reading of the contents of the special power of attorney as a whole, however, in my view, does not lead to the conclusion that the petitioner had limited his attorney's authority to act on his behalf in the Court at Calcutta alone. Having regard to the nature and extent of the powers conferred on the attorney, the objection to the contrary does not commend acceptance.

15. Chapter IV of the Gauhati High Court Rules outlines the general rules for applications and affidavits to be filed before this Court. Clause 8 thereof mandates that every application should be signed with the full name and date either by the applicant or the declarant or his Advocate. Chapters VA and VB dealing with rules governing applications under Articles 226 and 227 of the Constitution of India also do not prescribe the requirement of signing each and every page of the petition. In that view of the matter, omission to sign all the pages of the instant petition cannot be held to be violative of the High Court

Rules. The affidavit annexed to the petition has been sworn and signed by the attorney on being identified by the learned Counsel for the petitioner. The affidavit is in prescribed form and the petitioner has stood by the statements made in the petition. The underlying purpose of a verification and/or the affidavit required by the law being to obviate the possibility of disownment of the pleaded facts by the party concerned at his/her convenience, I am, in the above factual premises, unable to uphold the plea of infraction of any procedural directive in this regard. The preliminary objections raised on the maintainability of the petition therefore fall.

16. On the bar of res judicata, suffice it to mention that the application filed by the petitioner "under Section 10 of the Divorce Act in the Court of the District Judge at Alipore was for a decree for divorce. The interim application by him was for custody and visitation rights to meet the minor child. No prayer was made to provide maintenance. The suit was eventually dismissed acting on the contents of the letter addressed by the petitioner to the Officer-in-Charge, Park Street Police Station, Calcutta, indicating that a decree for divorce had already been obtained by him from a Court in the United States. No issue as such on the maintenance of the child was either framed or decided. The plaint was rejected mainly on the ground of suppression of material facts. In the above view of the matter, the bar of res judicata is obviously not attracted in the facts of the instant case.

17. The pleaded facts present conflicting versions with regard to the citizenship of the petitioner. Though he has asserted in clear terms before this Court that he is an Indian national but a resident of California, statements by him in the application dated 6.12.2001 filed by him before the Superior Court of California, County of Fresno praying for dismissal/abatement of the maintenance proceedings reveal that he claimed himself to be a citizen of United States of America. He, however, admitted therein that the respondent No. 2 was a citizen of India. The same stand finds reflection in a subsequent application filed by the petitioner on 21.7.2005 before a Canadian Court alleging abduction of the minor child by his mother, respondent No. 2 and praying for an order to apprehend the minor and deposit him in the petitioner's custody. In the application filed by the petitioner before the Calcutta Court, he asserted that he was a permanent resident of U.S.A. On the other hand, the respondent No. 2 in her affidavit before this Court has stated on oath that the petitioner is a citizen of the USA.

18. Noticeably though the documents relatable to the California/Canada Court proceedings as above were produced in course of the arguments, no objection whatsoever was raised with regard to the authenticity thereof. These bear the signature of the petitioner and/or his attorney. It further transpired in course of the arguments that the petitioner is a permanent resident of California and that the respondent No. 2 is currently residing at Canada. On a consideration of the relevant facts on record on this fact of the lis, more particularly, in view of the recorded plea of the petitioner, it would be permissible to proceed on the basis

that he is a citizen of United States of America. The ultimate determination of the issues raised herein, however, is not contingent on the citizenship of the petitioner.

19. Is the Court at Shillong, the only Forum competent in law to entertain the prayer for child support/maintenance, in view of Section 43 of the Divorce Act, so as to oust the jurisdiction of any other Court including the Superior Court of the State of California as asserted on behalf of the petitioner? The provision of the Divorce Act ex facie does not support the above plea. It is a statute to amend the law relating to divorce of persons professing Christian religion and to confer upon certain Courts, jurisdiction for matrimonial matters. Court as defined in Section 3(4) means the High Court or the District Court as the case may be. Section 43 thereof empowers the Court to make such interim orders as it may deem proper with respect to the custody, maintenance and education of the minor children in a suit for obtaining a dissolution of marriage or a decree of nullity thereof and to direct proceedings to be taken for placing such children under the protection of the Court. Where a decree of dissolution or a nullity of marriage is passed, the District Court u/s 44 of the Act, may, upon application for the purpose, make from time-to-time such orders and provision with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was subject of the decree. Under the said provision, the District Court may also pass order for placing such children under its protection. The statute does not contain any overriding or exclusionary provision mandating ouster of jurisdiction of any other competent Court of law to entertain and adjudicate upon any prayer inter alia for support or maintenance of any minor child, marriage of whose parents was the subject matter of controversy in a suit before a Court thereunder. In view of the aforementioned scheme of the Divorce Act, it is, therefore, not possible to hold that even if the legally recognized jurisdictional essentials stand satisfied vis-a-vis any other judicial forum it would lack competence to adjudicate upon any issue of child support or maintenance of a minor, the marriage of whose parents was either dissolved by a proceeding under the Divorce Act or was declared a nullity thereunder. The contention to the contrary, therefore, does not appeal to this Court.

20. The validity or otherwise of the proceedings of the California Court is relevant primarily to judge the bona fide of the petitioner's concern to provide maintenance to the minor child for his upbringing, the order of child support, interim though, in the California proceedings, notwithstanding. The basic thrust of the petitioner's case in this regard is that Section 43 of the Divorce Act bars the jurisdiction of the said Court and that the Shillong Court having granted the decree for dissolution of marriage, it is that Court alone which can determine the issue of custody, maintenance and education of the minor child.

21. The documents on record which include copies of the proceedings before the California Court (authenticity whereof is not in dispute) disclose that the child support case was registered at the instance of the respondent No. 2 in the later

part of 2001 being represented by the County of Fresno with the petitioner as the respondent therein. Her contention in substance had been that the petitioner had deserted her and the child in the year 1994 and had left for USA and since then had not provided any financial support. In the letter dated 15.1.2002 addressed by her to Mr. George Gingo, Deputy District Attorney appearing for her, she referred to the proceedings before Calcutta Court initiated by the petitioner for the custody of the minor contending that the said Court would not make a verdict on child maintenance principally as the petitioner was a resident of another country.

22. In the meantime, on 6.12.2001, the petitioner submitted an application before the California Court describing him to be a citizen of USA and a resident of Fresno, California. He contended inter alia that in the year 1994 he had filed an application before the Calcutta Court for dissolution of his marriage with the respondent No. 2 as well as custody of the minor child and visitation rights. He pleaded that the Matrimonial Suit No. 388/1999 was pending u/s 43 of the Divorce Act and that he had established a trust fund for the support of the child besides transferring his computer operation business in favour of the respondent No. 2 wherefrom she had been earning a handsome income. According to him, notwithstanding the pendency of the above proceeding, the California Court had the jurisdiction regarding the issue of child support, as one of its parents was a resident in California in terms of the Family Code but the case was dismissible on the doctrine of Forum Non Conveniens. As the mother and the child were citizens of India and residents thereof and a proceeding initiated by the petitioner is pending, any decision in the California case might result in conflict of rulings. As there was no urgency warranting intervention by the California Court, the proceeding before it was liable to be dismissed more particularly when the Courts in India were competent to resolve the same issue adequately and an appropriate arrangement for child support have in the meantime been made by the petitioner in India.

23. The application was resisted on behalf of the respondent No. 2 contending that the cause of child support/maintenance had been taken up under the policy enacted by the Fresno County Family Support Division under the US Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, whereunder the necessary support services are to be provided to any person who applies therefor, regardless of the place of residence of the custodial parent and the child. It was maintained that in such child support enforcement actions, the plea of Forum Non Conveniens is wholly untenable.

24. The California Court in its proceeding held on 24.1.2002 denied the motion to dismiss the child support case. Subsequent thereto, on 4.2.2002, it passed an order directing the petitioner to provide monthly support amount of \$ 500 to the minor child w.e.f. 1.2.2002 with the rider that the said arrangement would continue until further orders of the Court unless terminated by operation of law.

25. In the proceeding next held on 22.7.2002 (Annexure 8 to the writ petition),

the California Court upon hearing the rival submissions on the necessity of continuance of the proceedings before it observed that it had the jurisdiction to make orders of child support in the facts and circumstances of the case and expressed in categorical terms that it was not inclined to eliminate the interim support order unless it was satisfied that the child was being maintained by an order of the Indian Court. While noticing that the endeavour to get the proceeding before it abated or dismissed on the ground of Forum Non Conveniens was by a person residing within its jurisdiction and that any order passed by it could be enforced there, the California Court made it categorically clear that any consideration for abatement of the proceedings before it would not arise unless there was an appropriate order of child support in India. It held the view that any such order of the Indian Court notwithstanding, it might not abate the proceedings before it. The California Court, however, in view of the insistence on the part of the learned Counsel for the petitioner to have the issue considered by an Indian Court, in the attending factual premises adjourned the further hearing of the case till 25.11.2002. On that date (Annexure 9 to the writ petition), the California Court while continuing the child support order passed earlier fixed the case next on 8.7.2003 directing the parties to file updated income and expenditure declarations. The respondent No. 2 was also ordered to provide her temporary address in the United States.

26. In the mean time, on 22.11.2002, the petitioner filed an application before the Shillong Court u/s 43 of the Divorce Act, which got rejected by the order impugned in the present petition. Noticeably before 22.7.2002 as above, the application for dissolution of marriage, custody and visitation rights filed by the petitioner before the Calcutta Court had been rejected on 16.1.2002 and the marriage between the parties had been dissolved by the Shillong Court on 5.7.2002. Admittedly, therefore, on 22.7.2002, no application by either of the parties was pending before any Indian Court for child support/maintenance.

27. Assertive submissions having been made for and against the validity of the California Court proceedings based on Section 13. CPC, expedient it would be to deal with the authorities on this facet of the controversy as cited at the bar and otherwise.

28. In *Y. Narusima Rao and Ors. v. Y. Venkatalakshmi and Anr.* (supra), the appellant No. 1 and the respondent No. 1 were married in India at Tirupati in the year 1975 according to Hindu law but got separated in the year 1978. The appellant prayed for dissolution of marriage in the Sub-Court of Tirupati averring that he was a resident of New Orleans, Louisiana, USA and a citizen of India. In the year 1980, he filed another petition for dissolution of marriage in the Circuit Court of St. Louis County, Missouri, USA, contending that he had been a resident of Missouri for 90 days or more. He alleged desertion by the respondent No. 1 for one year or more, preceding the filing of the petition by refusing to live with him in the United States. The averments made in the petition before the Sub-Court of Tirupati, however, reveal that the petitioner No. 1 and the respondent No. 1 lived

at New Orleans and not within the jurisdiction of the St. Louis Court in the district of Missouri.

29. The respondent No. 1 in her reply while questioning the jurisdiction of the foreign Court, without prejudice to the above stand, contested the case on merits. The Circuit Court assumed jurisdiction in the matter on the ground that the appellant No. 1 had been a resident of the State of Missouri for a period of 90 days before the Commencement of action and passed a decree for dissolution of marriage in absence of the respondent No. 1 on the ground that the marriage was irretrievably broken. The petition before the Sub-Court of Tirupati was not pressed and the appellant No. 1 then married appellant No. 2 in 1981.

The respondent No. 1 then filed a criminal complaint against the appellants for the offence of bigamy. The appellants were granted discharge by the learned Magistrate examining the complaint had accepting the defence of dissolution of marriage by the Missouri Court. On revision, however, the jurisdictional High Court set aside the order of the Magistrate on the ground that the photostat copy of the judgment of the Missouri Court was not admissible in support of the assertion of the dissolution of marriage. The Apex Court in the above factual premises held the decree of dissolution of marriage passed by the Circuit Court of St. Louis County, Missouri, USA, a Foreign Court, to be without jurisdiction according to the Hindu Marriage Act, 1955, on the considerations as hereinbelow:

As pointed out above, the present decree dissolving the marriage passed by the foreign Court is without jurisdiction according to the Act as neither the marriage was celebrated nor the parties last resided together nor the respondent resided within the jurisdiction of that Court. The decree is also passed on a ground, which is not available under the Act, which is applicable to be marriage. What is further, the decree has been obtained by appellant No. 1 by stating that he was the resident of the Missouri State when the record shows that he was only a bird of passage there and was ordinarily a resident of the State of Louisiana. He had, if at all, only technically satisfied the requirement of residence of 90 days with the only purpose of obtaining the divorce. He was neither domiciled in the State nor had he an intention to make it his home. He had also no substantial connection with the forum. Appellant No. 1 has further brought no rules on record under which the St. Louis Court could assume jurisdiction over the matter. On the contrary, as pointed out earlier, he has in his petition made a false averment respondent No. 1 has refused to continue to stay with him in the State of Missouri where she had never been. In the absence of the rules of jurisdiction of that Court, we are not aware whether the residence of respondent No. 1 within the State of Missouri was necessary to confer jurisdiction on that Court, and if not of the reasons for making the said averment.

30. Dwelling on the elemental rules of Private International Law and noticing the absence of any enacted rules therefore in the country, the Apex Court, to ensure certainty in the matter of recognition of foreign judgment in India, laid down the guidelines for elucidation of Section 13, CPC. It held the view that the principles

of interpretation so evolved were called for to secure the required certainty in the sphere of this branch of law in conformity with public policy, justice, equity and good conscience as well as to protect the sanctity of the institution of marriage and the unity of family, the cornerstones of our social life.

31. Dilating on the various clauses of Section 13, CPC, the Apex Court held that Clause (a) thereof which appertains to the jurisdiction of a foreign Court, should be interpreted to mean that the Court of competent jurisdiction would be one which the Act or the Law under which the parties are married is recognized to entertain the matrimonial dispute. It further held that any other Court would be without jurisdiction unless both the parties voluntarily and unconditionally subject themselves to its jurisdiction. The Apex Court held Clause (b) to convey that the decision of the foreign Court should be on the ground available in law under which the parties are married and the decision should be a result of the contest between the parties. It was of the view that a mere filing of the reply to the claim under protest without submitting to the jurisdiction of the Court or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court cannot be considered to be a decision on the merits of the case.

32. It was held with reference to Clause (c) that when a foreign judgment is founded on a jurisdiction or on a ground not recognized by the law under which the parties are married it would be one in defiance thereof and consequently not conclusive of the matters adjudicated therein and, therefore, unenforceable in the country. Observing that Clause (d) of Section 13 states no more than an elementary principle on which the civilized system of justice rests, it held that the requirement of the principles of natural justice should be interpreted to mean more than mere compliance of the technical rules or procedures. It observed that mere service of the process of the Court on the respondent should not be deemed to be sufficient but it ought to be ascertained whether the respondent was in a position to present himself/her self and contest effectively the proceedings. The Apex Court added a rider that the mandate of Clause (d) could be held to be satisfied if as a matter of rule the foreign matrimonial judgment is recognized only if it is of the forum where the respondent is domiciled and habitually or permanently resides. The Apex Court reiterated its view in *Smt. Satya Vs. Shri Teja Singh*, refusing to recognize a foreign judgment obtained by fraud in terms of Clause (e) of Section 13, CPC. It added that fraud for the said purpose need not be only in relation to the merits of the matter but also regarding jurisdictional facts. The Apex Court summarized its view on the principles of interpretation of a foreign matrimonial judgment in India in paragraph 20.

From the aforesaid discussion the following rule can be deduced for recognizing a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The

exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

33. On the touchstone of the above rules of interpretation of Section 13, CPC, the decree of dissolution of marriage by the Circuit Court of St. Louis County in the State of Missouri was held to be unenforceable in India as the jurisdiction of the forum as well as the ground on which the same was passed was not in terms of the Hindu Marriage Act, 1955, under which the parties were married and further the respondent had not submitted to the jurisdiction of that Court or had consented to the passing of the said judgment.

34. Noticeably in the summary of deductions made in the above extract, the Apex Court had carved out some exceptions to the rule that the jurisdiction of the foreign Court and the grounds on which relief is granted in any matrimonial proceeding has to be essentially in accordance with the law under which the parties are married, these being when the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married or where the respondent voluntarily and effectively submits to the jurisdiction of the forum and contests the claim which is based on a ground available under the matrimonial law under which the parties are married or if the respondent consents to the grant of relief.

35. Earlier in point of time, the Apex Court in *R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid*, while elaborating on the essence of Section 13, CPC held that the judgment of a foreign Court to be conclusive between the parties must be one of a Court of competent jurisdiction in an international sense and not merely by the law of the foreign State in which the Court delivering the judgment functions. It observes that private international law is not one governing relations between independent States but is simply a branch of a civil law of the State evolved to do justice between litigating parties in respect of transactions or personal status involving a foreign element. The rules of private international law of each State must, therefore, in the very nature of things differ but by the comity of nations certain rules are regarded as common to the rules of civilized jurisdictions. It held the view that though in the judicial system of each State these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgments of foreign Courts in certain matters or as a result of international conventions. While underlining that Section 13, CPC in essence enacts a branch of the rule of *res judicata* in its relation to foreign

judgments, the Apex Court ruled that a foreign judgment to be conclusive it must be by a Court competent both by law of the State which has constituted it and in an international sense and it must have directly adjudicated upon a matter which is pleaded is *res judicata*. On the requirement of Clause (d), Section 13, CPC, the Apex Court ruled that the essence of a judgment of a Court being due observance of the judicial process, the Court rendering the judgment must observe the minimum requirement of natural justice namely it must be composed of impartial persons acting fairly without bias and in good faith and provide reasonable notice to the parties and offer each one of them reasonable opportunity to present his case.

36. In the same vein, the Apex Court in *Sankaran Govindan Vs. Lakshmi Bharathi and Others*, observed that the true basis of enforcement of a foreign judgment is that it imposes an obligation upon the defendant and. therefore, there must be a connection between him and the forum sufficiently close to make it his duty to perform that obligation. This, the Apex Court highlighted in the context of the essentiality of a foreign Court's jurisdiction in the international sense. On the precept of natural justice incorporated in Clause (d) of Section 13, CPC. the Apex Court while underlining that the wholesome maxim *audi alteram partem* is deemed to be universal and not merely of domestic application emphasized the substantial compliance with the prevailing notion of fair play in conducting the proceedings to ensure that the defendant is not deprived of an opportunity to present his case would be sufficient.

37. In *Smt. Satya Vs. Shri Teja Singh*, the parties were married according to the Hindu rites. They were Indian citizens and domiciled in India at the time of their marriage. Later the respondent moved to USA for higher studies. For the next five years, the appellant continued to live in India with her minor children and did not join the respondent in America. The appellant subsequent thereto moved an application before the Indian Court seeking maintenance alleging that the respondent had neglected to maintain her and the minor children. The respondent pleaded dissolution of marriage by a decree of divorce granted by the Second Judicial District Court of the State of Nevada, etc. The respondent though unsuccessful before the lower judicial tiers succeeded before the jurisdictional High Court which returned a finding that at the time of commencement of the proceedings for divorce before the Nevada Court, he was domiciled within that State in the USA and. therefore, the domicile of the wife followed his. The challenge was taken before the Apex Court by the aggrieved wife. It was held that in determining whether a divorce decree would be recognized in another jurisdiction as a matter of comity, public policy and good morals may be considered, however, no country is bound by comity to give effect in its Courts the divorce laws of another country which are repugnant to its own laws and public policy. It reiterated that if a decree of divorce is to be accorded full faith and credit in the Courts of another jurisdiction it is necessary that the Court granting the decree has jurisdiction over the proceedings. A decree of divorce is thus treated as a conclusive adjudication of all matters in controversy except the

jurisdictional facts on which it is founded. The Apex Court, therefore, was of the view that a foreign divorce decree is subject to collateral attack for lack of jurisdiction even where the decree contains the findings or recitals of jurisdictional facts besides being open to challenge on the ground of fraud. Observing that domicile is a jurisdictional fact, the Apex Court in the facts of the case, determined that prior to the institution of the divorce proceedings before the Nevada Court, the respondent might have stayed within its jurisdiction but had no domicile as required. It concluded that the respondent had gone to Nevada as a bird of passage and resorted to the Court there solely to procure a decree of divorce on misrepresentation and left the place even before the ink on his domiciliary assertion was dried. Referring to Section 13 of the CPC and Clause (e) thereof in particular, the Apex Court held that fraud as to the jurisdiction of the Nevada Court on false representation of domicile brought the judgment of the Nevada Court within the coils of Section 13(e), CPC which was thus not recognizable in India.

38. In *Raj Rajendra Sardar Maloji Marsingh Rao Shitole Vs. Sri Shankar Saran and Others*, the exparte decree passed by the Gwalior Court on 15.5.1947 and transferred to the Court at Allahabad in UP for execution on 14.9.1951 was under challenge being a foreign decree and thus a nullity. The respondents against whom the suit was filed at the time of its institution were residents of UP and beyond the jurisdiction of the Gwalior Court. In terms of Section 2(5), IPC, Gwalior Court was a foreign Court and its judgment, therefore, had to be enforced in the manner like a foreign judgment. The Apex Court in the above factual backdrop and on a consideration of the contemporaneous law ruled against the extra territorial validity of the judgment of the Gwalior Court on the following considerations.

1. The respondents were not subjects of Gwalior and did not owe any allegiance to the Ruler of Gwalior and were under no obligation to accept the judgments of the Courts of the State.
2. They were not residents of that State when the suit was instituted.
3. They were not temporarily present in the State when the process was served on them.
4. They did not in their character as plaintiffs in the foreign action select the forum where the judgment was given against them.
5. They did not voluntarily appear in that Court.
6. They had not contracted to submit to the jurisdiction of the foreign Court.

39. The Apex Court held that the Gwalior Court was, therefore, not a competent Court of jurisdiction and the decree was a nullity beyond the United State (Madhya Bharat) in which Gwalior was located. The plea that the decree was valid under the Madhya Bharat CPC and that the impediment to its executability was removed as a consequence of subsequent constitutional changes and

amendments of the Indian Code was also negated.

40. The Apex Court in *Renusagar Power Co. Ltd. Vs. General Electric Co.*, noticed the disapproval of Courts to recognize a foreign judgment found to be contrary to the public policy of the country in which it was sought to be invoked or enforced. It, however, observed that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and that the Courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved.

41. In this background of precedential law, the contextual facts may now be marshalled. Section 13, CPC which embodies the principle of international law and the elucidation thereof by the Apex Court in *Y. Narasimha Rao and Ors.* (supra), in particular, pertaining to foreign matrimonial judgment, provides the unassailable touchstone for the purpose. In terms thereof, a Court of competent jurisdiction within the meaning of Clause (a) of the above provision of the Code would be one recognized by the law under which the parties are married and entitled to entertain the matrimonial dispute. Exception to this would be, if both the parties voluntarily and unconditionally subject themselves to the jurisdiction of any other Court and the respondent contests the claim, which is based on the ground available under the matrimonial law governing parties or where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on the ground available in the matrimonial law under which the parties are married or where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties. Admittedly at all relevant times, the petitioner was a permanent resident of the State of California. The action had been initiated in the California Court or the failure on his part to provide maintenance or support to the child he having deserted the respondent No. 2 and the minor in the year 1994. The obviously is also a ground to" seek relief for child maintenance under the matrimonial law applicable to the parties. No objection had been taken by the petitioner questioning the jurisdiction of the California Court founded on the bar of Section 43 of the Divorce Act. The contest was only on the ground of the Forum Non Convenient. No law, policy or convention mandating ouster of the California Court's jurisdiction has been brought to the notice of this Court. The interdiction of Clause (a), therefore, is not attracted.

42. The child support order, interim though, has been passed any/or maintained thereafter upon hearing both the parties. The petitioner was represented by his Counsel and the proceedings of the California Court disclose a conscious consideration of the materials on record culminating in the support order. Per se, therefore, it is not possible to conclude that the child support order is not on the merits of the case. Admittedly on the date of the said order, no other order by any other Court for the maintenance of the minor was in existence. No proceeding before any Indian Court was also pending. Clause (b) of Section 13,

CPC as well does not come in the way.

43. The proceeding of the California Court, available on records, do not reveal that the action was founded on an incorrect view of international law. Refusal to recognize any law in India relevant to the issue is also not discernible. As held hereinabove. Section 43 of the Divorce Act does not exclude the jurisdiction of any other Court of competent jurisdiction. Clause (c) of the above provision of the Code also is not applicable.

44. Admittedly the petitioner had appeared before the California Court being noticed of the child support case and in addition to filing his pleadings, contested the issue by duly participating in the proceedings being represented by his lawyer. No plea of want of any reasonable opportunity or breach of the judicial process had ever been raised. No misrepresentation on jurisdictional facts or otherwise have also been pointed out to indicate any fraud perpetrated by the respondent No. 2 in the matter of assumption of jurisdiction by the California Court. True it is that at the time of initiation of the action before the California Court, the application of the petitioner before the Calcutta Court for dissolution of marriage, for custody of the child and visitation rights as well as proceedings for dissolution of marriage before the Shillong Court instituted by the respondent No. 2 were pending. But in none of these cases, the issue of maintenance was subjudice. The proceedings before the California Court and the support order passed by it cannot thus be denounced on the ground of fraud.

45. The petitioner being the father of the minor under the Indian law governing the parties, he is obliged to maintain him. Except the child support order passed by the California Court, there is no order by any Indian Court to the said effect requiring the petitioner to provide maintenance to the child. The consideration which weighed with the California in passing the maintenance order was the interest and welfare of the child and the lack of adequate means of the mother to independently rear him up in a way befitting to the status of the family to which he belonged. The factor prompting the California Court to entertain the proceedings and render the support order embodies a common principle of general application for adjudicating issues on child maintenance. The California Court, therefore, cannot be said to have sustained a claim founded on any breach of law in force in India. Clause (f) is not attracted either.

46. The contention that the child support passed by that California Court was for all practical purposes, intended to be subjects to fresh proceedings before the competent Indian Court and orders to be passed by it, is also not borne out by the proceedings in the foreign Court. The observations of the California Court in its proceedings of 22.7.2002 do not admit those to be so interpreted. The observations were clearly generated by its concern for the child and to ensure adequate maintenance by a legal forum. By no means, the California Court intended that the proceedings before it and the child support order passed therein would get effected *proprio vigore* with the initiation of an action before an Indian Court on the issue and orders passed in it. Noticing, however, the

eagerness expressed by the petitioner's Counsel to have the issue examined by an Indian Court on the ground of Forum Non Conveniens, the California Court adjourned the proceedings so as to enable the petitioner, if so advised, to act in terms of the representation made before it. The child support case before the California Court, therefore, on this Court as well, cannot be held to be incompetent or lacking in jurisdiction.

47. From the materials available on record, it transpires that the Family Support Division in the State of California functions under the Child Support Enforcement Programme established in the year 1975 to provide amongst others child support services as comprehended under the Title IV-D of the Social Security Act. The office of the Child Support Enforcement functions under the US Department of Health and Human Services. The documents furnished to this Court in course of the hearing reveal that Section 454(4)(A)(ii) of the Social Service Act, imposes an obligation on the State agencies to provide Title IV-A services to anyone who had applied therefor. It appears further that Section 454(6)(A) of the said legislation requires that services under the plan shall be made available to residents of other States on the same terms as to residents of the State. No residency or citizenship requirement as a pre-condition for availing Title IV-D services has been insisted upon.

48. u/s 4000 of the California Family Code, if a parent has the duty to provide for support of the child but wilfully fails to do so, the other parent or the child by a guardian ad litem, may bring an action against the parent to enforce the duty. Section 4002(a) empowers a County to proceed on behalf of the child to enforce its right of support against the parent. The primary jurisdictional foundation, in view of the above, is thus also available for the California Court to deal with the issue.

49. The respondent No. 2 invoked the child support mechanism available in the State of California of which the petitioner was a permanent resident and thus readily reachable within the jurisdiction of that Court. The petitioner, it is noticeable, as such did not question the competence or jurisdiction of the California Court on any ground other than an assumed statutory bar perceived by him u/s 43 of the Divorce Act. His resistance somewhat otherwise had been on the ground of Forum Non Conveniens. This, by itself, does not strip the California Court of its jurisdiction in view of the other overwhelming materials to the contrary. The learned Court below, as rightly contended on behalf of the respondent No. 2, did not return a finding of lack of jurisdiction on its part to entertain the application of child support made by the petitioner. It only exercised its discretion against him expressing reservation on his bonafide in view of the pendency of the California Court proceedings.

50. The reciprocity aspect, having a bearing on the executability of an order of an Indian Court in a foreign country next deserves attention. The relevant provisions of the CPC again would be pertinent as u/s 55 of the Divorce Act, all decrees and orders made by the Court thereunder in any suit or proceeding

would be enforceable and appealed from, in the like manner as decrees and orders thereof, in the exercise of its original civil jurisdiction are enforced and appealed from, under the law, rules and orders for the time being in force. Section 45 of the said Act prescribes that subject to the provisions thereof, all proceedings thereunder would be regulated by the Code of Civil Procedure.

51. Sections 38 to 45 of the CPC deal with the Courts by which decrees may be executed. Having regard to the issue under consideration, it would be permissible to confine the attention to Sections 44A and 45 thereof. Section 44A provides for execution of decrees passed by Courts in reciprocating territory. Thereunder, if a certified copy of a decree of any of the superior Courts of any reciprocating country is filed in a District Court, the decree may be executed in India as if passed by the District Court. A reciprocating country has been defined to mean a country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of the section. Similarly, Superior Courts with reference to any such territory has been defined to mean such Courts as may be specified in the said notification. The above provision of the Code, therefore, exclusively deals with the execution of the decrees passed by a foreign Court in a reciprocating territory within the meaning thereof.

52. Section 45, CPC, however, appears to be more relevant for the present purpose as it relates to execution of decrees outside India. It ordains in essence that a Court in any State is empowered to send a decree for execution to any Court established by the authority of the Central Government outside India to which the State has by notification in the Official Gazette declared the said section to apply. A plain reading of the above provision of the Code yields the following features:

- (1) The decree to be executed is of an Indian Court for execution in a foreign territory.
- (2) The transferee Court should be one established by Central Government in such foreign territory.
- (3) The State Government, by notification, has declared this section to apply to the said foreign Court.

53. Section 45, therefore, prescribes the essential pre-conditions for execution of a decree of an Indian Court outside the country. Having regard to the unequivocal precepts of permissibility, the inevitable conclusion is that in absence of either of these conditions, an Indian Court has no jurisdiction to send its decree for execution to a Court not situated in India. No material, whatsoever, has been produced on behalf of the petitioner to demonstrate that the above statutorily prescribed essentials are satisfied. On the other hand, Annexure F to the affidavit in opposition filed by the respondent No. 2 suggests absence of reciprocity between India and the State of California. The conclusion of the learned Court below in this regard, therefore, is unassailable. The authorities

cited at the Bar in SS Said-id Hamid (supra) and Md. Abdulla (supra), being referable to the execution of judgments of foreign Courts in India in the manner contemplated u/s 44A, CPC do not call for any detailed discussion.

54. Is the petitioner's conduct in resisting the California proceedings on the plea of Forum Non Conveniens compatible with his concern to provide maintenance to the child through an order of the Indian Court? Noticeably no such endeavour had been made by him prior to the filing of the application on 22.11.2002 before the Shillong Court. Though he applied for dissolution of marriage under the Divorce Act before the Calcutta Court and by an interim application sought visitation rights, there was no offer to provide maintenance to the child. It was only after the child support order passed by the California Court on 4.2.2002 and rejection of his prayer for dismissal of the said proceedings that he approached the Shillong Court presumably to fall in line with the stand taken by him before the Court at California. The proceedings initiated by the respondent No. 2 being for the maintenance of the child, the resistance from the petitioner's side and his urge to obtain a separate order from the Shillong Court is really intriguing. If the petitioner's reservation is on the amount granted by the California Court, he has ample opportunity to contest the issue on this Court by adducing relevant materials in support of his stand. He enjoys the advantage of participating in the proceedings before the California Court being a permanent resident of that place. The petitioner's proclaimed dormancy over the need of his child's maintenance for all these years and his sudden animation following the California Court's support order constrains this Court to hold that the concern expressed before the Shillong Court is ostentatious and not real. There appears to be no logic or rationale in permitting parallel proceedings before the learned Court below on the same issue. The impugned order does not suffer from any vitiating error on a fundamental principle of law or procedure to merit invocation of the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

55. The petition, thus being without any merit, is dismissed. No costs.