NEUTRAL CITATION
2025:GUJHC:49833-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 2426 of 2023
With
R/FIRST APPEAL NO. 2451 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.Y. KOGJE
and
HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA

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Approved for Reporting	Yes	No

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SMITI W/O. AAKASH SHAH D/O. ATULBHAI BABUBHAI SHAH
Versus
AAKASH KIRANKUMAR SHAH

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Appearance:
AADITYA D BHATT(8580) for the Appellant(s) No. 1
CHANDNI S JOSHI(9490) for the Appellant(s) No. 1
KSHITIJ M AMIN(7572) for the Defendant(s) No. 1
MR. RAHUL R DHOLAKIA(6765) for the Defendant(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE A.Y. KOGJE**
and
HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA

Date : 08/08/2025
ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA)

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I. INTRODUCTION

1. These two appeals are filed by the wife.

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2. First appeal No. 2451/2023 is filed challenging the order passed under Order 7 Rule 11 of Civil Procedure Code, 1908 (For short 'CPC') whereby, the plaint filed by the wife, in which she has sought the declaration that decree dated 07.06.2017 passed for dissolution of the marriage by the Federal Circuit Court of Australia at Sydney was null and void and for consequential injunction has been accepted and the plaint has been rejected.

3. First Appeal No. 2426/2025 is filed challenging the order passed under Order 7 Rule 11 of CPC under which, the Family Suit No. 1738/2016 filed by the wife seeking restitution of conjugal rights where the plaint filed in family suit No. 1738/2016 seeking restitution of conjugal rights has been accepted and the plaint has been rejected.

II. FACTS OF THE CASE:

4. The facts, as could be ascertained from the pleadings and also the written submissions, which are not in dispute, which has led to the filing of these appeals are as follows:

4.1. On 12.07.2008, the marriage took place between the husband and wife at Ahmedabad as per Hindu Rites and Rituals and on 23.07.2008. This marriage was also registered under the provisions of Gujarat Registration of Marriages Act.

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4.2. On 28.08.2008, i.e., one and a half months after the marriage, the husband returned to Australia, where he was a permanent resident.

4.3. On 25.10.2008, i.e., three months after the marriage, the wife also moved Australia and joined her husband.

4.4. On 26.05.2011, while the couple stayed in Australia, the husband acquired Australian citizenship.

4.5. On 06.04.2013, the husband and wife had their first child namely Aagam.

4.6. On 30.10.2014, it appears differences cropped up between them (according to the dates and events submitted by the husband) and, he returned to India.

4.7. On 03.03.2015, the husband secured an Overseas Citizenship of India Card as per the provisions under the Citizenship Act.

4.8. On 25.8.2015, the wife who had stayed back in Australia in order to acquire Australian Citizenship, was granted Australian citizenship.

4.9. On 10.09.2015, the wife along with son returned to India.

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4.10. On 09.03.2016, the husband initiated proceedings for divorce and the care of child by approaching the Federal Circuit Court of Australia at Sydney being file No. SYC1366/2016.

4.11. On 26.08.2016, the notice of this divorce application was served on the wife who was at Ahmedabad.

4.12. On 23.09.2016, the wife filed a petition under Section 125 of the CrPC being Cr.MA No. 2398/2016 and also a suit under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights being Family Suit No. 1738/2016 in the Family Court at Ahmedabad.

4.13. On 26.09.2016, she also filed a response to the divorce application filed by the husband before the Federal Circuit Court of Australia at Sydney.

4.14. On 24.11.2016, the Federal Circuit Court of Australia at Sydney granted the divorce.

4.15. On 07.12.2016, the wife, thereafter, filed an application seeking for review of the said order of divorce,

4.16. On 01.02.2017, the wife filed a complaint under the Domestic Violence Act before the Court of Metropolitan Magistrate at Ahmedabad.

4.17. On 07.06.2017, the review application filed by the wife in the Australian Court was also dismissed.

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4.18. On 05.07.2017, the wife was also granted an OCI Card by the Government of India as provided under the Citizenship Act.

4.19. On 11.07.2018, the wife filed a family suit No. 1499/2018 seeking for a declaration that the decree passed by the Federal Circuit Court of Australia at Sydney is null and void.

4.20. On 06.09.2021, the husband filed an application under Order 7 Rule 11 of CPC seeking for rejection of the plaint in the Family Suit No. 1738/2016 which was filed by the wife seeking restitution of conjugal rights.

4.21. On 20.06.2022, the husband filed a similar application under Order 7 Rule 11 of CPC in family suit No. 1499/2018 which was the suit filed by the wife seeking for declaration that the divorce decree granted by the Federal Circuit Court of Australia at Sydney was null and void.

4.22. On 31.03.2023 by the orders impugned herein, the learned Family Court has allowed the application and rejected both the plaints filed by the wife i.e. the plaint filed seeking for restitution of conjugal rights and also the plaint filed seeking for declaration that the decree of divorce granted by the Federal Circuit Court of Australia at Sydney was null and void.

4.23. As a consequence, as stated above, these appeals are filed challenging the said order.

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III. SUBMISSIONS ON BEHALF OF THE APPELLANT-WIFE:

5. Learned Counsel appearing for the wife contended that the Family Court was wrong in rejecting the plaints on the ground that the Australian Court was a Court of competent jurisdiction to grant a decree of divorce since, the wife had contested the proceedings before the Australian Courts principally on the ground that the Court did not have the jurisdiction to entertain the application for divorce.

6. He contended that since the question of jurisdiction was raised, the judgment rendered in such a proceeding would be of no consequence under Section 13 of the Marriage Act. He submitted that the question as to whether, the Australian Court had jurisdiction or not was a triable issue and the Trial Court could not have invoked its powers under Order 7 Rule 11 of CPC to reject the plaint.

7. Learned counsel highlighted the fact that there was no provision under the Hindu Marriage Act to dissolve a marriage on the ground that there was an irretrievable breakdown to the marriage and the learned Family Court had, in fact, granted the divorce only on that ground.

8. He submitted that under Section 13 (c) of the CPC, a Foreign Court which had rendered a judgment by applying the improper law, would not bind the Courts in India and therefore, the rejection of the plaint would be incorrect.

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9. Learned Counsel also pointed out that both the husband and the wife were granted the Overseas Citizens of India status, which permitted them to stay in India and as a consequence their domicile would be in India. He submitted that the acquisition of the Australian Citizenship would be of no consequence since, the couple continued to be Hindus and had been married under the provisions of Hindu Marriage Act. He submitted that since the marriage was under the Hindu Marriage Act and the marriage was also registered, the same marriage would be valid until it was dissolved as provided under the provisions of Hindu Marriage Act i.e. only on the grounds specified under Section 13 of the Act.

10. Learned Counsel also submitted that the husband was in fact staying in India when he presented the petition for divorce before the Australian Court and the wife was admittedly served the divorce proceedings when she had returned from Australia and was staying in India and she had also contested the proceedings while she stayed in India, thereby, indicating that she was domiciled in India. He submitted that since both the parties were actually residing in India when the divorce proceedings were initiated by the husband before Australian Court, the provisions of the Hindu Marriage Act would apply and not the Australian Laws governing divorce.

11. He submitted that, two Hindus, who got married under the Hindu Marriage Act, would always be governed by the provisions of the Hindu Marriage Act and a mere acquisition of citizenship or a domiciliary status of another country

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would not result in the applicability a law other than the Hindu Marriage Act.

12. Learned Counsel also submitted that Section 7 of the Family Act provided for the Family Court to entertain any suit in relation to the matrimonial status of the person and since the wife was seeking for a declaration that the decree obtained by the husband in the Australian Court was null and void, the resultant effect would be that the learned Family Court would be deciding on the question as to whether the husband and wife continued to be married and were husband and wife, consequently the learned Family Court did possess the jurisdiction to try the suit.

13. Learned Counsel appearing for the wife placed reliance on the following judgments.

A) Michael Graham Prince vs. Nisha Misra (MANU/KA/0611/2022) to contend that the matrimonial reliefs are not excluded from OCI card holders,

B) R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar,(MANU/TN/0166/1973) to contend that a Foreign judgment would not be conclusive if the judgment is obtained when the person is not a resident of that country

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C) Rupak Rathi Vs. Anita Chaudhary (MANU/PH/0200/2014) to contend that a plaint filed by the wife for dissolution cannot be rejected when she had contended that foreign judgment obtained against her would not be conclusive since she had not acceded to the jurisdiction of the Foreign Court.

D) Satya vs. Teja Singh (AIR 1979 SC 105) to contend that a marriage may be treated as snapped in a foreign country on the basis of a judgment rendered in that court but the marriage would be unsnapped in India, the country of domicile of the parties to the marriage.

E) Vikas Aggarwal Vs. Anubha (AIR 2002) SC 1796) to contend that the Court has the power to direct the appearance of the husband even in a case where the husband claimed to have obtained a divorce decree from a foreign court.

F) Y. Narasimha Rao and Ors. Vs. Y. Venkata Lakshmi and Ors [(1991) 3 SCC 451] to contend that in order for the Foreign Court to assume jurisdiction in a matrimonial dispute it is essential that the Foreign Court must apply the matrimonial law under which the parties had married.

G) Balram Yadav vs Fulmaniya Yadav ([(2016) 13 SCC 308] to contend that a declaration regarding the marital status of person can be determined only by the Family

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Courts by virtue of S. 7 (1) Explanation (b) of the Family Courts Act.

IV. SUBMISSIONS ON BEHALF OF THE RESPONDENT-HUSBAND

14. Learned Counsel appearing for the husband on the other hand contended that the divorce granted by the Federal Circuit Court of Australia at Sydney would be binding on the Indian Courts in view of Section 13 of the Civil Procedure Code, especially when the said judgment was rendered after hearing the wife. He submitted that the fact that the wife filed a review petition against the said decree, which was also rejected would clearly lead to the inference that she had submitted the jurisdiction of the Australian Court and having submitted to the jurisdiction of the Family Court at Australia, which was the court of the competent jurisdiction, it was impermissible for her to initiate proceedings before the Indian Courts.

15. He submitted that once the marriage was validly dissolved by the grant of decree by a court of competent jurisdiction, a subsequent suit seeking for declaration that the said decree is null and void or for restitution of conjugal rights was clearly barred by law and therefore, the learned Family Court was perfectly justified in rejecting the plaints.

16. Learned Senior Counsel submitted that by virtue of Section 1(2) and Section 2 of the Hindu Marriage Act, the

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provisions of the Hindu Marriage Act would apply only to a person who is a Hindu and who is domiciled in India. He submitted that since the wife was not domiciled in India by virtue of her acquiring Australian citizenship, the provisions of the Hindu marriage act could not be made applicable.

17. He submitted that since the parties are admittedly Australian Citizens the Federal Circuit Court of Australia at Sydney was the Court of competent jurisdiction to decide any marital dispute between Australian Citizens and it was only the Australian Courts that would therefore have the jurisdiction to decide the marital dispute in accordance with the Australian Laws. He submitted that since this aspect of the matter was indisputable and the marriage had already been dissolved by the Australian Courts, the Family Court has no option but to reject the plaint filed by the wife.

18. Learned Senior Counsel appearing for the husband placed reliance on the following judgments rendered by Hon'ble Supreme Court.

A) Sondur Gopal vs Sondur Rajini [(2013) 7 Supreme Court Cases 426] to contend that the right to change domicile of birth is available to any person not legally dependent on it and a person can acquire a domicile of choice and that the provisions of the HMA would apply to Hindus domiciles in India even if they reside outside India

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B) Civil Appeal No. 11200/2017 passed by the Hon'ble Apex Court in the matter between Samar Kumar Roy (D) through LR Mother vs. Jharna Bera to contend that a suit for declaration as to alleged character of an alleged marriage can be maintained only under S. 34 of the Specific Relief Act

C) Dinesh Singh vs Sonal Thakur [(2018) 17 SCC 12] to contend that it was permissible for permanent residents of a foreign country can proceed with a proceeding for divorce under the laws of that country though they were married un the provisions of the HMA.

19. In our view, only the judgments rendered in Y. Narasimha rao's case, Balham's Yadav (relied upon by the wife) and the judgments rendered in Sondur Gopal. Dinesh Singh (relied upon by the husband would have relevance and they are accordingly considered at the relevant stages in this judgment.

V. QUESTION INVOLVED IN THESE APPEALS

20. In light of the above submissions, the principal question would arise for consideration of these appeals is as to whether the Family Court was justified in rejecting the plaint filed by the wife seeking for restitution of conjugal rights and for a declaration that the divorce granted by the Australian Courts were void, under Order 7 Rule 11 of CPC on the ground that parties were Australian citizens and the

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marriage had already been dissolved by an order passed by the Australian Courts.

VI. DISCUSSION AND ANALYSIS

21. In order to consider this question, a brief overview of the concept of a marriage between two Hindus and a divorce between them would be necessary

A. A BRIEF OVERVIEW OF THE CONCEPT OF A HINDU MARRIAGE AND A DIVORCE BETWEEN HINDUS

22. A marriage between Hindus, historically, was always considered to be a sacrament and for a marriage to be valid, it was essential that the same was conducted through recognized religious ceremonies. A marriage between Hindus was, thus, a marriage directly associated with their religion and this marriage, historically, was always to be considered as indissoluble and lasting forever. In fact, the belief was that a marriage would be forever and would last over several lifetimes i.e., even after the husband and wife were reborn. There is thus a marked difference between a Hindu marriage and a marriage associated with other religions.

23. However, with the passage of time and with changing social beliefs the concept of a Hindu marriage has evolved from being a sacrament to a sacrament as well as a contract.

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24. On gaining independence, the Hindu Code was the first attempt to codify the law relating to Hindus in the matter of marriage, succession and adoption. In the Hindu Code, the forms of a marriage between two Hindus were specifically described as a *Sacramental marriage* and a *Civil Marriage*. The conditions relating to a Sacramental marriage stated that a sacramental marriage was not complete until it had been solemnized in accordance with customary rites and ceremonies of either party as were essential for such a marriage.

25. A civil marriage, on the other hand, required the adherence to five specified conditions at the time of the marriage, such as neither of the parties had a spouse living, neither of the party was an idiot or a lunatic, the bridegroom should have completed 18 years and the bride 14 years, they were not within the prohibited degrees of relationship and if they were less than 21 years, they required the consent of their guardian (comparable to the present S. 5 of the HMA).

26. The Civil marriage also required issuance of a notice of the intended marriage, it's publication, consideration of objections, if any were received and thereafter a declaration of the parties regarding their regarding their age and then its solemnization (which could be before the Registrar and could be in any form) which was followed by issuance of a certificate of marriage.

27. The Code did provide for restitution and judicial separation. It also provided for annulment by a Court on

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specified grounds and declared which of the marriages were to be considered as void. A marriage could also be dissolved if it contravened the conditions prescribed for a Dharmik (Sacramental) marriage or for a Civil marriage. Thus, for the first time, small steps were taken to provide for dissolving a marriage or for annulling a marriage or for a judicial separation.

28. However, this Code did not receive the approval of the Parliament. It must however be noticed that the Hindu code recognized the fact that it could be either a sacramental marriage or a Civil Marriage. In that sense, a Hindu marriage was proposed to be a hybrid and therefore a departure from the classical principle of it being only a sacramental marriage.

29. In 1955, the HMA was enacted and the law relating to a Hindu marriage was codified. The HMA did not provide for a Hindu marriage to be a civil marriage as had been proposed under the Hindu Code and it considered a marriage between Hindus to be a sacrament given the fact the marriage was to considered complete only if had been solemnized in accordance with customary rites and ceremonies (S. 7), though it did lay down conditions for a marriage just as was provided in the Hindu Code for a Civil marriage.

30. It was thus, in 1955, for the first time, the previous concept of a Hindu marriage being indissoluble was given up and a dissolution of marriage by the grant of a decree of divorce by a court of law was also permitted. The HMA, in

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effect, sought to transform a Hindu marriage from the concept of a sacrament to that of a sacrament as well as a contract. In that sense, it was a law which acknowledged and recognized the changing times and the need for evolving a suitable law which would meet the needs of the changing times. It retained the requirement that a marriage would have to be conducted in accordance with religious and customary ceremonies thereby maintaining the concept of it being a sacrament. However, it also required the adherence needed for a Civil marriage and also enabled the marriage to be dissolved by grant of a divorce, on specified grounds, including certain specific grounds reserved for a wife. The HMA, in effect, brought in a revolutionary change insofar as the concept of dissolving a Hindu marriage was concerned by blending customary law with the requirements of laws to suit modern times.

31. The basic belief that a marriage was more or less permanent was sought to be kept alive by permitting a divorce only under certain specified grounds. The original provisions of the HMA provided 9 specified grounds for either of the parties and 2 grounds for a wife. A divorce could not be sought for within three years as per the original provisions of the HMA.

32. It was only in the year 1976 (By Act 68/1976) divorce on the ground of cruelty and desertion was provided for (by insertion of S. 13 (1) (ia) and (ib). Divorce by mutual consent was also provided for by insertion of S. 13B and even in such cases, there was a minimum waiting period of six months

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prescribed and a confirmation of the mutual consent was also required, thereby indicating that the HMA intended to give marriage the widest possible chance to succeed and did not provide for a dissolution of a marriage as a matter of course or for the mere asking. In order to get a marriage dissolved, it was required to be proved that it was void or voidable or specified grounds were established by the party seeking dissolution.

33. The fact that the concept of an irretrievable breakdown is yet to be brought into the Act despite the lapse of 70 years since the HMA was enacted and despite several Law Commission recommendations to that effect only emphasizes the fact a Hindu marriage carries with it certain unique feature vis-à-vis divorce and a Hindu marriage cannot be dissolved easily. Thus, every Hindu marriage will have to be viewed and considered in this prism and not the general notions of a marriage and divorce associated with the other religions.

34. S. 1 (2) of the Act makes it clear that it extends to the whole of India and applies to Hindus who are domiciled in India even if they reside outside India. If two Hindus are domiciled in India and get married under the provisions of the HMA, thus, making it a Hindu marriage, that marriage will always be a Hindu marriage which can be governed only by the provisions of the HMA. A marriage so conducted between two Hindus who are domiciled in India and which has been conducted in India will continue to be a Hindu marriage for all time to come and can be dealt with only in

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the manner provided under the provisions of the HMA. A subsequent change of domicile i.e., habitual residence or the renunciation of Indian citizenship and the acquisition of a citizenship of another country will have absolutely no effect on the marriage which has been conducted under the provisions of the HMA.

35. If the argument that a marriage celebrated in India under the provisions of the HMA will be governed by a law of a foreign country only because the parties to the marriage have acquired a citizenship of another country is accepted it will lead to certain anomalous results. For a Hindu marriage, the citizenship of the parties to the marriage has absolutely no relevance and what is relevant is only the fact that both the parties profess the Hindu faith and agree to bind their marital relationship in terms of the HMA. Thus, a Hindu marriage conducted in India in accordance with the religious ceremonies and customs will always be governed by the provisions of the HMA and cannot be governed by any other law even if the parties acquire a new domicile or a citizenship of any country in the world. As a consequence, even if the couple live in another country, the courts in that country can deal with their marriage and permit its dissolution only under the provisions of the HMA. The domicile of a husband and wife after the marriage, in law, would be of no consequence to a Hindu marriage.

36. The Apex court in the case of (1991) 3 SCC 451 has held as follows:

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11. The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules have also been evolved by judicial decisions. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. The distinction between matters which concern personal and family affairs and those which concern commercial relationships, civil wrongs etc. is well recognised in other countries and legal systems. The law in the former area tends to be primarily determined and influenced by social, moral and religious considerations, and public policy plays a special and important role in shaping it. Hence, in almost all the countries the jurisdicational procedural and substantive rules which are applied to disputes arising in this area are significantly different from those applied to claims in other areas. That is as it ought to be. For, no country can afford to sacrifice its internal unity, stability and tranquility for the sake of uniformity of rules and comity of nations which considerations are important and appropriate to facilitate international trade, commerce, industry, communication, transport, exchange of services, technology, manpower etc. This glaring fact of national life has been recognised both by the Hague Convention of 1968 on the Recognition of Divorce and Legal Seperations as well as by the Judgments Convention of the European Community of the same year Article 10 of the Hague Convention expressly provides that

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the contracting States may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy. The Judgments Convention of the European Community expressly excludes from its scope (a) status or legal capacity of natural persons, (b) rights in property arising out of a matrimonial relationship, (c) wills and succession, (d) social security and (e) bankruptcy. A separate convention was contemplated for the last of the subjects.

12. We are in the present case concerned only with the matrimonial law and what we state here will apply strictly to matters arising out of and ancillary to matrimonial disputes. The Courts in this country have so far tried to follow in these matters the English rules of Private International Law whether common law rules or statutory rules. The dependence on English Law even in matters which are purely personal, has however time and again been regretted. But nothing much has been done to remedy the situation. The labours of the Law Commission poured in its 65th Report on this very subject have not fructified since April 1976, when the Report was submitted. Even the British were circumspect and hesitant to apply their rules of law in such matters during their governance of this country and had left the family law to be governed by the customary rules of the different communities. It is only where was a void that they had stepped in by enactments such as the Special Marriage Act, Indian Divorce Act, Indian Succession Act etc. In spite, however, of more than 43 years of independence we find that the legislature has not thought it fit to enact rules of Private International Law in this area and in the absence of such

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initiative from the legislature the courts in this country their inspiration, as stated earlier, from the English rules. Even in doing so they have not been uniform in practice with the result that we have some conflicting decisions in the area.

13. We cannot also lose sight of the fact that today more than ever in the past, the need for definitive rules for recognition of foreign judgments in personal and family matters, and particularly in matrimonial disputes has surged to the surface. Many a man and woman of this land with different personal laws have migrated and are migrating to different countries either to make their permanent abode there or for temporary residence. Likewise there is also immigration of the nationals of other countries. The advancement in communication and transportation has also made it easier for individuals to hop from one country to another. It is also not unusual to come across cases where citizens of this country have been contracting marriages either in this country or abroad with nationals of the other countries or among themselves, or having married here, either both or one of them migrate to other countries. There are also cases where parties having married here have been either domiciled or residing separately in different foreign countries. This migration, temporary or permanent, has also been giving rise to various kinds of matrimonial disputes destroying in its turn the family and its peace. A large number of foreign decrees in matrimonial matters is becoming the order of the recognition of the foreign judgments in these matters. The minimum rules of guidance for securing the certainty need not await legislative initiative. This Court can accomplish the modest job within the framework of the present statutory provisions if

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they are rationally interpreted and extended to achieve the purpose. It is with this intention that we are undertaking this venture. We aware that unaided and left solely to our resources the rules of guidance which we propose to lay down in this area may prove inadequate or miss some aspects which may not be present to us at this juncture. But a begining has to be made as best as one can, the lacunae and the errors being left to be filled in and corrected by future judgments.

14. We believe that the relevant provisions of Section 13 of the Code are capable of being interpreted to secure the required certainty in the sphere of this branch of law in conformity with public policy, justice, equity and good conscience, and the rules so evolved will protect th sanctity of the institution of marriage and the unity of family which are the corner stones of our societal life.

15. Clause (a) of Section 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. We are of the view that this clause should be interpreted to mean that only that court will be a court of competent jurisdiction which the Act or the law under which the parties are married recognises as a court of competent jurisdiction to entertain the matrimonial dispute. Any other court should be held to be a court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that court. The expression ``competent court'' in Section 41 of the Indian Evidence Act has also to be construed likewise.

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16. Clause (b) of Section 13 states that if a foreign has not been given on the merits of the case, the courts in this country will not recognise such judgment. This clause should be interpreted to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and 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, should not be considered as a decision on the merits of the case. In this respect the general rules of the acquiescence to the jurisdiction of the Court which may be valid in other matters and areas should be ignored and deemed inappropriate.

17. The second part of clause (c) of Section 13 states that where the judgment is founded on a refusal to recognise the law of this country in cases in which such law is applicable, the judgment will not be recognised by the courts in this country. The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and no other law. When, therefore, a foreign judgment is founded on a jurisdiction or on ground not

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recognised by such law, it is a judgment which is in defiance of the Law. Hence, it is not conclusive of the matters adjudicated therein and therefore, unenforceable in this country. For the same reason, such a judgment will also be unenforceable under clause (f) of Section 13, since such a judgment would obviously be in breach of the matrimonial law in force in this country.

18. Clause (d) of Section 13 which makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained are opposed to natural justice, states no more than an elementary principle on which any civilised system of justice rests. However, in matters concerning the family law such as the matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. If the rule of audi alteram partem has any meaning with reference to the proceedings in a foreign court, for the purposes of the rule it should not be deemed sufficient that the respondent has been duly served with the process of the court. It is necessary to ascertain whether the respondent was in a position to present or represent himself/herself and contest effectively the said proceedings. This requirement should apply equally to the appellate proceedings if and when they are file by either party. If the foreign court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the costs of travel, residence and litigation where necessary, it should be held that the proceedings are in breach of the principles of natural justice. It is for this reason that we find that the rules of Private International Law of some countries

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insist, even in commercial matters, that the action should be filed in the forum where the defendant is either domiciled or is habitually resident. It is only in special cases which is called special jurisdiction where the claim has some real link with other forum that a judgment of such forum is recognised. This jurisdiction principle is also recognised by the Judgments Convention of this European Community . If, therefore, the courts in this country also insist as a matter of rule that foreign matrimonial judgment will be recognised only it it is of the forum where the respondent is domiciled or habitually and permanently resides, the provisions of clause (d) may be held to have been satisfied.

19. The provision of clause (e) of Section 13 which requires that the courts in this country will not recognise a foreign judgment if it has been obtained by fraud, is self-evident. However, in view of the decision of this Court in Smt. Satya v. Teja Singh, (supra) it must be understood that the fraud need not be only in relation to the merits of the mater but may also be in relation to jurisdictional facts.]

20. From the aforesaid discussion the following rule can be deduced for recognising 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)

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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.

21. The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, nationality, residence-permanent or temporary or ad hoc forum, proper law etc. and ensuring certainty in the most vital field of national life and conformity with public policy. The rule further takes account of the needs of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband and that it is the husband's domicilliary law which determines the jurisdiction and judges the merits of the case.

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37. It is therefore clear that once a marriage is conducted under the provisions of the HMA, it can be that law that can be made applicable to any matrimonial dispute arising out of it and such a marriage cannot be determined under any other law. The present case will therefore have to be considered in the context of this declaration of law made by the Apex Court.

B. APPLYING THE PROPOSITION OF LAWS TO THE FACTS OF THIS CASE

38. The Family Court has held that the plaint is liable to be rejected on the ground that it does not disclose a cause of action and this is on the premise that the husband and wife were Australian citizens, and the Australian Courts had accordingly exercised its jurisdiction against Australian citizens under the relevant Australian law and the wife would not therefore have a cause of action to seek for restitution of conjugal rights under the HMA.

39. As already noticed above, the Apex Court in Y Narasimha Rao's case (supra) has clearly held that marital disputes arising out of marriages which have taken in India can only be governed by the provisions of the law under which the marriage has taken place, thereby meaning the applicability of a foreign law to dissolve a marriage which has been performed under the provisions of the HMA is impermissible. In the light of this declaration of law, the reasoning of the Family Court to the effect that the Australian Court possessed the jurisdiction to dissolve the marriage and the wife had no cause of action to seek for restitution or for a

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declaratory decree regarding the judgment of the Australian Courts would be erroneous and the case set up by the wife would have to be examined in the light of this declaration of law.

40. The plaint could not have been rejected on the ground that it did not disclose a cause of action since the wife had clearly pleaded that the decree of divorce granted by the Australian Court was without jurisdiction and was thereby null and void and it was only the Indian Courts which possessed the jurisdiction to dissolve the marriage as provided under the provisions of the Hindu Marriage Act. The very prayer made by the plaintiff would indicate that she did have a clear cause of action to approach the learned Family Court and therefore, the provisions of Order 7 Rule 11 (a) of CPC would not be attracted and can have no application.

41. As regards the question that the husband was an Australian citizen and he could have invoked the jurisdiction of the Australian Court, the following facts would be germane.

42. It was the case of the husband that since the Court of competent jurisdiction i.e., Federal Circuit Court of Australia at Sydney had dissolved the marriage by granting a decree of divorce, the application filed for restitution of conjugal rights was clearly not maintainable as there was no marriage in subsistence for restitution to be ordered. It was the husband's case that the Federal Circuit Court of Australia at Sydney was a court of competent jurisdiction and possessed

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the jurisdiction to dissolve the marriage of the husband and wife, and hence the prayer for declaration that it did not have jurisdiction would not be maintainable in law and the Family Courts at Ahmedabad could not have entertained them and the Family Court had rightly rejected the plaint.

43. This argument by the learned Counsel for the husband basically stems from the fact that the husband and wife had become Australian Citizens and were therefore, domiciled in Australia and as a consequence, according to the husband, these set of admitted facts clearly established that the Federal Circuit Court of Australia at Sydney would be the only Court which could be considered to be Courts of competent jurisdiction to try and adjudicate upon their marital dispute.

44. The averments made by the wife in her plaint, which would be relevant for the adjudication of these appeals, are as follows:

> *7. The Respondent left the Australia on 29.12.2014 leaving the Petitioner and minor son in very miserable condition and at that time the Respondent has transferred 5000 AUD from the joint account of the parties, withdraw 3000 AUD in cash. The Respondent has taken 80000 AUD from his partner Jalpa Kiran Patel while coming to India. Thus the Respondent has misappropriated this much handsome amount while coming to India. Moreover the Respondent has kept 21000 AUD Electricity Bill pending, 4500 AUD Coffee Bill pending, Rent of Stores pending, Payment of Tax Office pending and in all*

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100000 AUD Super (P.F.) of all employees pending. The Respondent has misappropriated 20000 AUD from the A/c. of friend Ankit which was repaid as Ankit came to know this fact. The Respondent has borrowed 20000 AUD from friend Brijesh while coming to India. Thus the Respondent has came back to India after throwing these much heavy burden upon the Petitioner.

xxx

10. The Respondent has left the society of the Petitioner from Australia and returned to India without there being any fault on her part. The Petitioner has stayed alone in Australia alongwith his only son Aagam till 07.09.2015 and came back in India on 09.09 2015.

xxx

11. At the time of coming in India, the Petitioner has informed the Respondent about her flight even then the Respondent has not come to take the Petitioner at Ahmedabad Airport hence the Petitioner informed his father on telephone and father of the petitioner picked up her and child Aagam from airport.

xxx

14. That the petitioner-wife came to know that the respondent – husband has filed a divorce petition in the Federal Circuit Court of Australia at Sydney bearing No. 1366/2016 in the

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last week when the respondent-husband came to the residence of petitioner's father and thrown the papers of divorce application on her and threatened, "I have filed the divorce application in the Court of Sydney and you will not be able to protest as I have managed to see that the Federal Circuit Court of Australia at Sydney passes the exparte decree of divorce on the next day of hearing i.e. 10.10.2016.

xxx

16. Since 10.09.2015, the Respondent has neglected the Petitioner and her child Aagam and does not care about their maintenance. The Petitioner is not able to maintain herself and for her children in view of the physical and mental and economical torture by the husband Respondent. The Respondent is doing business of Garments in the partnership of his cousin brother and earning Rs. 1,00,000/- p.m."

45. A bare reading of the plaint would therefore indicate that the wife was contending that the marriage had been conducted in India and under the provisions of the HMA and therefore the Australian Courts possessed no jurisdiction and could not have applied the Australian laws. She also specifically pleaded that both she and her husband were staying in India when the proceedings for divorce had been initiated in Australia. This would therefore indicate that there was indeed a clear cause of action for the wife to approach the Family Court at Ahmedabad since the parties were residing within the jurisdiction of that Family Court.

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46. The parties have also filed a paper book, in which the response filed by the wife to the divorce petition before the Federal Circuit Court of Australia at Sydney has been produced and also the order passed by the said Court has been produced.

47. In the response filed by wife, she has stated as follows:

> *"4. First of all I invite your Lordship's attention on Part-G and Part H of the application i.e. affidavit of the applicant. This affidavit is sworn in here at Ahmedabad Gujarat India on 23-03-2016, which clearly suggests that the applicant has filed this application for divorce from India. Thus the applicant is having a clear intention of getting divorce decree from Federal Circuit Court of Australia, Sydney by running away to the home country, thoughtfully, with pre-thoughtful mind and filing divorce petition there, fully knowing that his action of filing divorce application is prejudicial and with the misuse of the process of the Court against the respondent-wife……"*
>
> *5. I, the respondent-wife, protest and object to this application for divorce filed by the applicant-husband without submitting myself to the jurisdiction of the Honourable Court on the following grounds.*
>
> *(a) That the Federal Circuit Court of Australia is not a Court of competent jurisdiction to entertain the divorce application filed by the applicant husband in as much as the marriage-in-question is solemnized in India as per the Hindu rites and religion and governed by the Hindu Marriage Act, 1955.*

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(b) That the applicant-husband has not given any details of merits of the case in his application for divorce and on which ground he claims divorce which is available to him as required by sec. 13 of the Hindu Marriage Act, 1955.

(c) That the filing of divorce application in Federal Circuit Court of Australia from India is opposed to natural justice.

(d) appears on the face of the proceedings to be founded on an incorrect view of International Law and refusal to recognise the Law of India in cases in which the Hindu Marriage Act, 1955 is applicable. It may be mentioned here that the marriage-in-question is solemnized here in India according to Hindu rites and rituals governed by the Hindu Marriage Act, 1955. The applicant-husband has deliberately and intelligently suppressed these very material facts from the Honourable Federal Circuit Court of Australia.

(e) Filing of this application for divorce from India particularly when both the parties are in India at the time of filing of the application and according to the applicant-husband he is not visiting Australia again. This is a fraudulent act of the applicant-husband.

(f) The applicant-husband has not mentioned any of the grounds in his application on which the section 13 of the Hindu Marriage Act, 1955 allows the filing and granting divorce petition. In short no ground mentioned in Sec. 13 of the Hindu Marriage Act, 1955 is exists and available to the applicant-husband.

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48. It is therefore clear from the above, that it was the case of the wife that the husband was staying in Ahmedabad when he filed the affidavit in the Divorce application before the Federal Circuit Court of Australia at Sydney and his only intention was to invoke the beneficial provisions of the Australian Laws rather than face the prospect of securing a decree under the Provisions of Hindu Marriage Act under which they were married. The wife categorically stated that she was not submitting herself to the jurisdiction of the Australian Courts and raised 6 grounds in support of her plea.

49. The Australian Court while deciding the claim of the wife has held as follows:

Do both Courts recognise each other's orders and decrees?

44. Generally speaking, the Courts of Australia and India recognise each other's orders and decrees. Nevertheless, as Judge Riethmuller observed in Jasmit, there remains a real question as to whether or not a divorce granted by an Australian Court would be recognised in India under the Hindu Marriage Act 1955. 23

45. While there appears to be judicial consensus that any Indian divorce order would be, in all likelihood, recognised in Australia, in Josmit Judge Riethmuller opined that it may be unlikely that an Australian divorce order with respect to Hindus married in India would be recognised by the courts of India. That said, in Mehra & Bose (No.3) [2013] FCCA 2273, I accepted expert evidence that an Australian divorce order may be recognised in India."

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Which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy?

46. As already noted, this Court has jurisdiction in relation to the divorce application filed by the husband.

47. In the proceedings the wife commenced in India, the wife seeks orders against the husband for the "Restitution of Conjugal Rights, an Application for Maintenance, an Application for Interim Maintenance and "reserves her right to file criminal actions against the [husband] and her in-laws, if required""[25]

48. While courts exercising jurisdicuon under the Family Law Act 1975 have the power to make orders for property adjustment and spousal maintenance between married couples, on an interim and final basis, the Act does not empower a relevant Court in Australia making an order for the 'restitution of conjugal rights'.

49. I note that neither party have initiated parenting proceedings.

50. Given the differing nature of the applications that are presently before the Australian and Indian courts, it is difficult to see how this factor can assist any further in determining the jurisdictional issue.

In what order were the proceedings instituted and at which stage they have reached and what are the costs incurred?

51. As stated, the husband filed the divorce application approximately six months before the wife filed her applications in India.

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52 I am also satisfied (and find accordingly) that the divorce application was served upon the wife prior to the filing of her applications in India.

What is the connection of the parties and their marriage with each of the jurisdictions and the issues on which relief may depend in those jurisdictions?

53. I have already provided the relevant history of the parties and their relationship to both India and Australia.

54. The husband is an Australian citizen and there is some evidence that he works for an Australian company, Electrical Home Aids Pty Ltd. Although the husband acknowledges returning to India in 2016 he asserts that he returned to Australia in December last year and intends "to remain in Australia for the foreseeable future"[26]

55. As stated, the wife returned to India with the child on 9 September 2015 and has not returned to Australia.

56. While it is arguable that the husband could institute proceedings for divorce in India, as stated previously, there appears to be no basis for obtaining a divorce on the grounds of an irretrievable breakdown of the relationship or other basis similar to that available to the husband under the Family Law Act 1975 in Australia. The husband has a right to a divorce in Australia, without having to prove fault or impairment of the other party, simply on the grounds of irretrievable breakdown of the marriage and separation for a period of 12 months. As previously stated, under section 13 of the Hindu Marriage Act 1955 it does not appear that the husband has a prima facie basis to obtain a divorce if the wife opposes a divorce being granted. Consequently, the remedy of divorce only appears to be available to the husband in Australia. Being an Australian citizen and resident, the husband is entitled to the benefits and protections of Australian law

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Whether, having regard to their resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing?

57. No further issues arise in relation to this factor.

Finding

58. After considering the factors I have referred to above, I am not satisfied that Australia is a clearly inappropriate forum to determine the husband's divorce application. Consequently, the wife's application for a dismissal of the husband's divorce application on that basis is refused.

59. I will now return and consider the issue of whether a divorce order should be granted under the Act in light of the available evidence.

Should a divorce order be granted?

Jurisdiction

60. Having considered the available evidence in light of the relevant statutory criteria, the Court is satisfied as follows:

** the parties were married in Ahmedabad, Gujarat, India on 12 July 2008; and*

** the husband is an Australian citizen.*

61. I note that the wife argues that the Court should consider dismissing the divorce application because it was executed by the husband in India and that this fact, together with other evidence, would lead the Court to the conclusion that the husband does not regard Australia as his home and that he has no intention to remain indefinitely in Australia. Given the

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wording of section 39(3) (discussed above), it is clear that a divorce application can be filed provided either party to a marriage is an Australian citizen or is domiciled in Australia or is an Australian resident (and has been so resident for one year immediately preceding that date). The relevant section does not require that the relevant party to a marriage must be both an Australian citizen and domiciled in Australia. Consequently, the husband, as an Australian citizen, is entitled to initiate divorce proceedings under the Act. Given that the Court can safely make that finding there is no need for the Court to separately consider whether the husband is also domiciled in Australia. The husband asserts that he is. There is also no requirement that the divorce application itself must be executed by the applicant in Australia. Consequently, those arguments advanced by the wife must fail.

50. As could be seen from the above, the Australian Court was cognizant of the fact that, as per its own judgments, there did remain a question as to whether or not a divorce granted by Australian Court would be recognised in India under the Hindu Marriage Act. However, the Australian Court has ultimately stated that the husband was an Australian Citizen and he was entitled to initiate divorce proceedings under the Australian Laws. It would be sufficient to state here that the Australian Court also harboured its own doubts as to whether it possessed jurisdiction and therefore the Family Court could not have concluded that the Australian Court was the court of competent jurisdiction to decide the matrimonial dispute arising between a couple who were married under the provisions of the HMA.

51. In fact, the Australian Court has recorded clear findings that the husband had returned to India in 2016 and had only returned to Australia in December-2016. The Family Court

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has also recorded a finding that the wife did return to India with her son on 09.09.2015 and had not returned to Australia. As could be noted from the above extracted portion, the Australian Court has observed that it is likely that the husband would remain in Australia for the foreseeable future and the wife had returned to India and had not returned to Australia. If the parties to a marriage which was conducted in India come back to India and thereby indicate that their origin domicile of birth subsisted, they cannot be permitted to initiate proceedings in a country which had become their domicile by choice. The fact that both the husband and wife had secured OCI cards by themselves indicates that it was never their intention to abandon their domicile by birth permanently and they consciously had decided to retain their domicile by birth. It is therefore clear that the husband had no right to initiate proceedings in the Australian courts by taking advantage of the fact that he had acquired Australian citizenship.

52. The reliance placed upon by the learned Senior Counsel on the case of Sondur Gopal would be of no relevance since in that case, the Apex Court has actually stated that the HMA would apply if Hindus residing outside the territory of India are domiciled in the territory of India. In this case, the finding recorded even by the Australian Courts and the pleas raised by the wife were to the effect that the proceedings were initiated in India while the both the husband and the wife were residing in India. The question as to whether the provisions of the HMA would govern the parties even if they acquire foreign citizenship has not been considered in this

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judgment and the case dealt with a case where the husband and wife were Swedish citizens and the husband was residing in Australia and the wife was residing in India. The factual situation is also completely different for the husband to draw any sustenance from this judgment.

C. RE: EFFECT OF S. 13 OF THE CPC

53. Section 13[1] of the CPC stipulates as to when a foreign judgment would not be conclusive and it states that the foreign judgment would only be conclusive in any matter which has been directly adjudicated upon between the parties except in 6 specific cases.

54. The first exception to this presumption that a foreign judgment is conclusive, would be when it has not been pronounced by a Court of competent jurisdiction.

55. It was the specific case of the wife that the Federal Circuit Court of Australia at Sydney did not possess the jurisdiction to entertain the petition for divorce since the

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[1] *Section 13 of the CPC provides that a foreign judgment shall be conclusive as to any matte directly adjudicated upon between the parties except in the following six cases:*

a) The judgment has not been pronounced by a court of competent jurisdiction.

b) The judgment has not been given on the merits of the case.

c) The judgment appears on the face of it to be founded on an incorrect view of international law or a refusal to recognize Indian law.

d) The proceedings in the foreign court were opposed to natural justice.

e) The judgment was obtained by fraud.

f) The judgment sustains a claim founded on a breach of any law in force in India.

Source: Civil Procedure Code, Section 13.

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marriage had been conducted under the provisions of Hindu Marriage Act. The wife also stated, and it has also been recorded by the Federal Circuit Court of Australia at Sydney that she had returned to India and continued to stay in India when the divorce proceedings had been initiated by the husband. This, therefore, establishes that the Family Court Ahmedabad would have to decide the question as to whether the Australian Courts were the Courts of competent jurisdiction, keeping in mind that both the husband and the wife were staying in India when the divorce proceedings were initiated in Australia by the husband. If the husband and wife were admittedly staying in India and the wife has continued to stay in India on the basis of her OCI card, the initiation of divorce proceedings in Australia and securing a decree of divorce despite the protestations of the wife regarding the jurisdiction of the Australian Courts, would be a legal question which requires serious consideration and therefore the rejection of the plaint, in such a case, would be untenable.

56. As already stated above, a marital dispute arising out of a marriage conducted in India between two Hindus under the provisions of the HMA can only be entertained and considered under the provisions of the HMA and not by the application of any foreign law. Thus, the rejection of the plaint on the ground that the marriage had already been dissolved by the court of competent jurisdiction would be incorrect.

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57. Section 13(c) states that a foreign judgment would not be conclusive *"where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable."*

58. As could be seen from the aforesaid extracted portion, it is the case of the wife that the provision of the Hindu Marriage Act would be applicable to her marriage, but the Australian Court has refused to accept this particular contention and has gone on to hold that the Australian laws will be applicable since the husband was an Australian citizen. It is therefore clear that the ground in S. 13 (c) i.e., the refusal to recognise the law of India would be attracted and an argument can be made by the wife that the foreign judgment granting a divorce and dissolving the marriage would not be conclusive. The Family suits filed by her, therefore, would have to be adjudicated on its merits and the plaint cannot be rejected

59. The Family Court has mechanically stated that, the husband and wife were Australian citizens who had OCI cards and the husband being an Australian citizen had filed a petition for divorce in the Australian Court and this was contested by the wife and after hearing the wife the Australian Court had granted a divorce and it was clear that the judgment was rendered on merits and hence the Australian Court was the Court of competent jurisdiction. The Family Court has also held that the parties were Australian citizens, there was no question of an incorrect law

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being applied and therefore the judgment rendered by the Australian Court was conclusive and as a consequence there was no cause of action for the wife to initiate proceedings before the Family Court at Ahmedabad.

60. This reasoning of the Family Court is fundamentally wrong since the wife had asserted before the Australian Courts that it had no jurisdiction to entertain the petition filed by the husband and the Australian Court had overruled this objection and had granted a divorce. It will definitely be open for the wife to contend that the Australian Court had no jurisdiction since they were married under the provisions of the Hindu Marriage Act and hence their marriage, including its dissolution, would have to be decided under the Hindu Marriage Act and not under a foreign law. It is therefore clear that the wife did have a clear cause of action and the view of the Family Court that the marriage was dissolved cannot be accepted.

D. RE: JURISDICTION OF THE FAMILY COURTS TO ENTERTAIN A PETITION QUESTIONING THE DECREE OF DIVORCE GRANTED BY A FOREIGN COURT

61. Learned Senior Counsel for the husband strenuously contended that the Family courts Act did not confer a jurisdiction on the Family Court to consider a question as to whether a decree passed by the Australian Court was null and void and the Family Courts established under the Act can only have the jurisdiction to decide a suit or a proceeding in which the question relating to the declaration of validity of

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the marriage. This argument that the validity of the marriage was not an issue between the parties and therefore, the learned Family court possessed no jurisdiction cannot also be accepted.

62. Section 7 of the Family Court reads as follows.

> ***7. Jurisdiction.—*** *(1) Subject to the other provisions of this Act, a Family Court shall—*
> *(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil*
> *court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and*
>
> *7(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.*
>
> *Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—*
>
> *(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;*

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(b) a suit or proceeding for a declaration as to the validity of a marriage ***or as to the matrimonial status of any person;***

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

63. As could be seen from sub clause (b) of the Explanation to S. 7, the Family Court does possess jurisdiction to entertain a suit or a proceeding in which a declaration is

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sought regarding the matrimonial status of any person. If a litigant, such as the wife, in this case, were to initiate a proceeding seeking for a declaration that the decree of divorce obtained by the husband in a foreign court was null and void, the necessary consequence on such a decree being granted is that her matrimonial status of being the wife in a subsisting marriage would be declared. It is therefore obvious that she was essentially seeking for a declaration regarding her matrimonial status as a wife in a subsisting marriage and the Family Court would therefore clearly possess jurisdiction to decide such a suit. The argument of the learned Senior Counsel is therefore unacceptable.

64. In fact, in the decision relied upon by the learned Senior Counsel i.e., AIR 2016 SC 2161, it has been stated as follows:

> *7. Under Section 7(1) Explanation (b), a Suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the Civil Courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 also endorses the view which we have taken, since the Family Courts Act, 1984, has an overriding effect on other laws.*

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VII. CONCLUSION AND FINAL ORDER

65. As could be seen from the above, the Hon'ble Supreme Court has in fact clearly stated that whenever the matrimonial status of any person is the subject matter of any declaration sought for, it is only the Family Court which would possess the jurisdiction to try the suit.

66. In the result, the impugned orders are set aside and the appeals are allowed. The Family Court shall decide the Family suits filed by the wife seeking for restitution of conjugal rights and for a declaration that the decree of divorce obtained by the husband in the Australian Court, on its own merits and in accordance with law.

67. Considering the overall request of learned Advocate for the respondent – husband, this order shall remain stayed for a period of two weeks.

(A.Y. KOGJE, J)

(NSSG,J)

Mehul Desai