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NRI Marriages: The Transnational Conundrum

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ABSTRACT

This research paper deals with labyrinthine of various issues involved in NRI Marriages. Largely it includes criminal offences in NRI marriages like ***cruelty*** *by the husband or his relatives,* ***criminal breach of trust*** *by misappropriation of a woman's personal property,* ***dowry wrongs***, ***abandonment*** *of spouse,* ***forced marriages***, ***criminal neglect*** *to maintain spouse, children or parents,* ***bigamous marriages*** *and commission of* ***adultery***. *Lately, it has given rise to procedural controversies in the sphere of Private International Law itself, like* ***parallel adjudication of matrimonial disputes*** *which has further given rise to* ***anti injunction suits***. *There are other set of issues which has raised legislative questions in India, for instance* ***Inter parental child custody disputes*** *has raised questions on India's status of conformity with Hague Convention; whether "****irretrievable breakdown of marriage****" should be included as ground of divorce legislatively; revisiting the* ***bilateral extradition treaties*** *in order to curtail matrimonial criminal offences in NRI marriages, for example, to include domestic violence as a criterion for seeking custody of an accused. All these issues are result of the loopholes in Indian legislative setup on NRI marriages and sole dependence on judiciary in this regard. The answer therefore lies in giving NRIs law which is applicable to them as Indians rather than leaving them in a transnational limbo and letting them invade the Indian system with judgement of foreign jurisdictions which do not find applicability in the Indian system.*

Keywords: *NRI Marriages, Private International Law, NRI matrimonial offences, NRI matrimonial disputes, Jurisdiction in NRI marriages, inter parental child custody disputes, section 13 CPC, irretrievable breakdown of marriages, Indian marriages, forced marriages, anti-injunction suits in divorce cases, Hague.*

I. INTRODUCTION

David Held, befittingly stated, that this world is of "overlapping communities of fate- where the trajectories of each and every country are tightly entwined".[3] A challenge to law and justice

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[3] David Held, Cosmopolitanism: Globalisation Tamed?, Vol. 29, No. 4 (Oct., 2003), Review of International Studies, pp. 465

 [ISSN 2581-5369]

in one place has consequences for many other places and can be experienced everywhere. However, it is important to point out here, that in past few decades globalisation has taken a new turn and emphasis from states have shifted to the individuals lately. Therefore, one can say how private international law has taken more importance than public international law especially because it is not law but power politics between nations that define the latter. The importance of private international law in India has increased out of the fact that, travel across international borders by Indians and legal transactions carried out by them transnationally has become prevalent that we need, norms to regulate their rights and duties, primarily through courts and through legislations, specially through state becoming party to international conventions which bring uniformity across the world, otherwise we leave out such individuals left in a transnational limbo stuck in the labyrinthine of conflict of laws. The greatest travesty in this aspect have emerged in case of marriages involving NRIs as one of the parties. NRI Marriages have given rise to multi-dimensional problems like Socio legal issues (especially that of forced marriages), jurisprudential issues in private international law, problems in procedural law and of course finding an appropriate solution to deal with these issues & problems legislatively.

II. SOCIAL ASPECTS OF NRI MARRIAGES

Dharmecha, Arthecha, Kamecha, Mokshecha Aham Evam Naati Charami - "I promise to stand by you as a righteous partner during times of uncertainties, overcoming all desires of riches and needs. From this moment on I promise to embrace and cherish everything life has to offer with you."

Vows are exchanged in every kind of marriage across the world, but none parallel to what happens in India. As a society, we hold marriages as a divine sacrament, a union that shall stand the test of time upholding the traditional ethos of the culture and value system in India. Make no mistake, every marriage can be dissolved legally and parties to the marriage have an absolute right to legitimately divorce their partner, and yet divorce is perceived as a very last resort, a consequence of irretrievable damage with no possibility of reconciliation.

Marriages over a period of time have assumed the status of a social contract, yet retaining its invigorating nature of the sacrament. The metamorphosis of marriage as its seen in the present day, marriages are not restricted among the known and peers, a healthy dose of technology has helped people to connect with people across the globe. Marriages in the e-commerce era have changed the idea of getting married. A good match is a result of a great algorithm and rightly so, it has catered to the fancy of people. The idea that a person can get married to an American

 [ISSN 2581-5369]

national and enjoy the riches and luxe life of living in states took upon the nation. Dowry also most popularly called as solicited gift, was paid to the tune of crores and brides were decorated in kilograms of gold like a newly wedded bride, for the lack of similitudes. The endemic rise of NRI marriages was unparalleled to any mass hysteria in recent times. Like every bad decision in life, even NRI marriages had consequences. The husbands eluded the wives after the wedding, the wives found that the husband was already married. Lawfully wedded wives were treated as slaves denying any kind of decent living.

III. LEGAL ASPECTS OF NRI MARRIAGES

The following laws govern the NRIs in respect of marriage, divorce, maintenance and custody of the children:

1. The Hindu Marriage Act, 1955,
2. The Special Marriage Act, 1954,
3. Hindu Adoption and Maintenance Act, 1956,
4. The Dissolution of Muslim Marriages Act 1939
5. The Divorce Act 1869
6. The Marriage Laws (Amendment) Act, 2003
7. The Foreign Marriage Act, 1969
8. The J&K Hindu Marriage Act, 1980
9. Goa, Daman and Diu Laws
10. Quaranic Laws of Muslims
11. Parsi Marriage and Divorce Act, 1936
12. The Indian Christian Marriage Act, 1872
13. The Indian Divorce Act, 1869

Despite the presence of many laws protecting the sanctity of marriage the physical absence of the wrongdoer does make it extremely difficult to bring the culprit to books. Every law that is present remains to be an instrument of no-use to help save the women from this tyranny.

The Indian laws are more stringent than the western countries in respect of divorce. The husbands who are residing in western countries take advantage of the laws where they are residing to avoid the Indian laws and obtain divorce decree. A question would arise about the validity of the divorce obtained from foreign countries, when the marriage was performed on Indian soil and as per the provisions of Hindu Marriage Act.

 [ISSN 2581-5369]

In *Dipak Bannerjee versus Sudipta Bannerjee, 1987,*[4] the husband questioned the jurisdiction of Indian court to entertain and try proceedings initiated by wife under Section 125, Code of Criminal Procedure, 1898 (hereinafter CrPC), for maintenance, contending that no Court in India had jurisdiction in international sense to try such proceeding as he claimed to be citizen of United States of America and his wife's domicile also followed his domicile. The Court held that where there is conflict of laws every case must be decided in accordance with Indian Law and the rules of private international law applied in other countries may not be adopted mechanically by Indian courts. The Court felt that keeping in view the object and social purpose of Sections 125 and 126 of CrPC, the objection raised by husband was not tenable and the jurisdiction of Indian Court was upheld as it was the court within whose jurisdiction she ordinarily resided. Therefore, when there was conflict of laws the Indian laws prevail over foreign laws. The efforts of NRI's to go away from the Indian laws are an only futile exercise.

IV. NRI MATRIMONIAL CRIMINAL OFFENCES

Criminal offences in NRI marriages largely include cruelty by the husband or his relatives, criminal breach of trust by misappropriation of a woman's personal property, dowry wrongs, abandonment of spouse, forced marriages, criminal neglect to maintain spouse, children or parents, bigamous marriages and commission of adultery. However, the process of criminal investigation and trial in India can be tardy and, in this backdrop, the Supreme Court judgement in *Thota Venkateshwaralu versus State of Andhra Pradesh, 2011,*[5] held that Indian courts, with the prior consent of the central government, can try offences committed by an Indian citizen in a foreign country. The case was related to a Hindu traditional marriage solemnised in Andhra Pradesh with allegations of torture met out to the wife in Botswana. Accordingly, abandoned brides, jilted spouses, destitute children, and offended families back home can now seek justice from Indian courts under criminal law. In terms of Section 4 of the Indian Penal Code, 1860, Indian criminal courts can try and accuse Indian citizen even if the offence was committed outside India. Under Section 188 of the CrPC, if a criminal offence is committed by an Indian citizen outside India, he may be dealt with in respect of such an offence as if it had been committed at any place within India at which the Indian citizen may be found. This pronouncement has enabled criminal courts in India to proceed with clarity in the dispensation of justice to wronged NRI marriages. The jurisdiction of the Indian courts in respect of NRI marital offences will no longer be lost by reason of the venue of the offence and the object of prior sanction of the Central government is only to prevent the accused from being tried over

[4] AIR 1987 Cal 491
[5] (2011) 9 SCC 527

 [ISSN 2581-5369]

again in two different places for the same offence and not to escape the noose by jurisdictional immunity.

However, in cases of **forced marriages** the Indian law still has some loopholes. The term forced marriage can be used to cover various different concepts like arranged marriage, marriage for reasons of Customs, child marriage, early marriage, marriage of convenience, marriage to acquire nationality, bogus or sham marriage, undesirable marriage. In all of those marriages the consent to marriage is the crucial issue. The term forced marriage is defined differently in different countries. Not all nations, cultures or individual share a common conception of marriage or regard it as the same institution in terms of its content or form. In some cultures, consent to marriage is not regarded to be essential. In cases other than those where there is actual physical proof that a persons' freedom of consent has been denied by physical force or violence, it is not always easy to determine the relationship between the individuals in terms of intent and the psychological phenomena associated with the explicit content of the marriage contract. It is very difficult to prove emotional threats that may have prevented individuals from imposing a marriage which is against their will. Consequences of such forced marriages include psychological, sexual or domestic violence, rape, self-hurt or suicide or sometimes even honour killings. The Forced Marriage Unit (FMU) of the Consular Assistance Group of Foreign and Commonwealth Office, London in 2009 received 1,682 reports relating to possible forced marriage and dealt with 377 assistance (overseas and within United Kingdom) and immigration cases, wherein 8% of the cases where the FMU gave advice or support relating to possible forced marriage were associated with India; out of 152 overseas assistance cases where the FMU provided direct support, 6 cases involved British nationals in India. Out of the 137 immigration cases dealt with by the FMU, 14 cases involved spouses from India. In response to the problem of forced marriages in the UK, the Forced Marriage (Civil Protection) Act, 2007, an Act of the Parliament of the United Kingdom was passed. It enables the victims of forced marriage to apply for court orders for their protection. The aim of the act is to provide protection to those at risk of forced marriage and to provide recourse for those who have already been forced into marriage. The act also sends out a strong signal that forced marriage is unacceptable and will not be tolerated. There is an equally crying need for separate consolidated forced marriages legislation in India as done in the UK considering that India is a society in which forced marriages occurred with a high frequency. It is pertinent that this legislation should have extraterritorial application as well, just as the provisions of the Hindu marriage Act, 1955 (hereinafter HMA).

 [ISSN 2581-5369]

V. QUESTION OF JURISDICTION OF NRI MATRIMONIAL DISPUTES

Areas of family law in which the problem of jurisdiction of law is seen occurring very frequently relate to dissolution of marriage, inter parent to child abduction, inter-country child adoption and succession of property of non-resident Indians. The parallel adjudication of NRI matrimonial disputes in the courts simultaneously in India and abroad activate a new *inter se* marital discord. The clash of jurisdictional battles also leads to conflict amongst the authority of courts. Foreign courts often impose penal sanctions unaware of prior directions given by Indian courts earlier. In matters of divorce, since irretrievable breakdown of marriage is not a ground for dissolving the marriage under Indian law, Indian courts in principle do not recognise foreign matrimonial judgements dissolving marriage by such breakdown. Likewise, enforcement of a foreign court order in whose violation of child of the family has been removed and brought to Indian soil brings a parent to India desperately seeking legal remedy. Unfortunately, no special Indian legislation exists to combat such remedies. The number of Indians on foreign shores have increased multi-fold but the multiple problems which bring them back to India are still left to be resolved by the conventional Indian legislation. Times have changed but laws have not. However, the dynamic, progressive and open-minded judicial system in the Indian jurisprudence often comes to the rescue of such problems by interpreting the existing laws with the practical application to the new generation problems of immigrant Indians. The "judicial legislation" in this regard has been lain down in following paragraphs.

Under Indian law, Section 13 and 14 of Civil Procedure Code, 1908 (hereinafter CPC) deals with the foreign court judgments and its presumptions. The foreign court judgments are conclusive as to any matter thereby directly adjudicated upon between the same parties or between the parties under whom the, or any of them claim litigating under the same title. If it is passed by competent court having jurisdiction, if it has been given on merits, if it is not found on face of the proceedings to be found on in correct international law or refused to accept Indian law, it is not opposed to natural justice, not obtained on fraud and not in breach of law in India.

The Hon'ble Apex court dealt with Section 13 of CPC elaborately in *Narasimha Rao versus Venkata Lakshmi, 1991*.[6] Where in the decree of dissolution of marriage passed by the Circuit Court of St. Louis County, Missouri, USA was passed by the court by assuming jurisdiction over the divorce petition filed by the husband there, on the ground that the husband had been a resident of the State of Missouri for 90 days preceding the commencement of the action as the minimum requirement of residence. Secondly, the decree had been passed on the only ground

[6] [1991] 2 SCR 821

 [ISSN 2581-5369]

that there remained no reasonable likelihood that the marriage between the parties could be preserved, and that the marriage had, therefore, "irretrievably broken". Thirdly, the respondent wife had not submitted to the jurisdiction of the foreign court. The Court in its observations explained the implications of each clause of Section 13 in this case. The relevant portion of the judgment is worth quoting:

> "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 judgment 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 an 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.
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> 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,

 [ISSN 2581-5369]

therefore, a foreign judgment is founded on a jurisdiction or on a ground not 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 filed 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 insist, even in commercial matters, that the action should be filed in the forum where the defendant is either domiciled or is habitually resident."

On the basis of the above interpretation, the Court then went on to lay down a golden rule that has been repeatedly followed and relied upon in subsequent cases: 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 only three exceptions to this rule were also laid down by the Court itself as follows:

a. 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.

 [ISSN 2581-5369]

b. 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.

c. 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.

Bringing in the benefit of certainty and predictability of law, the Court said that "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." According to the Court, the decree dissolving the marriage passed by the foreign court was without jurisdiction in this case as according to the HMA neither the marriage was celebrated, nor the parties had last resided together, nor the respondent resided within the jurisdiction of that court. The decree was also passed on a ground which was not available under the HMA which is applicable to the marriage. Further, the decree had been obtained by the husband by representing that he was the resident of the Missouri State when the record showed that he was only a "bird of passage"- He had, if at all, only technically satisfied the requirement of residence of 90 days with the only purpose of obtaining the divorce. The court reiterated that residence does not mean a temporary residence for the purpose of obtaining a divorce, but 'habitual residence' or residence which is intended to be permanent for future as well. The final judgment therefore was that since with regard to the jurisdiction of the forum as well as the ground on which the foreign court had passed the decree in the case, were not in accordance with the Act under which the parties were married, and the respondent had not submitted to the jurisdiction of the court or consented to its passing, it could not be recognised by the courts in this country and was unenforceable. The Court finally said: "We believe that the relevant provisions of Section 13, CPC 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 the sanctity of the institution of marriage and the unity of family which are the cornerstones of our societal life."

 [ISSN 2581-5369]

In *Harmeeta Singh versus Rajat Taneja, 2003,*[7] the wife was deserted by her husband within 6 months of marriage as she was compelled to leave the matrimonial home within 3 months of joining her husband in the US. When she filed a suit for maintenance under the Hindu Adoptions and Maintenance Act in India, the High Court disposed of the interim application in the suit by passing an order of restraint against the husband from continuing with the proceedings in the US court in the divorce petition filed by the husband there and also asking him to place a copy of the order of the High Court before the US court. The Court made some other observations while passing this order, mainly that even if the husband succeeded in obtaining a divorce decree in the US, that decree would be unlikely to receive recognition in India as the Indian court had jurisdiction in the matter and the jurisdiction of the US courts would have to be established under Section 13, CPC. The Court then said that till the US decree was recognised in India, he would be held guilty of committing bigamy in India and would be liable to face criminal action for that. The court also said that since the wife's stay in the US was very transient, temporary and casual, and she may not be financially capable of prosecuting the litigation in the US court, the Delhi courts would be the forum of convenience in the matter.

Bombay High Court in *Kashmira Kale versus Kishore Kumar Mohan Kale, 2010,*[8] set aside the parallel proceedings for divorce of the Pune family court and upheld a divorce decree passed by the court of Oakland, State of Michigan, USA, dissolving a Hindu marriage on the principle of breakdown, has evoked a new question over the settled law. The verdict gave sanctity to a US divorce decree in preference to proceedings under the Hindu marriage Act, 1955 between the same parties upsets the settled law. It has been pointed out that the conclusion drawn by the Bombay High Court that the parties were domiciled in the US and hence the Hindu marriage act cannot apply to them is per se erroneous.[9] Furthermore, the non-application of the HMA to Hindus was misconstrued and the application of the breakdown principal without considering the written statement of the husband challenging the jurisdiction of the US court were factors which doesn't approve the foreign decree which did not take into consideration the provisions of the HMA under which the parties were married. The Bombay High Court in *Sondur Rajini versus Sondur Gopal, 2006,*[10] had held that the provisions of the HMA do not cease to apply on change of domicile which is determined when the parties tie the nuptial knot under the HMA and not on the date when an application is made for matrimonial

[7] 102 (2003) DLT 822
[8] 2011 (1) HLR, 333
[9] Anil Malhotra, no bull in a China shop of NRI divorces and anti-suit injunctions, The Tribune, November 7, 2010
[10] 2006 (2) HLR 475

 [ISSN 2581-5369]

reliefs. Above all, the view of the Bombay High Court disagrees with the celebrated view of the Supreme Court in Y. Narasimha Rao versus Y. Venkata Lakshmi[11], clearly holding the rule that 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 Supreme Court in *Neerja Saraph versus Jayant Saraph, 1994,*[12] thereafter had even suggested feasibility of a legislation to hold that "no marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court". Thus, we need concrete laws to deal with such jurisdictional cases rather than allowing foreign courts to decide Hindu marriages disputes. Indian courts are better suited to decide them without foreign interference.

VI. INTER PARENTAL CHILD CUSTODY DISPUTES & MAINTENANCE

International mobility, cross-border migration and dismantling of intercultural taboos have all the positive traits but are fraught with a new set of risks for children caught up in cross-border situations. Caught in crossfire of broken relationships with ensuing disputes over custody and relocation, the hazard of international abduction looms large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. Intercontinental abduction of children by parents is now a contemporary legal issue which baffles different legal systems of Nations whose *inter se* conflicting positions prevents return of children to the country of their habitual residence. Solace can be found *inter se* between countries which are signatories to the Hague Convention on Civil Aspects of International Child Abduction, 1980. But what happens to those aggrieved parents were not a part of this global conglomerate of like-minded nations who honour each other's laws? No global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimised by legal systems.

Section 26 of Hindu marriage act deals with the custody of child, which runs as follows:

In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in

[11] (supra)
[12] 1994 (6) SCC 641

 [ISSN 2581-5369]

case the proceeding for obtaining such decree were still pending, and the Court, may also from time to time revoke, suspend or vary any such orders and provisions previously made.

As per the said section, welfare of the child is always paramount consideration. None of the parents have absolute rights over child. As per Section 6 of Hindu Minority and Guardianship Act, the natural guardian is father after him mother but if they didn't complete the age of 5 years the natural guardian is mother. The Hon'ble Apex court in catena of decisions (laid down in following paragraphs) held that child is not the property of parents and paramount consideration is the welfare of child.

In *Ruchi Majoo Vs Sanjeev Majoo, 2011,*[13] the Supreme Court has ruled that Indian courts have jurisdiction to deal with the custodial disputes of minor children even if a foreign court has passed an order in favour of either of the parents. A bench of justices V S Sirpurkar and T S Thakur held in this judgement that simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity, and not abject surrender, is the mantra in such cases. The apex court passed the judgement while upholding an appeal filed by Ruchi Majoo challenging a Delhi High Court judgement that Indian courts have no jurisdiction under the doctrine of "comity of courts" to entertain any petition if a decree or order has already been passed by any foreign court. The couple were living with the kid in the US before she returned to India in 2008. A Delhi court had on Ruchi's application granted her custody of the child under the Guardians and Wards Act. The Delhi High Court had, however, struck down the trial court's order and asked the couple to submit themselves to the Californian court as all the three possessed US citizenship. Aggrieved, the wife appealed in the apex court where she accused her husband of being involved in pornography and adulterous relationship. The husband, while denying the allegations, maintained that Indian courts had no jurisdiction since a decree had already been passed by the Californian court. Rejecting the husband's arguments, the apex court said "recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Criminal Procedure 1908 as amended by the Amendment Act of 1999and 2002.

In *Syed Saleenmuddin v. Dr. Rukhsana and Ors, 2001,*[14] the Supreme Court dealing with a habeas corpus seeking custody of minor children, inter alia, observed as under:"... it is clear

[13] AIR 2011 SC 1952
[14] 2001 (5) SCC 247

 [ISSN 2581-5369]

that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court."

Marggarate Pulparampil v Dr. Chacko Pulparampil, 1970,[15] is one of the earliest cases before an Indian court involving the issue of children's custody in NRI marriage. In this judgment the High Court of Kerala not only recognized the important principle of "real and substantial connection" to establish the court's jurisdiction to decide custody issue, but also recognized the availability of the remedy of writ of habeas corpus to claim custody of child who has been illegally removed by a parent. Here the court allowed the child to be moved back to the mother in Germany even though that meant allowing the child to be moved out of the Indian court's jurisdiction, as the court felt that the interests of the child were of paramount consideration and in this case made it necessary to give the custody to the mother in Germany. The court also laid down the safeguards for ensuring the parental rights of the father in India were not totally compromised in the process by passing a series of directions to balance the conflicting interests:

- The petitioner will execute a bond to this Court to produce the children whenever ordered by this Court to do so.
- An undertaking from the German Consulate Authority in Madras that they will render all assistance possible for the implementation of any order passed by this Court from time to time within the framework of the German Law will be produced by the petitioner.
- The petitioner will obtain and send a report from the Parish Priest within the Parish in which they propose to live every three months to this Court giving sufficient details about the children, their health and welfare and send a copy thereof to the father.
- The petitioner will inform the Registrar of this Court the address of her residence from time to time and any change of address will be immediately notified.
- She will not take the children outside West Germany without obtaining the previous orders of this Court excepting when they are brought to this country as directed in this order.
- Once in three years, she must bring the children to this country for a minimum period of one month at her own expense. At that time, the father will have access to the children on

[15] AIR 1970 Ker 1

 [ISSN 2581-5369]

terms and conditions to be directed by this Court when the children have reached this country. The three years' period will be determined from the date on which the children are taken by the mother from this country. They will be brought to India earlier as directed by the Court at the instance of the father provided that it is not within a year from today, if the father is willing to meet the expenses for the trip from Germany to India and back for the mother and children.

- (vii) The father, if he is visiting Germany, will be allowed access to the children on terms and conditions as ordered by this Court on motion by the father intimating his desire to go and see the children and requesting for permission for access.
- (viii) When the children are brought to India at the end of 3 years the whole question of custody may be reviewed Suo motu by this Court or at the instance of the father or mother and the present order maintained, modified, altered or cancelled."

If we go through the case laws and judgments decided by the Hon'ble Apex Court and High Courts in India, the custody was given to mothers whether they have been residing in India or abroad.

Section 125 of CrPC, Section 24, 25 of Hindu marriage Act and Section 20 of Domestic violence Act, Section 18 and 20 of Hindu Adoption and Maintenance Act contemplates the maintenance to the wife and children. Under section 125 of CRPC the wife can seek maintenance if she resides in India by the time of filing of the case, if she is unable to maintain herself. She can also seek maintenance for her minor child. As per section 24 of HMA interim maintenance and pendent lite expenditure can be sought. Under Section 25 of the Hindu Marriage Act, she can seek permanent alimony.

VII. POSSIBLE SOLUTIONS

Recently, the government took step towards making the registration of marriages compulsory by introducing the Registration of marriage of NRI Bill 2019, in addition, it amends the Passport Act, 1967, and the Code of Criminal Procedure, 1973. The government also provided for issuing look out circular was for keeping a watch on arrival or departure of NRI spouses and preventing them from fleeing India. Other legislative solutions can be as follows:

- Dissolution of marriage on the ground of breakdown of marriage as an additional ground for diverse should be introduced when at least one of the spouses is an NRI subject to safeguards provided by legislation

 [ISSN 2581-5369]

- Wherever one of the spouses is an NRI, parallel additions must be made in Hindu marriage act 1955 and special marriage act 1954 to provide for provisions for maintenance and alimony of spouses, child custody and child support as also settlement of matrimonial property. This will ensure that the spouse or children on Indian soil are maintained and provided for in accordance with the income and standard of the NRI spouses in the foreign jurisdiction.
- Under section 3 of the Family Courts Act 1984 the respective state government where family courts have not been established should be directed to provide for family courts. the states with high NRI population should immediately create such courts and give priority to settlement of family law issues where parties are NRIs.
- In the area of inter-parental child abduction or removal of child to India from foreign jurisdictions against court orders, India must become a signatory to the **Hague Convention on Civil Aspects of International Child Abduction, 1980** to provide a treaty to be followed for observance and implementation of foreign court orders. India did frame the civil aspects of international child abduction Bill 2007 however it is yet to be tabled in Parliament. We need a new synergy and commitment to the cause of the remove the child. A law must be put in place expeditiously should sleep for the welfare of the child.
- A legislation should be brought about to explicitly state the definition of NRIs rather than indirectly defining them via Income Tax Act and Foreign Exchange Act, 1999. The definition should be in comparative terms with OCIs and PIOs. Their rights and duties should also be clearly stated out by the government.
- A separate & consolidated forced marriages legislation with extraterritorial application.
- A core committee of specialist in private international law should be constituted for preparing a comprehensive draft to suggest the changes in legislation apart from the suggestions given by the law commission of India.
- **Bilateral extradition treaties:** Revisiting the bilateral extradition treaties in order to curtail matrimonial criminal offences in NRI marriages, for example, to include domestic violence as a criterion for seeking custody of an accused.
- **Alternative Dispute Resolutions:** Mediation and conciliation can resolve the complex NRI marital disputes in a cost effective and time effective manner. In India the increased level of awareness about mediation and conciliation, and the existence of a comprehensive code applicable uniformly to mediation and conciliation, besides the sufficient availability of the mediation services would certainly accelerate the use of mediation and conciliation

 [ISSN 2581-5369]

in resolving marital disputes. Section 23 of the Hindu marriage act 1955 and order XXXIIA of the code of civil procedure, 1908 are legislations which facilitate alternate dispute resolution and sometimes making it compulsory.

- **Pre-Nuptial Agreements:** Traditionally, Indian society views marriage as a sacramental union and not as a contractual relationship. The new India in the 21st century is not yet ready to accept diluting the traditional sacramental notion of marriage into a somewhat commercially sounding agreement called prenuptial agreements. But, like the UK perspective it is believed that it is perhaps wiser to accept the concept of a prenuptial agreement in India that clearly states a fair division of property, personal possessions and financial assets than having the parties fighting over these issues for years after filing of a divorce. The larger issue that looms in the Indian set up is the fact that any prenuptial agreement or post nuptial agreement or settlement could well be struck down by the courts on the ground of public policy, depending on the facts and circumstances of the case-to-case basis. However, the enforcement of prenuptial agreements may prove to be an effective check on some false or implicating prosecutions by some women who misuse section 498A IPC or the provisions of the domestic violence act 2005 to blackmail or to extort money.

VIII. CONCLUSION

The need is dire for in acting new laws to deal with the new generation NRI problems more comprehensively. But, at the same time, legislative changes will fail if they are not backed up with specially created or empowered courts to deal with these legal issues of NRIs. Thus, enacting appropriate NRI laws, making corresponding procedural statutory rules and vesting authority in competent court to adjudicate NRI disputes is the wholesome answer on an all-India basis. Therefore, a joint effort of Indian judiciary and Indian Legislature is required today to address all the issues arising from NRI marriages.

Marriages cannot be an exercise of futile faith, in a rapidly developing nation, the tyranny of NRI marriages have to be arrested. The recent 2019 bill is surely the necessary beginning to end this travesty. The objective of the Bill is to create more accountability and offer more protection against exploitation of Indian women by their NRI spouses. The bill remains to see the light of day.

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 [ISSN 2581-5369]