

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**FAMILY COURT APPEAL NO. 56 OF 2016**  
**WITH**  
**CIVIL APPLICATION NO. 154 OF 2016**  
**IN**  
**FAMILY COURT APPEAL NO.56 OF 2016**

Shilpa Sachdev  
adult, Indian Inhabitant,  
res. at Venus Apartments,  
F/8. 2<sup>nd</sup> floor, R. G.Thadani Marg,  
Worli, Mumbai 400 018

.. Appellant (Original Petitioner )

v/s.

Anand Sachdev  
Adult, Indian Inhabitant, res at  
39/40, Barathi Cross Road No.2,  
Saibaba PO Coimbatore, Tamil Nadu  
present at PO Box NO.51273, Dubai UAE

..Respondent  
(Original Respondent )

Ms. Mrunalini Deshmukh a/w. Mr. Vikram Deshmukh & Ms.  
Mehernaaz Bharde i/b. Crawford Bayley & Co. for the Appellant/Org.  
Petitioner.

Mr. Ashish Kamat a/w. Megha Chandra & Maya B, Idnani for the  
Respondent.

**CORAM : A.S.OKA & SMT. ANUJA PRABHUDESSAI, JJ.**  
**JUDGMENT RESERVED ON: 5TH DECEMBER, 2016**  
**JUDGMENT PRONOUNCED ON : 11<sup>th</sup> AUGUST, 2017.**

**JUDGMENT (PER ANUJA PRABHUDESSAI, J.) :**

1. Being aggrieved by the Order dated 22<sup>nd</sup> February, 2016 in  
Petition No. A-3072 of 2016, passed by the Family Court at Bandra,

Mumbai, the appellant (wife) has filed the present appeal under Section 19 of the Family Court Act, 1984.

2. For the sake of convenience, the appellant-wife shall be referred to as “petitioner” and the respondent-husband shall be referred to as “respondent” as per their status in the petition before the Family Court.

3. A few relevant facts necessary to decide the appeal are as under:-

The marriage of the petitioner and the respondent was solemnized on 9<sup>th</sup> March, 2000 at Coimbatore, Tamil Nadu, according to the Hindu Vedic Rights. The marriage was subsequently registered at Mumbai, on 13<sup>th</sup> March, 2000. Subsequent to the marriage, the petitioner and the respondent moved to Dubai. While in Dubai, the couple was blessed with two children, a son and a daughter. The son was born on 16<sup>th</sup> December, 2001 and the daughter was born on 15<sup>th</sup> January, 2008.

4. On 21<sup>st</sup> June, 2008, the petitioner returned to Mumbai along with the children, and since then the petitioner along with her children is

residing in Mumbai, whereas the respondent continues to reside in Dubai. On 12<sup>th</sup> November, 2014 the petitioner filed a petition for divorce on the ground of cruelty. The petitioner also claimed maintenance and accommodation for herself and the children.

5. The respondent, by application dated 16<sup>th</sup> January, 2015 questioned the maintainability of the divorce petition filed by the petitioner. The respondent claimed that the petitioner had come to Mumbai on 21<sup>st</sup> June, 2008 with return tickets for Dubai on 31<sup>st</sup> August, 2008. The petitioner, however, did not return to Dubai and his efforts to convince her to return to Dubai rendered futile. The ensuing matrimonial discord led the respondent to file a petition for divorce being Petition No.8 of 2012 in Dubai Court. The respondent claimed that the petitioner was duly served with summons issued by Dubai Court, despite which the petitioner failed to appear in the Court, either personally or through her representative. Hence the matter proceeded in the absence of the petitioner in Dubai (UAE Court). The Dubai (UAE) Court by judgment dated 1<sup>st</sup> November, 2012 granted the

petition for divorce. A copy of the said judgment was sent to the petitioner by DHL Express Courier. However, the petitioner refused to accept the same.

6. The respondent contends that the issue of dissolution of marriage has already been adjudicated on merits in Case No. 8 of 2012 by the Dubai (UAE) Court. Since the petitioner as well as the respondent last cohabited in Dubai, within the territorial jurisdiction of Dubai Court, the said Court had jurisdiction to decide the matter. The judgment passed by Dubai Court in Case No. 8 of 2012 being a foreign judgment is conclusive and the issue of dissolution of marriage having already been adjudicated on merits, the same cannot be re-adjudicated by filing petition under Section 13 of the Hindu Marriage Act. Hence, the petition filed by the petitioner before the Family Court at Bandra is barred by the principles of res-judicata.

7. The petitioner claimed that she had not received any summons from the Court at Dubai and that the issue raised in the said

matrimonial proceedings was not adjudicated by the Dubai Court on merits. The petitioner further claimed that the Court at Dubai was not competent Court to adjudicate the issue. It is contended that the forum as well as the grounds on which the relief is granted are not in accordance with the matrimonial law that govern the parties. The petitioner therefore claims that the decree is without jurisdiction and is not conclusive.

8. The learned trial Judge held that Dubai Court had proceeded ex-parte after providing sufficient opportunity to the petitioner to appear before the Court. The learned Judge further held that Dubai Court has granted divorce on the ground of desertion, which ground is available under the Hindu law. The judgment of Dubai Court was not obtained by fraud. The decree being legal and valid and not having been challenged has attained finality and is binding. The learned Judge held that the suit filed by the petitioner is barred by the principles of res-judicata and hence allowed the application and dismissed the petition filed by the petitioner. Aggrieved by the said order, the petitioner has

filed this appeal.

9. Heard Ms. Mrunalini Deshmukh, the learned Counsel for the petitioner. She submitted that the petitioner had not submitted to the jurisdiction of Dubai Court. At the time of filing of the suit the petitioner was in Mumbai and she was not served with the summons. The petitioner, therefore, could not contest the petition filed before the Dubai Court. The learned Counsel further submitted that the Dubai Court had no jurisdiction to entertain the suit/petition for divorce. She submits that since the said suit was not adjudicated on merits by a Court of Competent Jurisdiction, the same ceases to be conclusive. The learned Counsel for the petitioner has submitted that domicile of the spouses has always been in India and as such the marriage could be dissolved only by a Competent Court in India.

10. The learned Counsel for the petitioner further submitted that the learned Judge has failed to consider the fact that the petition in Dubai Court was only for dissolution of marriage, whereas in the present

petition, apart from divorce, the petitioner has also claimed maintenance and accommodation for herself and the children. The petition therefore could not have been dismissed, without adjudicating upon these issues.

11. The learned Counsel for the petitioner has submitted that the Dubai Court was not competent to adjudicate on the issue of divorce. The judgment passed by the Dubai Court was not on merits of the matter and the judgment being without jurisdiction, does not operate as res-judicata. She has further submitted that the judgment of Dubai Court not being conclusive and enforceable in India was not required to be challenged. She has relied upon the following decisions:-

- i) ***Nagabhusnanammal v. C. Chandikeswaralingam (2016)4 SCC 434;***
- ii) ***Sondur Gopal versus Sondur Rajini (2013) SCC 426;***
- iii) ***Y. Narashimha Rao & Ors. v. Y. Venkata Lakshmi & Anr. (1991) 3 SCC 451;***

12. The learned Counsel for the respondent has submitted that it is

not in dispute that since marriage, the petitioner and the respondent were residing in Dubai. Both children were also born in Dubai. He has submitted that that the petitioner had left Dubai with a return ticket which fact indicates that she had intention to return to Dubai. The learned Counsel for the respondent submits that since Dubai was their place of domicile, Dubai Court had jurisdiction to entertain the suit filed by the respondent.

13. The learned counsel for the respondent further contends that the petitioner was duly served with summons, despite which the petitioner did not contest the suit. He has further submitted that the respondent had adduced evidence to prove the ground of desertion and that the Dubai Court had adjudicated the issue on merits. The learned Counsel for the respondent therefore contends that the judgment was given on merits of the case by a Court of competent jurisdiction. The said judgment is therefore conclusive and would operate as res-judicata. He has relied upon the following judgments:-

***i) Smt. Surinder kaur Sandhu v. Harbax Singh Sandhu***

***& Anr. (1984) 3 SCC 698;***

***ii) International Woollen Mills v. Standard Wool (U.K.) Ltd. (2001) 5 SCC 265;***

***iii) K.D.Sharma v. Steel Authority of India Ltd. (2008) 12 SCC 481;***

14. At the outset, it may be mentioned that in the petition before the Family Court at Bandra, apart from divorce, the petitioner has also sought maintenance and accommodation for herself and the minor children, whereas the petition before the Dubai Court was simplicitor for divorce. It is thus evident that the issues as regards maintenance and accommodation were not adjudicated before the Dubai Court. Hence, the entire petition before the family court, which also covered issues of maintenance and accommodation, could not have been dismissed by invoking the principles of res-judicata.

15. Now coming to the merits of the objections raised by the respondent, it is not in dispute that the marriage between the petitioner and the respondent has been dissolved by the Dubai Court on the ground of desertion. The question is whether the said judgment is

conclusive and operates as res-judicata.

16. It may be mentioned that validity of foreign judgment in a civil proceedings is governed by the provisions of section 13 of the Code of Civil Procedure, which reads thus:-

**13. When foreign judgment not conclusive.-** A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except,—

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) 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;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in India.

Section 14 of the Code of Civil Procedure, which deals with the Presumption as to foreign judgments, reads thus:

**14. Presumption as to Foreign Judgment.-**The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment,

that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

17. From a plain reading of these provisions it is clear that a foreign judgment is conclusive between the parties as to any matter directly adjudicated upon, unless it is marred by any of the disqualifications under clauses (a) to (f) of Section 13 of the Code of Civil Procedure, 1908. Besides there is a presumption about the competency of the court. This presumption however is rebuttable.

18. In *Y. Narsimha Rao and Ors* (supra), while considering the scope of Section 13 CPC, the Apex Court observed that there is a need for definitive rules for recognition of foreign judgment in personal and family matters and particularly in matrimonial dispute, when a large number of foreign decrees in foreign matters are becoming the order of the day. The Apex Court observed that minimum rules of guidance for securing the certainty in the matter of recognition of foreign judgments; need not await legislative initiative. The Apex court,

therefore, laid down guidelines which read thus:-

*“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 the 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.*

*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 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. 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 if 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 834 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 matter 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) 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 domiciliary law which determines the jurisdiction and judges the merits of the case.”*

19. The law is thus well settled that a decree of a foreign court, in respect of matrimonial proceedings, is conclusive in India only when it is passed by a Court of competent jurisdiction and it is in accordance with the law that governs the matrimonial matters between the parties. Any other Court would be without jurisdiction, unless the case is covered by any of the three exceptions carved out by the Apex Court in para 20 of Y. Narasimha Rao (supra) viz. (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim

which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties. Furthermore, the decree should not be affected by any of the circumstances enumerated in Clauses (a) to (f) of section 13 CPC.

20. In the instant case, it is not in dispute that the petitioner and the respondent are Indian nationals and are Hindus by birth. They were married at Coimbatore as per Hindu Vedic Rights and were governed in the matter of marriage and divorce by the provisions of the Hindu Marriage Act, 1955. The respondent had not filed the petition before a forum specified in section 19 of the Hindu Marriage Act but had filed a petition before a court at Dubai. There can be no dispute that the Court in Dubai would have no jurisdiction to entertain the petition in accordance with the provisions of the Hindu Marriage Act, 1955 unless the case was covered by any of the three exceptions carved out by the Apex Court in Y. Narasimha Rao.

21. It is to be noted that the petitioner had neither submitted nor consented to the jurisdiction on the Dubai Court to adjudicate the action in accordance with the provisions of the Hindu Marriage Act and the grounds available therein. Hence exceptions (ii) and (iii) are not applicable to the facts of the present case. The controversy centers around exception (i), which refers to the 'forum', where the "respondent" is domiciled or habitually and permanently resides. The learned Counsel for the respondent has tried to justify filing of the divorce petition before the Dubai Court on the ground that the respondent is a permanent resident and domicile of Dubai.

22. In support of his case, the respondent has relied upon the decision of the Apex Court in *Surinder Kaur Sandhu* (supra). The dispute in the said case was regarding the custody of the child who was a British citizen having born in England and holding a British passport. In the said case, the spouses had set up their matrimonial home in England. While the mother was away at work the father

brought the child to India. Pursuant to the proceedings filed by the wife in England, the child became a ward of the Court and an order was passed under which the husband was directed to hand over the custody of the child to the wife or her agent. Armed with the said order, the wife came to India and filed a petition before the High Court for production of the child. The said petition was dismissed mainly on the ground that it would be in the interest of the child that he should be in the custody of his father. While setting aside the said order, the Apex Court observed that "It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy." Under these circumstances, the Apex Court had held that the English Court had jurisdiction to decide the question of custody and directed the father to hand over the custody of the child to the mother.

23. In the present case the issue is regarding the binding nature of a foreign judgment in a matrimonial dispute, when the spouses are

admittedly governed by Hindu Marriage Act. The decision in Surinder Kaur Sandhu is therefore distinguishable and not applicable to the facts of the present case.

24. It is to be noted that in para 10 of the objections, the applicant has stated that since both, the petitioner and the respondent, last co-habited in Dubai, within the territorial jurisdiction of Dubai Court, the Court at Dubai had jurisdiction. Since the respondent has invoked the jurisdiction of Dubai Court, being a Domicile of Dubai, it would be advantageous to refer to the judgment of the Apex Court in ***Liou De Raedt vs. Union of India 1991 AIR 1986***, wherein the Apex Court has explained the domicile rule as under:-

*“Although it is impossible to lay down an absolute definition of domicile, as was stated in Central Bank of India v. Ram Narain, [1955] 1 SCR 697 it is fully established that an intention to reside for ever in a country where one has taken up his residence is an essential constituent element for the existence of domicile in that country. Domicile has been described in Halsbury's Laws of England, 4th edition, Volume 8, Paragraph 42 1) as the legal relationship between individual and a territory with a distinctive legal system which invokes that system as his personal law. Every person must have a personal law, and accordingly every*

*one must have a domicile. He receives at birth a domicile of origin which remains his domicile, wherever he goes, unless and until he acquires a new domicile. The new domicile, acquired subsequently, is generally called a domicile of choice. The domicile of origin is received by operation of law at birth and for acquisition of a domicile of choice one of the necessary conditions is the intention to remain there permanently. The domicile of origin is retained and cannot be divested until the acquisition of the domicile of choice. By merely leaving his country, even permanently, one will not, in the eye of law, lose his domicile until he acquires a new one. This aspect was discussed in Central Bank of India, vs. Ram Narain (supra) where it was pointed out that if a person leaves the country of his origin with undoubted intention of never returning to it again, nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country. The position was summed in Halsbury thus:*

*"He may have his home in one country, but be deemed to be domiciled in another."*

*Thus the proposition that the domicile of origin is retained until the acquisition of a domicile of choice is well established and does not admit of any exception.*

*10. For the acquisition of a domicile of choice, it must be shown that the person concerned had a certain state of mind, the animus manendi. If he claims that he acquired a new domicile at a particular time, he must prove that he had formed the intention of making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone, unaccompanied by this state of mind, is insufficient."*

25. In ***Sondur Gopal vs. Sondur Rajani***, the Apex Court has held that :-

*“Domicile are of three kinds, viz. domicile of origin, the domicile by operation of law and the domicile of choice. In the present case, we are concerned only with the domicile of origin and domicile of choice. Domicile of origin is not necessarily the place of birth. The birth of a child at a place during temporary absence of the parents from their domicile will not make the place of birth as the domicile of the child. In domicile of choice one is abandoned and another domicile is acquired but for that, the acquisition of another domicile is not sufficient. Domicile of origin prevails until not only another domicile is acquired but it must manifest intention of abandoning the domicile of origin.*

.....

*The right to change the domicile of birth is available to any person not legally dependant and such a person can acquire domicile of choice. It is done by residing in the country of choice with intention of continuing to reside there indefinitely. Unless proved, there is presumption against the change of domicile. Therefore, the person who alleges it has to prove that. Intention is always lodged in the mind, which can be inferred from any act, event or circumstance in the life of such person. Residence, for a long period, is an evidence of such an intention so also the change of nationality.*

26. It is thus well settled that domicile of origin continues till it is

abandoned and a new domicile is acquired. It is equally true that a new domicile cannot be acquired merely by change of residence or length of residence but such change of residence must be with an intention of making it a permanent abode. It may be mentioned that exception (i) in para 20 of the judgment in Y. Narsimha Rao, refers to the domicile of the “respondent” and not of the petitioner. Hence, while considering the question whether the judgment delivered by Dubai Court is conclusive or not, it is necessary to decide whether the petitioner wife who was the respondent before the Dubai Court is a domicile of Dubai and that Dubai Court had jurisdiction to entertain the petition and to adjudicate upon the issue.

27. In this regard, it would be useful to refer to the copy of the petition (Law Suit No.8 of 2012) filed before the Dubai Court. The respondent has placed on record a translated copy of the said petition, which reads thus:

*" 1. The plaintiff is the husband of defendant under a document issued by India, Mumbai on 9.3.2000 and that they have two children. (Aryan -10 eyars old, Arushi- 4 years old.)*

*2. Whereas, the defendant is always fabricating problems towards her husband/plaintiff.*

*3. Whereas, the defendant left nation and didn't come back since 21.6.2008.*

*4. Whereas the plaintiff is forced to most difficulties because of continuance of marriage relationship with defendant.*

*Therefore,*

*The plaintiff request from justice of Court to register a case and fix a hearing to consider the same and to announce the defendant, the statement of claim and scheduled time, to rule to differentiate between plaintiff and defendant and to oblige the defendant to pay fees and expenditure."*

28. The aforesaid pleadings do not indicate that the respondent had invoked the jurisdiction of Dubai Court claiming that the petitioner wife is a resident of or domicile of Dubai. The said pleadings do not state that the petitioner wife herein had abandoned her domicile of birth by making Dubai her permanent abode. There are no averments that the petitioner wife being a permanent resident of Dubai, the Dubai Court was competent to entertain the petition for divorce. The judgment of Dubai Court also does not state that the wife was domicile of Dubai or that she had an intention to continue her stay in Dubai. On the contrary, the records reveal that the wife had returned to India

on 21<sup>st</sup> June, 2008 and since then she is permanently domiciled in India. Similarly, there are no averments in the Law Suit No. 81 of 2008 filed before the Dubai Court that the respondent husband had made Dubai as his permanent abode. Both the spouses are Indian citizens and in the absence of the averments as well as material to endorse the claim of being domicile of Dubai, the presumption under section 14 of the Code of Civil Procedure stands dislodged. Under the circumstances, we are unable to hold that the Dubai Court was a Court of competent jurisdiction to decide the matrimonial dispute between the petitioner and the respondent. Resultantly, the judgment is not conclusive and binding in view of clause (a) of Section 13 of CPC.

29. It is also to be noted that the translated copy of the judgment of the Dubai Court indicates that the divorce was granted on the ground of desertion. The relevant portion of the judgment reads thus:

*" In terms of the plaintiffs claim for terminating his marriage contract concluded with the defendant; it is according to the provisions of Article 117/1, both spouses have the right to claim for divorce due to the damage with which marital life becomes impossible saving that no party's right in the same may not be nullified unless*

*they are proved to conciliate. The explaining memorandum, in explaining such article, stated that the damage includes unjustifiable deserting while Article 122 of the applicable law stipulated, "In divorce case due to damage, such damage shall be proved through legal proving means and the testimonial shall be correspondingly accepted if the witness is interpreted or understood that the damage is common in the two spouses' life as decided by the court"*

*Accordingly, and whereas it is established in the personal statement submitted by the plaintiff that the defendant has deserted him since three years is adversely affected by the same, the court is assured and convinced by their statements as the desert and damage by the defendant against the plaintiff. Accordingly, the court responds to the plaintiff's claim as per the judgment text"*

30. It may be mentioned that the Hindu Marriage Act does not recognise a ground of irretrievable breakdown of marriage, ground akin to Article 117/1 i.e 'divorce due to the damage with which marital life becomes impossible'. Similarly, under Section 13(1)(ib) of the Hindu marriage Act, marriage can be dissolved by a decree of divorce on the ground that the spouse has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. The explanation to the sub-section stipulates that the expression "desertion" means the desertion of the

petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage and its grammatical variations and cognate expressions shall be construed accordingly".

31. It is thus evident that under the Hindu Marriage Act, factum of separation and animus to desert or intention to bring cohabitation to end are essential requisites of desertion. The Dubai Court has not considered the aspect of animus deserendi and has granted divorce solely on the ground that the parties were living separately for a period of more than two years. It is therefore evident that the Dubai court had not considered the real controversy between the parties and hence the said judgment cannot be said to be a judgment on merits of the case.

32. In *M/s. International Woolen Mills vs. M/s. Standard Wool (UK Ltd.)*, the Apex Court has held that the decision of a Court given ex-parte on the basis of the plaintiff's plea and the documents, without

going into the controversy between the parties, would not be a judgment on the merits of the case. It was held that even an ex-parte judgment in favour of the plaintiff can be judgment on merits, if same evidence adduced on behalf of the plaintiffs, and the judgment, however brief, is based on the consideration of that evidence. When the judgment is on merits it will not be governed by the exceptions of Section 13 of Civil Procedure Code (CPC) and would be conclusive between the parties thereto or between the parties under any one of them or without litigating in the same title. It was held that the decision on merits involves application of mind of the Court to the truth or falsity of the plaintiff's case, and therefore, though a judgment passed after judicial consideration of the matter by taking evidence may be a decision on merits, even though passed ex-parte, the decision passed without evidence of any kind or passed only on its pleadings cannot be held to be a decision on the merits.

33. The ratio of the judgment in International Woolen Mill (supra) applies to the facts and circumstances of the case in as much as the

judgment of Dubai Court is not on merits of the case. Hence it is not conclusive of the matters adjudicated therein and therefore not enforceable in India. Such a judgment would be in breach of the matrimonial law in force and will therefore be unenforceable under clause (f) of section 13 CPC.

34. It is also pertinent to note that the petition for divorce was filed in Dubai while the petitioner was domiciled in India. The Apex Court, in *Surinder Kaur Sandhu* (supra) stressed the need to protect the wife against the burden of litigating in inconvenient forum. Hence apart from serving the petitioner with summons, it was necessary to ensure that the petitioner was in a position to remain present before the court at Dubai and contest the proceedings effectively. The judgment of the Dubai Court does not indicate that the respondent herein had ensured effective contest by making all necessary provisions for the petitioner to defend the petition, including the cost of travel, residence, and litigation. Hence, in terms of the ratio of the judgment in *Y. Narasimha Rao* (supra), the proceedings were in the breach of

principles of natural justice. Consequently, the judgment is unenforceable in terms of clause (d) of section 13 CPC.

35. For the reasons recorded above, the judgment of Dubai Court ceases to be conclusive, and consequently the same could not operate as res-judicata. Following the dictum of the Apex court in the case of Sondur Gopal (supra), it can be safely held that the parties being hindus and Indian domiciles are governed by the provisions of Hindu Marriage Act. The Family Court Bandra has jurisdiction to try the divorce petition. Consequently, the marriage petition filed by the petitioner before the family court could not have been dismissed on the basis of the judgment of Dubai Court, which is not binding and enforceable in India.

36. Under the circumstances, and in view of the discussion supra, the appeal is allowed. The impugned order is set aside. The petition No. A-3072 of 2016 is restored to file. Parties are directed to appear before the Family Court, Bandra, Mumbai on 18<sup>th</sup> September, 2017 at

11 a.m. No orders as to costs.

. In view of the above, Civil Application No. 154 of 2016 does not survive, and the same is accordingly disposed of.

**(ANUJA PRABHUDESSAI, J.)**

**(A.S.OKA, J.)**