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CRITICAL ANALYSIS OF DOMICILE OF DEPENDENT PERSON UNDER PRIVATE INTERNATIONAL LAW

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1. INTRODUCTION

Conflict of laws refers to private International Law which means branch of Indian law applied by Indian Courts whenever a dispute before it involves a foreign element¹. Foreign element means, a relevant fact or issues has certain geographical or other connection with a territorial unit, other than the territorial where the court is dealing with the proceedings. Foreign elements consist of citizen or domicile in a foreign country and dispute may be related to status or property which is situated in that country. Conflict of laws are set of rules for procedural law which determine the legal system and the law of jurisdiction applying to a given legal dispute².

Domicile i.e., *lex domicilli*, has a dominating role in family, matrimonial property law. It also plays role in other areas such as capacity of persons to make contracts. Domicile is considered to be one of a significant connecting factor which links people with a particular legal system. For instance, a married man domiciled in England is under the jurisdiction of England for purposes of dissolving or annulling his marriage³. In personal matters, the *lex domicilli* is governed by common law countries. Domicile is also considered as habitual residence, considered to be based on the principle of Individual Liberty- an individual free to establish his domicile at any place in the world. There are three forms of domicile such as - Domicile of Origin (acquired at birth); Domicile of Dependence (domicile dependent on another); Domicile Of Choice (acquired by independent person residing in country w/o intention to settle indefinitely, *factum, animus*).

This paper will discuss the concept of Dependent domicile under Indian and English law. The

¹ Vishwanathan R v. Rukn- Ul-Mulk Syed Abdul Wajid , A.I.R. 1963 SC 1 (INDIA).

² Conflict of laws is a set of rules of procedural law, (Dec. 10,2023, 10.04 AM) <http://conflictoflaws.uslegal.com/>, last seen at 10th December 2023.

³ Domicile and Residence, (Dec. 10, 2023, 11.00 AM) <https://www.scribd.com/doc/19446932/DOMICILE-UNDER-INTERNATIONAL-LAW>.

term dependent domicile is applicable to a person who is incapable of having domicile of choice⁴. The domicile of dependency is an imposed domicile and it changes only when the person to whom the dependent is dependent on changes his domicile. Considering the concept of dependent domicile, researcher will divide this into chapters such as domicile of dependent person for married woman, minor with the concept of doctrine and acquisition of domicile. The rules under conflict of laws are applicable when a legal dispute has a “foreign” element such as a contract agreed to parties in different countries. There are certain concepts which are important or are regarded as a determinative factor in the conflict of laws.

2. Conflict of Law

I. Definition, Meaning and Concept of Domicile

The concept of domicile⁵ is of the important area of law. Domicile is a “*connecting factor*” or link between a person and the legal system or rules that will apply to him/her in particular contexts like in case of validity of marriage, succession, adoption, property, taxation, contract, tort and many more.

This deep-rooted concept is detailed discussed in old cases such a *Whicker v Hume*⁶ where it is observed that, domicile is nothing but a permanent home. Where an individual's shows his/ her intention to reside permanently or residing at one place since long continuously. However, there are many reported cases where a person has lived in a place for 30 or 40 years but still does not have a domicile there. But this case speaks about the concept of permanent home.

A. Definition-

a. Duhaime's law dictionary- permanent residence of a person, a place to which even if he or she were temporarily absent, they intend to return.

In law, it is said that a person may have many residents but only one domicile.

The definition of *domicile* has vexed jurists for centuries. In *Whicker v Hume*, Justice Cranworth described it by way of an *illustration*:⁷

"From which you cannot be separated if nothing removes you. When you depart from them, you are seen as a stranger."

⁴ Ibid 10.

⁵ DICEY AND MORRIS, CONFLICT OF LAW, 1209 (10th ed.1980).

⁶ (1858) 7 HLC 124, 160.

⁷ Definition of domicile, (24th Dec. 2023, 3 pm) <http://www.duhaime.org/LegalDictionary/D/Domicile.aspx>.

In that same case, Justice Wensleydale offered: *"One very good definition (of domicilli) is habitation in a place with the intention of remaining there forever, unless some circumstance should occur to alter his intention."*

b. **In, Lord v Colvin Case** - Justice Kindersley wrote that- *"That place is properly the domicilli of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special or temporary purpose, but with a present intention of making it his permanent home, unless and until something occurs to induce him to adopt some other permanent home"*⁸.

II. CONCEPT OF DOMICILE IN INDIA- in this contemporary era, the world is dominated by individual movements which crosses state bordered and are easily globalized. These movement are not specifically related to any specific stream but vary across areas such as employment, education, settlement and many other. When individual leaves his/her own country they carry their domicile. In some cases, he/she decides to reside permanently or temporary at foreign land but where possibilities of unexpected problem for legal solutions are also increased. Like in India, the legal court also handling such cases on regular basis. It is hard to adopt mechanically the rules of Private International law evolved by other countries.

While talking about the concept of domicile in India, said concept is discussed in Art 5 of the Indian Constitution which says that, Citizenship at the commencement of the Constitution. At the commencement of this Constitution, every person who has his domicile in the territory of India and—

- a. Born in the territory of India; or
- b. Parents was born in the territory of India; or
- c. Resident of the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

III. CONCEPT OF DOMICILE IN ENGLAND

In English law, domicile is a traditional concept which is discussed in Rule 4-16. The civil Jurisdiction and Judgment Act 1982 which provide necessary definition but the resulting concept

⁸ (1858) 7 HLC 124, 160.

has little in common save its name with the traditional concept⁹.

Domicile is a concept of permanent home. An individual may be said to have his home in a country if he resided in it without any intention of at present removing from it permanently or for an indefinite period. But a person does not cease to have his home in a country merely because he/she is temporarily resident elsewhere; and a person who has formed the intention of leaving a country does not cease to have his/her home in it until he/she acts according to that intention¹⁰.

3. DOMICILE OF ORIGIN

Domicile of origin comes into picture as soon as the child becomes an independent person by birth. If the child is born in a lawful wedlock, then the child takes the father's domicile. The domicile of origin remains with an individual until another has been acquired¹¹. In order to change the domicile of origin, there must be an absolute removal from their present residence along with an intention to reside in another place. A mere intention to remove is not sufficient. Such intention to remove must be brought into effect. On moving to a new place, a person acquires a domicile of choice and loses domicile of origin. But if such person returns with an intention to reside in his/her prior residence then s/he will get back his/her domicile of origin¹².

Further in case of domicile in an illegitimate child's domicile, the illegitimate child first has to be legitimized by a statute. Here the statute legitimizes the unlawful wedlock for recognizing and acknowledging to the child's domicile. For this purpose, the parent whose relation is required to be made legitimate must be domiciled in a state that permits such an act. If a father is a resident of a state that permits legitimization by recognition, the fact that the mother and child are domiciled elsewhere will not affect the act of legitimating. Such a legitimization will be recognized in every state. However, if the domicile of the father at the time of the act of recognition is not of the state which implements the act, then it confers a legitimate status to the child. In this case the father's subsequent removal to the latter state will not confer a legitimate status to the child.

⁹ Cowley v Heatley , The Times, July 24(1986)

¹⁰ Whicker v Hume L.R.1Sc.307 (1858)

¹¹ Parrott v. Abraham, 146 S.W.3d 623 (Tenn. Ct. App. 2003)

¹² Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

Domicile of origin is a creation of law and in no way can it be given up totally, for the simple reason that it continues to exist, till the person has voluntarily given up such domicile along with acquired another domicile.

4. DOMICILE OF CHOICE

An independent person is free to acquire domicile in place of his choice. The capacity to acquire such domicile is governed by the law of existing domicile.

There are two major requirements to achieve domicile of choice-

- i. A habitual residence in a country, where domicile sought to be acquired and
- ii. An intention to live in a country of domicile of choice permanently

A domicile of choice can be acquired only by a person who is not incapacitated either by age or by unsoundness of mind. There are no formal steps to be taken for a person who is of full age and capacity to acquire a domicile of choice.

I. ENGLAND

At common law, every person other than dependent person can acquire a domicile of choice of a place with an intention to reside permanently¹³. Any circumstances which is evidence of a person's residence, or intention to reside there permanently, should be taken into consideration to determining whether he/she has acquired a domicile of choice. To determine whether a person has the requisite intention to reside permanently the court can regard the motive which induced him/her to take up such residence, also consider whether he/she had freely done so, or that such residence was precarious¹⁴. Hence, for acquiring the domicile of choice two attributes are very important i.e., Residence and Intention.

II. INDIA

Indian courts follow common law rule, the question of determining a person's domicile is well brought out in *Sakaram Govindan v Laksmi Bharti case*, a decision of a Supreme Court on the question of domiciled in matter related to the succession to movables of a person born in India,

¹³ DICEY AND MORRIS, CONFLICT OF LAW, 133(14th ed.1999).

¹⁴ Ibid at 135.

who died in England.

There are few essentials are required for the acquisition of domicile-

- i. Residence in the country of domicile of choice, and
- ii. Intention to choose to live in the country of domicile of choice permanently¹⁵.

The Indian Succession Act 1925, Section 10 lays say that, “a man can acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.” In the other words, *factum et animus* must concur in this case. If he/she leaves his country of domicile of origin with an intention to settle in another country, or it may be formed after numerous years of being a residence just as in the case of a fugitive. But the co-existence of intention and residence is mandatory so that the domicile of choice can be occurred.

5. DEPENDENT DOMICILE- MARRIED WOMEN

Common Law rule is that, wives are acquired dependent domicile of their husband and the dependent persons cannot independently change their domicile of origin; if on the other hand, the husband changes his domicile of origin, the domicile of wife usually changes with a change in the domicile of husband. This rule is also expressed by saying that the husband’s actual and the wife’s legal domicile are one, irrespective of the wife’s personally residing.

I. POSITION UNDER INDIAN LAW

The provision of the Indian Succession Act 1925, which have already been noted, broadly embody this principle and have been followed in India, even though they do not apply to the majority of Indian.

The Indian law does not follow the Indian Succession Act 1925 Sec.15 and 16 incorporate the general rule: on marriage wife required domicile of husband and during covertures her domiciled is the domicile of her husband. Then it is led down that wife can acquire own domicile in following two cases-

- a. If the wife is living separate under a decree of the court or,
- b. If the husband undergoing a life sentence.

¹⁵ Gour Gopal v Sipra Roy, 1978 Cal.163 (INDIA).

Indian court have been called to dwell upon the matter in the several situations.

In *Prem Pratap v Jagat Pratap*¹⁶

- A German domiciled woman married a domiciled Indian and set up the matrimonial home in India. After sometime, the husband left the wife. The wife filed the suit for maintenance in an Indian Court in the meantime. The main defense of the husband was that on abandoned of the wife by him, the wife's pre-marriage domiciled had reviewed and therefore the Indian court has no jurisdiction to entertain the petition rejecting. This plea, the Court observed that during covertures the domiciled of wife remains that of the husband.

*Smt. Allabandi v Union Of India*¹⁷, the Allahabad High Court also accepted the plea of the wife u/s 16 Indian Succession Act 1925 said that during the subsistence of covertures the domicile of the wife is the domicile of her husband which is quite clear.

It is very unfortunate that Indian courts followed the English decisions on the unity of the domicile of husband and wife. The courts of Indian post-independence were not bound to do so. If any decisions were considered to be so very necessary that could have easily looked to decisions of other jurisdictions and adopt accordingly. It is very curious that in order to follow English precedents, Indian judges ended up ignoring the specific provision of the Indian Succession Act 1925 which creates some ambiguity in some cases. They looked to the explanation to S.16 it was possible for them to reach conclusion. S.16 lays down that, wife's domicile does not follow husband's if wife has been judicially separated, or her husband is undergoing a sentence of transportation. Indian court could have easily extended this principle at least to those cases wherein the husband and wife are no longer living together, or the husband has deserted the wife.

II. POSITION UNDER ENGLISH LAW

A person's domicile is the place where s/he has his/her true fixed home and principal establishment, and to which, whenever s/he is absent, has the intention of returning. It is not required to have the intention to stay there permanently. A man and wife are presumed to have the same domicile. This presumption flows in favor of both. The general rule is that the wife

¹⁷ 1954 All. 457(INDIA).

must adopt the residence of the husband and that she must have a valid justification to maintain a separate domicile.

6. DOMICILE OF DEPENDANT PERSON- MINOR CHILD

a. -The domicile of a child 'under 16' is quite complicated.

if

- i. legitimate it is that of his/her father
- ii. if he is legitimated, it is that of his father from the time of the legitimating (such a child will have his mother's domicile as a domicile of origin)
- iii. if he is illegitimate or his father is dead, it is that of his mother
- iv. if he has no parents, his domicile probably cannot be changed
- v. if he is adopted his domicile is determined as
- vi. if he were the legitimate child of the adoptive parent or parents.

One anomaly which is important to understand is that a mother who changes her domicile will only change the domicile of a child dependent on her if what she does furthers the child's interest. Fathers are not so constrained.

Everyone at birth receives a domicile of origin, which is attributable by operation of law. A legitimate child takes her father's domicile¹⁸

Indian law is slightly different from English law. In respect of legitimated child

- a) S.7 of Indian Succession Act provides: "*The domicile of origin of every person of legitimate birth, is in the country in which at the time of his birth the father was domiciled or if he is posthumous child, in the country in which his father was domiciled at the time of father's death.*"
- b) S.8 of Indian Succession Act provides: "the domicile of origin of an illegitimate child is in the country in which at the time of his birth his mother was domiciled.
- c) S.14 of Indian Succession Act provides: "the domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin."

¹⁸ Divall v Divall.

There are two exceptions in Indian law when the minor does not follow that of his parent-

- i. If the minor is married
- ii. If the minor holds any office or employment in the service of Her Majesty or
- iii. If the minor has set up, with the consent of the parent, any distinct business¹⁹.

7. THE DOMICILE OF LEGITIMATE MINOR CHILDREN

Legitimacy in layman's language means the status acquired by a person who is born to parents who are married to one another at the time of the birth. *Legitimation* means that a person not born to married parents ends up acquiring the status of legitimacy as a result of some act. *Adoption* involves the extinction of the parental links between the child and the biological parents and the creation of similar links between the child and the adoptive parents.

Although there are many areas in which rules of law reflect current feelings of moral and social policy, few controversies call for the determination of such factors as directly as does a case involving the legal status and rights of an illegitimate child. This is particularly true where one state is called upon to validate the status of an illegitimate who was born or has been domiciled in another state prior to migration to the forum.

I. POSITION IN ENGLAND

A child is, or is considered to be, legitimate if he/she is born anywhere in the world in "lawful wedlock" At common law, the domicile of minor was dependent on, and changed with the domicile of father²⁰. This was not applicable universally and different set of rules applied in case the father of minor dead, in such cases the domicile of minor is followed by that of the mother. This is not universal rule at least as far as the domicile of minor whole father was dead, in this case the widow with several children domiciled in Scotland, remarried and shifted with her second husband to England with all children except her a daughter who decided to stay back and continued to stay in Scotland till she dies. It was held that the widow had refrained from exercising her power to change the domicile of that particular child who retained her Scottish domicile²¹.

¹⁹ Sec 14 Indian Succession Act, 1925.

²⁰ DICEY, MORRIS AND COLLINS, CONFLICT OF LAW, 156(14th ed 1991).

²¹ Re Beaumont (1893)3 Ch 490.

II. POSITION IN INDIA

In India, “Legitimacy” is a status of a child being born during the period of a valid marriage between the mother and any father, or within 280 days after its dissolution if the mother remains unmarried. Unless it is shown that the parties to the marriage had no access to each other at any time when he could have been conceived, his birth is good enough to be treated as a *conclusive proof* of he/she being legitimate. Under Section 112 of the Indian Evidence Act, 1872 (*herein after referred to as ‘the Act’*), if the applicant is domiciled in India on the date of application, the Indian court has jurisdiction to grant a declaration that he/she is the legitimate child of his parents. Indian law, whether Hindu law or Muhammadan law, only recognizes the concept of legitimacy of a child and not of legitimation. When there is any doubt as to legitimacy of a child, under Muhammadan law the acknowledgment by the presumptive father is the proof that the child so acknowledged is the legitimate child of the presumptive father, provided that legitimacy is possible.

8. ILLEGITIMATE CHILD

The usual conflict of laws case involving an illegitimate child arises in the follows scenarios: An illegitimate child born in State A, and while domiciled in that state, or in State B, the parents do an act which would have the effect of legitimating the child according to the law of that jurisdiction. Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he or she had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of his father’s kindred, either lineal or collateral, unless, before his death, his parents will have intermarried, and his father, after such kind of marriage, acknowledges him as his child, or adopts him into his family; in which case such child irrespective of it gender is deemed legitimate for all *purposes of succession*..

9. ADOPTED CHILDREN

The domicile of adopted children in England is determined in the same manner as that of the natural child. This position is also valid for Australia and Canada. That is also the effect of Sec.12 of the Hindu Adoption and Maintenance Act 1956.

In English Private International law, there is yet no authority on the domiciled of adopted child. Dicey and Morris suggested that, “ *the domicile of an adopted infant is during the lifetime of the adopting parent the same as, and changes with the domiciled of that parent*²². ”

In the UK, once an adopted child attains the age of 18 years or turns adult they have a right to apply to see their birth records under s.60 of the Adoption and Children Act 2002²³. Furthermore, they have the right to join the Adoption Contact Register, which is aimed at helping adopted people gain the contact details of birth relatives who are also registered.

10. CONCLUSION

While discussing the concept of domicile, it is found that domicile is not concept which should be seen in isolation. It has its own branches such as Domicile of origin, domicile by choice, domicile of independent person and domicile of dependent person. Further, the concept of Domicile under Private International Law is not a steady concept. Again, it is found different theories of domicile in different countries. Hence, it is necessary to study the domicile from head to toe. In this paper researcher studied one branch of domicile i.e. domicile of dependent person. In common law countries, dependents, i.e., married woman, minors and mentally deficient persons were regarded as incapable of acquiring a domicile on their own and their domicile followed that of the person they were regarded as being dependent on.

The common law rule provides that, wives were dependent on their husband and minors dependent on their parents from whom the minor derived his domicile of origin. Such concept is deferent in different countries. For that, researches collected views of leading practitioners and asked question regarding concept of dependent domicile through interview method. It is found that, the dependent’s domicile of wife creates discriminations in Indian society. She cannot easily acquire her choice of domicile as in English law. There are exceptions given in Sec 15 16 of Indian succession act 1925 but such exceptions are applied in very rare case. Further, researcher asked question on child custody. It seems to be resulted that, when parents of children start living separately and if custody is handover to the mother, then minor majorly faces a domicile problem as he is having domicile of origin and his domicile is dependent on his father and his parents living separately. Hence, under private international law, the concept of domicile plays very

²² DICEY, MORRIS AND COLLIN, THE CONFLICT OF LAW, 110 (4th Ed. 1998).

²³ The Adoption and Children Act 2002, (3rd Jan.2024, 2pm) <http://www.legislation.gov.uk/ukpga/2002/38/contents>.

important role. Domicile is nothing but a permanent home of an individual. Hence, through these chapters researcher tried to analyze the concept of dependent domicile in Indian and English Law.

