Airo International Research Journal
ISSN: 2320-3714
July 2020, Volume: 22 , Issue 1

Validity of the Foreign Marriage

Vijay Pal Singh* (Research Scholar)
Department of Law, University of Rajasthan, Jaipur, Rajasthan, India

Abstract: This present research paper relates with the validity of the Foreign Marriage in English and Indian law. The intention of this research paper is to investigate and analysis the validity of the Foreign Marriage in international level. This paper shows the divergence for validity of the Foreign Marriage, various religious ceremonies conducted in marriage, modus operandi and the difficulty that appears at the instance of the marriage and this complication appears due to lack of the strong Private International Law. This research paper concentrates on formal validity of the marriage; common law marriage performed abroad, marriage solemnized on merchant ships, consular marriages and Indian law on the foreign marriages. This research paper in brief, brings out the similarities and dissimilarities between the laws on the foreign marriages provided by the various countries.

Keywords: Validity of marriage, The English Foreign Marriage Act, Common law marriage, The Foreign Marriage Act, 1969, Consular marriages, Indian law on the validity, Similarities.

Formal validity of marriages is one of the most important area of the Private International Law, where is approximately harmony in the laws of all Countries in the Globe. The established vision is that the formal validity of marriage is controlled by the *lex-loci-celebrationis*. Though, in functioning out the particulars of this theory some distinctions are noticeable. Without some exception's, in English Private International Law, the necessity that a marriage should be formally valid by the *lex-loci-celebrationis* is essential, which confesses of no other test. In the continental Europe the necessity is that the marriage must be formally valid either by the *lex-loci-celebrationis* or by the personal law of the parties. Under French law a marriage which is solemnized outside France should be formally valid either under the law of the place where it is celebrated or by the personal law of the parties. The same position is present under the German law.[1] This is a sound recognized law of English Private International Law that a marriage to be formally valid should obey with the local law.[2]

Airo International Research Journal
ISSN: 2320-3714
July 2020, Volume: 22 , Issue 1

A marriage which does not obey with the rules and regulations of the local law is not valid. Both the positive and negative necessities of this rule are essential.[3] The rule means that if the marriage is formally valid in according to the law of the place, where it took place then the marriage would be valid all over the place. If the rule of the place where the marriage is solemnized put down that a marriage which fulfills with the necessities of the personal law of the parties is valid, than a marriage solemnized consequently shall be valid. What ceremonies should be solemnized is completely for the local law to specify. Therefore, if local law permits marriage by cohabitation or reputation or if it is represented *per-verba-de-praesenri* or by substitute, or if spiritual ceremony is necessary than a marriage solemnized according will be accepted as valid.[4]

The English law goes a footstep further and puts down that a marriage which is primarily invalid by local law will be accepted, if it is consequently validated by local law. Likewise, the marriage shall be valid, even if it is solemnized in a foreign country with a definite outlook to evade few annoying ceremony under the law of domicile. In the case of *Simonin v. Mallac*,[5] two domiciled French persons solemnized their marriage in London as the parties wanted to neglect the French prerequisite of parental approval. Later on the wife filed the petition for nullity on the ground of disobedience with the rules and regulations of their personal law. The English Court observed the marriage is valid. In England, such marriages is valid even if they are seized null and void in the country of the domicile of parties.[6] Though, if such a marriage is afterward null and void by the Courts of domicile, then English Courts will be familiar with the decree of nullity.

Abroad Marriages in Common Law System: The maxim *locus-regit-actum* some exemptions are predictable under the common law as well as the statutory law. In the preliminary phases of Empire building, this was accepted that the English settler in colonies such as Canada or Australia took so much of common law with them as was proper to the local circumstances. This gave rise to the first common law exemption that a common law marriage solemnized abroad was valid. Dicey and Morris take the view that this may not be the real exception as it may mean that Her Majesty exercised extra-territorial jurisdiction.[7] The theory of marriages in the common law system has not been the same. In the preliminary phases of colonialism the necessity of an episcopally intended priest or deacon could not be fulfilled. In the case of *Catterall v. Catterall*,[8] it was held that, where a fact of assent is present between two parties to become man and wife the marriage shall be

Airo International Research Journal
ISSN: 2320-3714
July 2020, Volume: 22 , Issue 1

considered as validly performed. Therefore, a marriage can also be validly performed without bans or licence. Likewise, the requirement of the existence of witness is not essential. Further, expansion of this exemption is that, a common law marriage solemnized abroad would be valid, where fulfillment with the local form was not possible. Consequently, marriages in foreign countries if solemnized in common law form is fully valid. In the same way, in a country where Roman Catholic priests are not permitted to officiate at protestant marriages and Prctestants are not permitted to enter into Roman Catholic marriages, a marriage solemnized by a protestant priest shall be valid.[9]

Marriages Solemnized on the Ship: In view of the fact that, in the Public International Law the hypothesis is that the ship is a floating segment of the country whose flag it carries. It has been thought that, a marriage performed on a ship on the high seas to be formally valid should obey with the law of the ships port of registry. This looks that it would be sufficient if parties took each other for man and wife *per-verba-de-praesenti*, but the Court is fully satisfied that, it was unworkable for them to pass the time until the ship reached a port where adequate conveniences were available either by the *lex loci* or under the Foreign Marriage Act.[10] If the ship is berthing at a port then obedience with the local form is essential unless there are insurmountable complexities in marrying in local forms.

Consular Marriages : The Foreign Marriage Act, (1892-1947) says that, a marriage between parties one of whom at least is a British citizen, solemnized before a Marriage Officer in abroad in the manner prescribed by the Act, shall be valid as if it has been solemnized in the United Kingdom with due ceremony of rules and regulations as required by law. A British high commissioner, ambassador, governor, consul or any member of the ambassadorial staff can be chosen as a Marriage Officer under this Act. A marriage under this Act should be performed at the official residence of the Marriage Officer with open doors in the existence of at least two witnesses.[11] Thus above mentioned a consular marriage is valid as regards the form even though it may be invalid under the local law.

The likelihood of such marriage being invalid by local law has been eradicated by the Foreign Marriage Order, 1964 under which, it had been incorporated that a Marriage Officer should not performed a marriage in abroad unless he is satisfied (1) that at least one of the parties is a British

Airo International Research Journal
ISSN: 2320-3714
July 2020, Volume: 22 , Issue 1

citizen (2) that the Government of that country will not protest to the celebration of the marriage; (3) either that inadequate conveniences present for the marriage of the parties in the law of that country or that the marriage will be permitted as valid in form by the law of that country and (4) that the marriage will be permitted or allowed as a valid structure of marriage by the law of their country.[12] This Act further says that the Marriage Officer need not perform a marriage, if he thinks that the solemnization thereof would be conflicting with international law or the comity of nations. Further, this Act says that nothing in them is to verify or harm or affect the validity of any marriage solemnized abroad otherwise than as therein provided.[13]

Indian Law on Foreign Marriage: There are two variety of marriage available in India that, if both parties are Hindus, Muslims, Christians, Parsis or Jews, then they may perform their marriage under (a) the personal law which both the parties belong and (b) under the Special Marriage Act, 1954. In the second case the marriage has to be a civil marriage though parties are free to join any other ceremonies. In the first case the marriage can be solemnized according to the ceremonies put down by their personal law. If parties belong to diverse societies then they may solemnize marriage only in the civil marriage form. When a marriage is solemnized in India fulfillment of the above formalities is necessary because non-fulfillment shall make the marriage null and void.[14] In the Hindus, when both parties are Hindus irrespective their domicile or nationality, a marriage may be performed in accordance with the customary ceremonies of either party thereto.

These ceremonies has two types (i) the *Sastric* ceremonies as mentioned in Hindu law and (ii) the customary ceremonies permitted by custom in the caste or society to which either party belongs. The earlier is though still religious ceremonies very few and simple in the modern Hindu law. Secondly, the customary ceremonies can be spiritual ceremonies or purely unspiritual ceremonies. They can be very intricate or very simple. This is also probable that tradition or custom of a specific society can not supply for any ceremony of marriage and living collectively as husband and wife may be sufficient. This is a recognized theory of Indian Private International Law that a marriage to be officially and formally valid should obey with the *lex-loci-celebrationis*.[15] The Foreign Marriage Act, 1969, sculpted on the English statutes of the Foreign Marriage Order, 1964 provides for foreign marriages, if one of the parties to the marriage is an Indian citizen.

This Act says that a foreign marriage may be solemnized in foreign country when one of the parties is an Indian citizen and the other party can be an Indian citizen or not, at the Official House of the

Airo International Research Journal
ISSN: 2320-3714
July 2020, Volume: 22 , Issue 1

Marriage Officer authorized by this Act with open doors between the prescribed hours in the presence of at least three witnesses in any shape which the parties may select to adopt but in no case a marriage shall be absolute and obligatory on the parties unless each party announces before the Marriage Officer and witnesses, in any language understood by the parties.[16] The Marriage Officer has authority to decline to celebrate or record a marriage which, in his opinion, is conflicting with international law. A marriage solemnized in foreign country in accordance with the *lex-loci-celebration* is between parties one of whom is an Indian citizen, can also be registered under this Act. And once marriage is registered it shall be deemed to be a marriage under the Act.[17]

However, if a marriage has not been registered under this Act, a petition for divorce cannot be filed in India. A marriage celebrated by an Indian with a foreigner even before the comity into force of the Foreign Marriage Act can be registered under this Act. A marriage solemnized or registered under this Act will be good and valid in law and will be recognized as such in India.[18] Thus, Section 23 of the Foreign Marriage Act, 1969 says that, if the Indian Government is satisfied that the law in force in any foreign country for the solemnization of marriages contains provisions parallel to those contained in this Act, it may by notification in the Official Gazette declare that marriages thus solemnized shall be recognized by Indian Courts as valid.[19] Section 27 says that the provisions of this Act in no way affect the validity of the marriages solemnized in foreign country which are neither celebrated nor registered under the Act.

Reference:

1. Paras Diwan, “Private International Law: Indian and English” 4th Edition, (1998), Deep and Deep Publications, New Delhi.
2. Berthiume v. Dastous, (1930) A.C. 79; Ken .eard v. Kenward, (1951) p. 124.
3. Berihiume v. Dastous, (1930) A.C. 79 at p. 83, per Lord Dunedin.
4. Apt v. Apt, (1948) p. 83; Ponticelli v. Ponticelli, (1958) p. 204.
5. (1860) 2 Sw. & Tr. 67.

Airo International Research Journal
ISSN: 2320-3714
July 2020, Volume: 22 , Issue 1

6. But see Formosa v. Formosa, (1963) p. 259 and Lepre v. Lepre, (1965) p. 52, where the Court of Appeal refused to accord identification to such a decree on the ground that, it despoiled the English concept of considerable justice.
7. Dicey and Morris, "The Conflict of Laws", Vol. 1, Stevens, 1980, p. 241.
8. (1847) 1. Rob- Ecc. 580.
9. Phillips v. Phillips, (1921) 38 T.L.R. 150.
10. See the case of Culling v. Culling, (1896), p. 116, where marriage was solemnized in the common law form on a warship lying of Cyprus.
11. Section 1 and 2 of the Foreign Marriage Act.
12. Hay v. Northcote, (1900) 2 Cb. 262.
13. Section 23 and 39 of the Foreign Marriage Act.
14. Paras Diwan, "Modem Hindu Law: Codified and Uncodified", 3rd Edition, (1990), Chapter VII, Deep and Deep Publications, New Delhi.
15. Mandaknj Pundalik Salkar v. Chandrastin Paikar, AIR 1986 Bom. 172 and Ma Twe v. Lwe Ham, 1919 L.B. 14.
16. Section 13 of the Foreign Marriage Act, 1969.
17. Chapter III of the Foreign Marriage Act, 1969.
18. Abdul v. Padma, 1982 Bom. 341 and Joyce v. Robert, 1982 A.P. 385.
19. Sections 15 and 17(6) of the Foreign Marriage Act, 1969.