



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2024

Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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MAINTENANCE AND PRENUPTIAL AGREEMENT: INDIA AND USA

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ABSTRACT

The Special Marriage Act of 1954, Section 125 of the Criminal Procedure Code of 1973, and the Protection of Women from Domestic Violence Act of 2005 are the laws that have been drafted regarding the issue of maintenance. These laws offer women, regardless of the religious community to which they belong, a statutory remedy.

The different enactments provide an independent and distinct remedy framed with a specific object and purpose. In spite of time frames being prescribed by various statutes for the disposal of interim applications, in practice in a vast majority of cases, the applications are not disposed of within the time frame prescribed. This is the present situation in India. However, what is the situation if the parties are not domiciled in India? In such a case what law should apply? Where should the parties go to seek a remedy? All the above questions will be discussed in the paper.

Keywords: Maintenance, Alimony, Jurisdiction, Private International Law.

LITERATURE REVIEW

Objective and Scope of the Study: A proceeding for maintenance and child support in a marriage where one of the parties is Indian should proceed in India and Indian courts have jurisdiction.

Articles, Journals and Research Papers

1. *Critical review of changing trends relating to maintenance under personal laws in India, 1.2 GLS LJ (2019) 18 by Kiran Gardner*

This paper is referred to in order to analyse the various judgements of Indian courts on the position of maintenance. This paper lists all the landmark case laws and puts a clear understanding of how and why maintenance will be granted under Indian law.

2. *Prenuptial Agreements in India : An Analysis of Law and Society, (2019) 12 NUJS L Rev 217 by Amrita Ghosh and Pratyusha Ka*

In this paper by evaluating the possible advantages that prenuptial agreements may have for Indian couples and outlining the types of agreements that prospective spouses may choose to use for managing their marital relations, it aims to return the attention to the important stakeholders..

3. *The Relationship Between Conflict of Personal Laws and Private International Law, 18 JILI (1976) 241 by Akolda M Tier*

This paper compares the relationship between personal laws and Private International Rules with the help of various landmarks judgements. This paper helps in understanding the application of private international rules to any situation.

4. *Validity of Marriage under International Private Law With Special Reference to 1978 Hague Marriage Convention: Towards Unification of the Rules of International Private Law, I JCLC (2013) 32 by Usha Tandon*

This paper would be referred to by the author in order to understand and substantiate the present legal position of Maintenance in India. This paper beautifully explains the situation of maintenance with respect to the principles of PIL.

5. Victoria Vasquez, *Evaluation of the New York Child Support Standards Act: Have the Guidelines Really Made a Difference?*, 4 J. L. & Pol'y (1995). Available at: <https://brooklynworks.brooklaw.edu/jlp/vol4/iss1/10>

This paper is referred to understand the New York law relating to child support. It highlights the principles of natural justice and the evolution of child support legislation.

Books

1. Cheshire, North & Fawcett, *Private International Law* (15th ed. 2015)¹

Web Sources

1. Cornell Law School, 26 CFR § 1.71-1T - Alimony and separate maintenance payments (last visited March 11, 2023), <https://www.law.cornell.edu/cfr/text/26/1.71-1T>
2. Prachi Bhardwaj, Maintenance in matrimonial disputes (last visited March 14, 2023) <https://www.sconline.com/blog/post/2020/11/04/maintenance-in-matrimonial-disputes-supreme-court-frames-extensive-guidelines-resolves-issue-of-overlapping-jurisdiction-under-different-laws-read-guidelines/>, last visited March 14, 2023.
3. NYC Comptroller Report of Child Support, <https://comptroller.nyc.gov/reports/audit-report-on-the-timely-processing-of-child-support-payments-by-the-administration-for-childrens-services/>

¹ The book referred to various landmark judgements in relation to maintenance in marriage as dealt with in **Chapter V: Family Law**.

1. INTRODUCTION

Private International Law (PIL) while considering maintenance refers to the legal principles and rules that determine the obligations of individuals to provide financial support to their dependents who are living in another country. It becomes simple when both parties are 'residents' of the same country, but a conflict of law arises when a foreign element is involved.²

The main objective of maintenance laws in private international law is to ensure that the dependents, who are living in a foreign country, are not left without financial support by their relatives residing in another country.³ The laws governing maintenance obligations in private international law vary depending on the country where the parties are located. Here we can refer to the basic principles of PIL i.e., *lex domicilii*,⁴ *lex loci celebrationis*,⁵ *lex patriae*,⁶ *Habitual Residence*⁷ (*Unlimited Residence*)⁸ and *Matrimonial Home*.⁹

All these principles are significant in deciding a PIL case. This is a significant area of private international law which includes dealing with the conflict of laws arising in cases where individuals, such as spouses or children, reside in different countries, and one of them seeks financial support from the other. This can have its roots in divorce, legal separation, child custody and adoption.¹⁰ International conventions and treaties, such as the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, provide the basic understanding for the resolution of maintenance disputes.¹¹

² Akolda M Tier, *The Relationship Between Conflict of Personal Laws and Private International Law*, 18 JILI 241, 255, (1976).

³ Prachi Bhardwaj, *Maintenance in matrimonial disputes-Supreme Court frames extensive guidelines; Resolves issue of overlapping jurisdiction under different Laws*, SCC ONLINE (March 11, 2023, 05:11 pm), <https://www.scconline.com/blog/post/2020/11/04/maintenance-in-matrimonial-disputes-supreme-court-frames-extensive-guidelines-resolves-issue-of-overlapping-jurisdiction-under-different-laws-read-guidelines/>.

⁴ *Lex Domicilii*- The domicile of the party

⁵ *Lex loci Celebrationis*- The law of the place where the marriage was solemnized.

⁶ *Lex Patriae*- The nationality of the concerned person; law of the fatherland.

⁷ *In the matter of B (A child)*, [2016] UKSC 4

⁸ "*In the Estate of Fuld*" *The Fuld Case* by R. H. Graveson.

⁹ *Matrimonial Home*- The place where both parties intended to reside after the marriage.

¹⁰ Amrita Ghosh and Pratyusha Ka, *Prenuptial Agreements in India : An Analysis of Law and Society*, 12 NUJS L Rev 217, 220, (2019).

¹¹ Jason M. Barbara, *Changes In NY Maintenance & Child Support Income Caps*, *Long Island Litigators* (March 10, 2023, 04:26 pm), <https://www.longislandlitigators.com/our-blog/2022/july/changes-in-ny-maintenance-child-support-income-c/>.

Specifically coming to New York legislation there are various acts enacted for the support of childcare and alimony including New York Domestic Relations Law, Uniform Marriage, and Divorce Act, 1973, New York Civil Practice Law and Rules, New York State Human Rights Law, Child Support Standards Act, and Internal Revenue Code.¹²

Apart from many other legislations for family law and maintenance/alimony, these are the ones that are highlighted.

New York Domestic Relations Law governs family law issues in New York, including maintenance/alimony.¹³ Section 236 of this law sets out the rules for determining maintenance/alimony, including factors such as the length of the marriage, the income and earning capacity of each spouse, and the standard of living established during the marriage.¹⁴ *The Uniform Marriage and Divorce Act* is a model law that has been adopted by many states, including New York. It includes provisions for spousal support, including temporary and permanent support.¹⁵ *New York Civil Practice Law and Rules* include rules for enforcing maintenance and support orders, including procedures for garnishing wages and other income.¹⁶

The Internal Revenue Code includes provisions related to the tax treatment of maintenance/alimony payments. For example, maintenance/alimony payments are tax-deductible for the paying spouse and taxable as income for the receiving spouse.¹⁷ *New York State Human Rights Law* prohibits discrimination on the basis of sex in employment, housing, and other areas. This law can be relevant to maintenance/alimony disputes if a spouse claims that they are being discriminated against based on their sex.¹⁸

The Family Court Act governs the procedures and jurisdiction of family courts in New York. It includes provisions related to child custody and support, paternity, and orders of protection.¹⁹

¹² Victoria Vasquez, *Evaluation of the New York Child Support Standards Act: Have the Guidelines Really Made a Difference?*, 4 J. L. & Pol'y, 279, 287-289 (1995), <https://brooklynworks.brooklaw.edu/jlp/vol4/iss1/10>

¹³ *Id.*

¹⁴ Section 236, New York Domestic Relations.

¹⁵ Victoria Vasquez, *Evaluation of the New York Child Support Standards Act: Have the Guidelines Really Made a Difference?*, 4 J. L. & Pol'y, 279, 287 (1995), <https://brooklynworks.brooklaw.edu/jlp/vol4/iss1/10>

¹⁶ *Id.*

¹⁷ Cornell Law School, 26 CFR § 1.71-1T - Alimony and separate maintenance payments (temporary) (last visited March 11, 2023), <https://www.law.cornell.edu/cfr/text/26/1.71-1T>

¹⁸ *Supra* note 17.

¹⁹ *Supra* note 15.

Child Support Standards Act establishes guidelines for the calculation of child support in New York. It includes a formula for determining the amount of support based on the income of both parents.²⁰ Overall, the issue of maintenance in private international law is crucial to ensure the protection of the rights of dependents living in different countries, and it requires the application of various legal principles and rules to ensure that the obligations of individuals to provide financial support are recognized and enforced across borders.

1.1 STATEMENT OF FACTS / BACKGROUND

Mr Abhishek Kumar, MBBS, MD from Bangalore and M.S. from New York and a doctor who claims himself to be a citizen of the United States of America with his domicile in the States of New York has spent 10 years and 5 months in different States. Mrs Payal Kumar was born and brought up in Gulbarga, Bengaluru.

The marriage was solemnized at 5-2/76, Shashi Vihar, M.G. Road on May 30, 1975, according to Hindu rites and a female child was born to them on February 21, 1977, at Gulbarga where Abhishek's father-in-law resided. In July 1974, Abhishek took his wife and daughter to the U.S.A., and he came back to India with them on 13.5.1983. The respondent thereafter alone went back to the U.S.A. on May 28, 1983, and after resigning from his job in the U.S.A. he came back to India on June 6, 1981, and since then he is living with his father's house at 5-3/87, Surya Residencies, Bengaluru. On May 4, 1986, the wife and the child left Abhishek's father's house and went to live with her parents at 62/7-5 Aloma, Gulbarga.

She filed on May 16, 1986, a petition for divorce in the District Judge's Court at Gulbarga on grounds of cruelty and desertion under Section 13 of the Hindu Marriage Act 1985.

1.2 CONFLICT OF LAW

The conflict of law arises when there is a foreign element present. As defined by Cheshire, "*Private international law is that part of the law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of*

²⁰ *Supra* note 17.

law as to necessitate recourse to that system."²¹ So in case of maintenance, when one of the parties is of foreign domicile, or the *lex loci celebrationis* is under foreign law or in any other way if there is an involvement of a foreign element, that case would be governed by the principles of PIL.

Under New York law, spousal support/ maintenance is determined by a guideline calculator based on the income of the two parties and the length of their marriage.²² The Court is allowed to deviate from the guideline amount based on a number of potential rebuttal factors, however, such deviations are rare.

Deciding on childcare and maintenance in New York can be a complex process due to a variety of factors, including high costs, limited availability, and strict regulations.

According to a report by the Center for Children's Initiatives,²³ childcare in New York City is among the most expensive in the country, with the average cost of full-time care for an infant exceeding \$16,000 per year. This can be a significant financial burden for many families, particularly those with low or moderate incomes. Such complexities bring complex methods in order to decide on the ratio of maintenance.

In addition to high costs, there is also limited availability of childcare in many areas of the city. According to a report by the New York City Comptroller's Office, more than half of the city's neighbourhoods are considered childcare deserts, meaning that there are more than three times as many children as available childcare slots.²⁴

Therefore, if the wife and husband are both living in India and the marriage was solemnized in India, by way of applying *Lex Fori* a simple conclusion can be reached to apply the domestic law. Indian law provides more robust protections for women in maintenance cases, and the process for obtaining maintenance in India is more efficient and cost-effective than in the United States. Under Indian law, a wife is entitled to maintenance from her husband if she is unable to maintain herself, and her husband has the means to provide maintenance.

²¹ Cheshire, North & Fawcett, *Private International Law* (15th ed. 2015).

²² Victoria Vasquez, *Evaluation of the New York Child Support Standards Act: Have the Guidelines Really Made a Difference?*, 4 J. L. & Pol'y, 279 (1995), <https://brooklynworks.brooklaw.edu/jlp/vol4/iss1/10>

²³ Scott M. Stringer, *NYC Under 3: A Plan to Make Child Care Affordable for New York City Families* (2019), <https://comptroller.nyc.gov/wp-content/uploads/documents/Child-Care-Report.pdf>.

²⁴ *Id.*

The amount of maintenance is determined by various factors, including the income of both parties, their standard of living, and the length of the marriage. In contrast, in New York, the process for obtaining maintenance is more complicated, and the amount of maintenance awarded may be less generous than in India. In addition, the costs of legal representation and court fees in the United States can be significantly higher than in India.

In the end, the decision of where to apply for maintenance will depend on the specific circumstances of each case. Here contracts/prenuptial agreements²⁵ come into play. It lays down every rule regarding dealing with any future dispute arising during/after the marriage. This is a foreign concept, prevalent in US and UK but also developing in India.

Since marriage in India is not contractual, the validity of the prenuptial is always questioned.²⁶ Prenuptial agreements' terms and conditions can be enforced as long as they do not conflict with the rules of various personal codes based on religion. Hence, under *Section 10 of the Indian Contract Act of 1872*, a contract like this is only enforceable if both parties freely accept it. However, *Section 23* of the aforementioned Act states that any agreement that is immoral or that is entered into in violation of or in opposition to the public policy shall be null and void.

There are two situations in India when prenups are legal. One in Goa as the marriages are governed under the *Portuguese Civil Code of 1867*. Second, every marriage performed by the *Special Marriage Act of 1954*, as well as the correct registration of all declaration documents at the Registrar's office is a situation where a prenuptial agreement is legally valid.

1.2.1 JURISDICTION

In accordance with international law, any nation's courts have jurisdiction over people who are its citizens, have a place of residence there, or otherwise owe that nation loyalty, as well as over property located there. The respondent argued the same thing. The proper choice of law rule must be used to determine the *lex causae*.²⁷ The choice of legislation will be influenced by a number of

²⁵ It is a contract in which a soon-to-be-married couple specifies the terms and circumstances of what will happen to their personal or family financial assets as well as other parts of their future together in the event that their marriage fails.

²⁶ Amrita Ghosh and Pratyusha Ka, *Prenuptial Agreements in India : An Analysis of Law and Society*, 12 NUJS L Rev 217, 220-221, (2019).

²⁷ Calia Wassterstein Fassberg, *Judicial and Legislative Jurisdiction in the Hague Conventions on Private International Law*, 27 Isr. L. REV. 460 (1993).

interrelated circumstances, including domicile, property situation, location of the wedding, etc. All systems of private international law may not have the same determining element.²⁸

A Connecting Factor may have a distinct meaning in two legal systems even when it is the same in both. It is crucial to choose which of the competing conceptions regarding the linking element should be accepted when a disagreement like this emerges. According to English Private International Law, English courts only consider the interpretation provided by Lex fori and the meaning provided by English law.²⁹ For a variety of reasons, every legal system classifies certain issues as either procedural law or substantive law. In private international law, this divergence has a special relevance. Unless an issue is classified as procedural or substantive, it is impossible to say which law applies to it. The legislation guiding how court procedures are conducted is known as procedural law.³⁰

It discusses the techniques and practises that are followed in the court for a case and specifies the succession of stages taken in civil, criminal, and administrative cases. Due process of law establishes a person's genuine right to have legal procedures if he or she is sued, and procedural law ensures that a case is conducted in compliance with that right. In order to summarise, it may be said that procedural law controls every step of the legal process, including obtaining evidence for a lawsuit, investigating an issue, and reaching a settlement. Hence procedural laws give the state the tools it needs to compel people to uphold their substantive rights. The Criminal Procedure Code and the Civil Procedure Code are two well-known examples of procedural legislation in India.³¹

1.2.2 CHOICE OF LAW

The choice of law in maintenance (also known as alimony or spousal support) in marriages is typically determined by the laws of the jurisdiction where the divorce or separation proceedings take place. In general, the laws of the state or country where the couple lived during their marriage will govern the maintenance award.³² However, there may be exceptions and variations depending

²⁸ *Supra* note 21.

²⁹ Hal Burman, *Private International Law*, 43, Summer 2009, 741, 2009.

³⁰ The legislation that controls the operation of the courts and how both the state and the individual (the latter includes groups, whether or not they are incorporated) assert their rights in the various courts is also known as adjective law.

³¹ The Code Of Criminal Procedure, 1973; The Code of Civil Procedure, 1908.

³² *Sm. Satya v. Teja Singh*, 1975 AIR 105.

on the specific circumstances of the case and the applicable laws in the jurisdiction. For example, some states or countries may allow the parties to choose the law that will govern the maintenance award by agreement or through a prenuptial or postnuptial agreement. In such cases, the parties may opt for the law of a jurisdiction that they believe is more favorable to their interests. The proper law of the contract is the one that the parties have selected, which decision may be verbal or inferred. If there is no option, the test with the closest connection will be used.³³

As a result, the term “proper law contract” refers to the law intended to govern the transaction. The Rome Convention’s *Article 3(1)* states: “A contract shall be governed by the law selected by the parties. The option must be made explicitly, or reasonably clear evidence of it must be shown by the contract’s terms or the specifics of the situation. The law that applies to all or just a portion of a contract might be chosen by the parties.”³⁴

Express and inferred choices are under the category of choice. *Article 3* makes note of both. Through express decision, the parties determine the appropriate law, such as *lex domicille* or *lex loci contractus*.³⁵ Unlike implicit choice, which is defined by the contract’s words, nature, and circumstances before the appropriate legislation is determined. The phrase ‘appropriate law’ was specifically defined in *Indian General Investment Trust vs. Raja of Kholikote* as “the suitable law of contract implies the law which the court is to follow in deciding the duty under the contract.”³⁶ The issue of determining the appropriate legislation depends on the intents of the parties to be determined in each case on evaluation of:³⁷

- a) the terms of the contract,
- b) the circumstances surrounding the parties, and
- c) all relevant facts.

³³ Kate Wilford, Legal advice privilege in England and the “closest connection” test, THOMSON REUTERS (March 23rd, 2013, 05:30pm), <http://arbitrationblog.practicallaw.com/legal-advice-privilege-in-england-and-the-closest-connection-test/#:~:text=The%20E2%80%9Cclosest%20connection%E2%80%9D%20test%20in,during%20the%20document%20production%20process.>

³⁴ *Article 3(1)* Rome Convention; Calia Wassterstein Fassberg, Judicial and Legislative Jurisdiction in the Hague Conventions on Private International Law, 27 *Isr. L. REV.* 460 (1993).

³⁵ *Id.*

³⁶ AIR 1952 Cal 508

³⁷ *Id.*

2. MAINTENANCE IN INDIA

The spouse who has authority over finances always has the winning hand in marriage disagreements. If there is a dispute and the marriage ends in divorce, the woman will suffer financially. When a marriage fails, a woman is forced into a condition of destitution since her role as the homemaker is not valued financially. She lacks the skills and capability to compete in highly competitive work marketplaces. They must abandon their protectionist stance and assert their legitimate claim to the right to live in dignity.

The Legislation specifies maintenance obligations under two headings: interim maintenance³⁸ and permanent maintenance.³⁹ The specifics are not much of a concern in this paper but rather the conflict of laws. There are instances where a woman is denied maintenance on the ground that the marriage was already dissolved in the USA.⁴⁰ In such cases the jurisdictional validity of Section 125 CrPC is often challenged. Also, there are instances where women are cheated by marrying in a foreign jurisdiction and after abandoning them they are not left with any remedy in the Indian courts.⁴¹ One can find many examples of this sort.

2.1 MAINTENANCE- RULES OF PRIVATE INTERNATIONAL LAW

The legislation governing marriage in India is a personal law. In other words, the law of the religious group to which the spouses belong, without regard to residence or nationality, governs marriage in India, not Indian law, or State law. Both the largest minority group, the Muslims, as well as the Hindu majority, have their family laws.⁴² According to historical precedent, all residents of Goa, Daman, and Diu are subject to the previous *Portuguese Civil Code*, whereas residents of Pondicherry are subject to additional regulations.⁴³

The traditional practises and customs of a few tribes in the Northeast have been given special legal protection. In India, intercommunal and interreligious weddings are uncommon and there is thus

³⁸ *Alimony pendente lite*: Section 36 of the Indian Divorce Act, 1869; Kiran Gardner, Critical review of changing trends relating to maintenance under personal laws in India, 1.2 GLS LJ, 18, 20, (2019).

³⁹ Section 37 of Indian Divorce Act, 1869; Section 25 of Hindu Marriage Act, 1955.

⁴⁰ *Dipak Banerjee v. Sudipta Banerjee*, 1987 SCC Online Cal 157.

⁴¹ *Harmecta Singh v. Rajat Taneja*, 2003 SCC Online Del 60.

⁴² Usha Tandon, Validity of Marriage under International Private Law With Special Reference to 1978 Hague Marriage Convention: Towards Unification of the Rules of International Private Law, I JCLC, 32, 39, (2013).

⁴³ *Id.*

no chance of a dispute forming between the rules of different groups.⁴⁴ Yet, there is a chance that the dispute will only indirectly involve intercommunal regulations. When one of a marriage's partners makes a conversion to a different faith, a conflict between pre-conversion law and post-conversion law occurs. *The Special Marriage Act of 1954* allows the marriage of the parties even though they are domiciled abroad.⁴⁵ We can understand that before a conflict with foreign law, they are already a conflict of internal laws.

Another act, the *Foreign Marriage Act of 1969*, permits marriages between individuals who are at least one Indian citizen to take place abroad.⁴⁶ The Act's Section 11 has an impact on the norms governing the applicable legislation. It states that the Marriage Officer will decline to perform the marriage ceremony if the *lex loci celebrationis* forbids it or if doing so would violate international law or international comity.⁴⁷ The rules for the recognition of marriages performed according to the laws of foreign nations are outlined in Section 23.⁴⁸

The laws governing international private law as they are practised in this nation are not codified and are instead spread out among several pieces of legislation, including the Code of Civil Procedure, the Special Marriage Act, the Foreign Marriage Act, the Indian Divorce Act, the Indian Succession Act, etc. The English principles of conflict of laws, whether they are common law standards or statutory rules, have had a significant impact on the way Indian courts address marriage issues involving foreign parties.⁴⁹

Now in the judgement of *Dipak Banerjee vs Sudipta Banerjee*⁵⁰ the court laid down that "nothing prevents the petitioner from adducing such evidence for his nationality, but it does not tilt the consideration regarding the exercise of proper jurisdiction in so far as the claim for maintenance made by the wife and child is concerned."⁵¹ The court interpreted *Sections 125 and 126 of the*

⁴⁴ *Supra* note 42.

⁴⁵ *Civil Marriages*, i.e., a marriage solemnized by a civil contract without religious ceremony.

⁴⁶ *Supra* note 42.

⁴⁷ *Id.*

⁴⁸ Usha Tandon, *Validity of Marriage under International Private Law With Special Reference to 1978 Hague Marriage Convention: Towards Unification of the Rules of International Private Law*, 1 JCLC, 32, 40, (2013).

⁴⁹ "The jurisdiction acquired by the foreign court as well as the grounds on which the remedy is awarded must be in conformity with the marriage law under which the parties are married," the Supreme Court of India held in *Y. Narsimha Rao v. Y. Venkata Lakshmi*, (1991) 3 SCC 451. Similarly, "No marriage between a non-resident Indian and an Indian woman which has taken place in India may be invalidated by a foreign court," the Supreme Court stated in *Neeraja Seraph v. Sh Jayant Seraph*, (1994) 6 SCC 461.

⁵⁰ (1987) 0 CALLT 491 HC.

⁵¹ *Id.*

Code of Criminal Procedure to substantiate the claim for maintenance and held that Indian courts do have jurisdiction in such cases. This answers the above statement of fact.

As noted above, the parties can come together on common ground and enter into an agreement which will decide on all these issues regarding maintenance. This will reduce the burden of the courts as it is a pre-determined intention of the parties with respect to the entire process of maintenance. This can be substantiated by the following:

According to the Supreme Court's reported ruling in the case of *Sm. Satya v. Teja Singh*,⁵² every issue that is brought before an Indian court must be determined in accordance with Indian law when there is a question of municipal law or a conflict of laws. Another issue is that the application of foreign law in a certain circumstance to decide a case with a "foreign element" may be mandated under the Indian Conflict of Laws. Such acknowledgement is given on the basis of fairness rather than out of civility.⁵³

Similarly in the case of *Khorshed Behram Rustomjee v. Behram Nowrojee Rustomjee*,⁵⁴ the husband initially filed a divorce petition under the *Parsi Marriage and Divorce Act 1936* at the Parsi Chief Matrimonial Court in Bombay, but then withdrew it and petitioned the High Court of London.⁵⁵ In her counterclaim in the Bombay court case, the wife was awarded a decree for the restoration of her marital rights. The jurisdiction under the English courts was dismissed as per *Forum non Conveniens*. Indian courts alone had the jurisdiction to deal under Parsi Marriage and Divorce Act 1936 and to pass such orders and not the English Matrimonial Court.⁵⁶

The rules laid down under Indian law follow justice and equity. In the case of *Shobha Suresh Jumani vs Appellate Tribunal, Forfeited property and Anr.*⁵⁷ it was held that wife living separately is also entitled to claim maintenance under Section 18 of Hindu Adoption and

⁵² 1975 AIR 105.

⁵³ "We cannot therefore adopt mechanically rule of Private International Law evolved by others. These principles vary greatly and are moulded by the respective social, political and economic conditions in this country."

⁵⁴ 1980 SCC ONLINE BOM 90.

⁵⁵ Under his *lex domicilii*.

⁵⁶ Also, the husband could never be governed by the English domicile law as he never acquired it. The law has advanced enough to grant jurisdiction to such Courts where the wife "resides."

⁵⁷ AIR 2001 SC 2288

Maintenance Act. Further in *P. Srinivasa Rao vs P. Indira*⁵⁸ the court held that deserted wife is also entitled for maintenance.⁵⁹

Similarly in Muslim laws, Christian laws, and Paris laws they have various enactments to protect the rights of women.⁶⁰ In the case of *Gulam Rashid Ali v. Kaushar Praveen & Anr.*⁶¹ wherein the court held that wife is entitled to maintenance until she remarries.

⁵⁸ AIR 2002 AP 130 (FB)

⁵⁹ Further this duty is also transferrable to the Father-in-law of the spouse as laid down in *D. Krishna Prasada Rao vs K. Jayashri*, AIR 1986 AP 126; the same principle is also present under Muslim law as laid down in *Mumtazben Jushabbhai Sipahi Vs Maheebkhan Usman Khan Pathan & Anr. II (1999) DMC 71 Guj. HC.*

⁶⁰ Muslim Women (Protection of Rights on Divorce) Act, 1986; Maintenance (Protection of Rights on Divorce) Act, 1986.

⁶¹ II (2010) DMC 371 Delhi HC; Similar judgement was also given in *Danial Latifi & another v. Union of India*, II (2001) DMC 714 (SC).

3. CONCLUSION

India, like other nations, needs a well-developed body of international private law rules in respect of the solemnization and recognition of marriages, recognition of foreign decrees of divorce, nullity of a marriage, legitimacy, and custody of children, etc. to deal with a significant number of foreign decrees in matrimonial cases.

Under New York law, the court emphasized the need for a careful analysis of the parties' financial circumstances in determining the amount of maintenance to be awarded. The court noted that the amount of maintenance must be fair and reasonable, and it should consider the needs of the receiving spouse and the ability of the paying spouse to provide support.⁶² In *Weisberger v. Weisberger*,⁶³ the court highlighted the complexity of enforcing a maintenance order and decided on the best interests of children.

This can also be seen in the recent landmark judgement of *Rajnish v. Neha*,⁶⁴ where the court laid down every element related to maintenance in detail. So, the basic principle of PIL is that when a remedy can be availed under the Lex Fori, there is no need to go for the application of any foreign law. If a wife is seeking maintenance from her husband, whether she should apply in India or New York would depend on several factors, such as the couple's place of residence, where the marriage was solemnized, and the laws that govern maintenance in each jurisdiction.

Therefore, in general, if the wife or husband are living in India or the marriage was solemnized in India, it may be more advantageous for the wife to apply for maintenance in India. This is because Indian law provides more robust protections for women in maintenance cases, and the process for obtaining maintenance in India is more efficient and cost-effective than in the United States. Under Indian law, a wife is entitled to maintenance from her husband if she is unable to maintain herself, and her husband has the means to provide maintenance.⁶⁵

⁶² Grunfeld v. Grunfeld, 94 N.Y.2d 696 (2000); Rosen v. Rosen, 696 So. 2d 697 (1997).

⁶³ 60 N.Y.S.3d 265.

⁶⁴ 2020 SCC OnLine SC 903.

⁶⁵ Prachi Bhardwaj, Maintenance in matrimonial disputes-Supreme Court frames extensive guidelines; Resolves issue of overlapping jurisdiction under different Laws, SCC Online (March 11, 2023, 05:11 pm), <https://www.scconline.com/blog/post/2020/11/04/maintenance-in-matrimonial-disputes-supreme-court-frames-extensive-guidelines-resolves-issue-of-overlapping-jurisdiction-under-different-laws-read-guidelines/>.

In contrast, in New York, the process for obtaining maintenance can be more complicated, and the amount of maintenance awarded may be less generous than in India.⁶⁶ In addition, the costs of legal representation and court fees in the United States can be significantly higher than in India. In *Chandaram Bunkar v. Smt. Ramadevi*,⁶⁷ the quantum of maintenance was decided which is 1/5th of the spouse salary drawn. This case illustrates the simplicity in calculating maintenance unlike the formulas present adopted by US courts.

Similarly, in *Kalyan Dev Chowdary v. Rita Dev Chowdary*, The Honb'l Supreme Court ruled that it would be equitable and proper to grant the husband's wife maintenance equal to 25% of his net salary.⁶⁸

⁶⁶ This can be inferred from the case of *Ambaram v. Reshambai*, AIR 1976 SC 2196 wherein the court determined that despite the situation of women who were married without being aware that their husband had a second wife deserves sympathy, support under Section 25 and they should still be awarded maintenance.

⁶⁷ AIR 2010 Raj 176.

⁶⁸ Civil Appeal No.5369 of 2017

4. RESEARCHERS' NOTE

When it comes to this, the institution of marriage, whether one is dealing with a divorce petition, nullity of marriage, judicial separation, presumption of death, or difficulties dissolving marriage, concerns of jurisdiction, choice of law, and acceptance and execution of foreign decrees may emerge. Indian law is party neutral in all the cases of maintenance. But a mere agreement cannot extinguish the right of a party to claim maintenance. As discussed earlier, an agreement such as prenups can only be valid when they do not override the legal provisions and public policy.

While the legal framework is in place to ensure that those who are entitled to maintenance receive it, the actual process of obtaining maintenance can sometimes be challenging, particularly for those who do not have access to legal support or face resistance from the party responsible for providing maintenance. These limitations are reduced while comparing to US.

ANNEXURE A

IN THE FAMILY COURT OF SURAJPUR, AT KALABURAGI, KARNATAKA

Maintenance Case _____ of 1986

IN THE MATTER OF:

Mrs. Payal Kumar

W/o Mr. Abhishek Kumar

Currently residing at 62/7-5 Aloma,

Gulbarga 500978

....Petitioner

VERSUS

Mr. Abhishek Kumar

S/o Mr. Rajendra Kumar

Currently residing at 5-3/87, Surya Residencies

Bengaluru 500345

....Respondent

**APPLICATION FOR MAINTENANCE BY WIFE UNDER SECTION 125 (1)(a) and
(1)(b) OF THE CODE OF CRIMINAL PROCEDURE, 1973**

MOST RESPECTFULLY SHOWETH:

1. That the petitioner herein is a qualified MBA (Marketing) from Symbiosis University (distance learning). That the Petitioner is the legally wedded wife of the Respondent and is currently residing at 62/7-5 Aloma, Gulbarga 500978 (hereinafter referred to as "Residence").

Copy of the petitioner address proof is annexed and attached herewith as Annexure P/1.

2. That the respondent is the husband of the Petitioner. The respondent is qualified in MBBS, MD and is currently working as Senior Doctor at Rainbow Hospitals. The office of the respondent is located at Lal Barg, Bengaluru 500987. According to the latest information available with the petitioner, the respondent is drawing a salary of Rs. 2,77,443/- per month (INR Two Lakhs Seventy-Seven Thousand, Four Hundred, and Forty Three Only).

3. The parties herein have one legitimate minor girl born out from the wedlock aged 7 years. (hereinafter together referred to as 'Child').

4. That the parties herein were living together in the USA in New York until 28.05.1983. Later both the petitioner and respondent came to India and started to reside at the petitioner's father-in-law residence. However, following certain differences between the parties as described below, the petitioner left the said residence on May 4, 1986. Further, the respondent has been regularly attending his office but not residing with the petitioner. That during this time the respondent has failed to maintain the petitioner, being his lawfully wedded wife and his legitimate minor child. The petitioner is not working, and the money is not enough to meet all the household expenses and the expenses related to the education and development of the child. The petitioner has extensively tried to contact the Respondent for resolving the problems between them and get back together; however, the respondent has been reluctant to reply or even talk to the petitioner or get back with his family. The petitioner is highly optimistic that the issues between them can be mutually resolved, and they can get back together and again live together as a family, along with their child. However, in the meantime, being faced with such extreme hardships at such a difficult time in her life, the petitioner is constrained to approach this Hon'ble Court under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Cr.P.C.") seeking maintenance from the respondent for maintaining herself and their minor child. It is submitted that the petitioner has not initiated any divorce proceedings against the respondent now.

5. The brief facts of the present matter leading up to the current situation and the issues between the parties are discussed herein below. These facts will clearly establish the reasons for seeking maintenance by the petitioner and will demonstrate that she is entitled to the same.

BRIEF FACTS

6. That the marriage between the petitioner and the was solemnised on May 30, 1975, in accordance with Hindu rights, rituals and ceremonies at 5-2/76, Shashi Vihar, M.G. Road 500984, in the presence of and with the blessings of the family members and friends of the petitioner and the respondent. That a declaration certificate of marriage between the respondent and petitioner was issued by the Registrar. Thereafter, the parties started residing together in USA. The petitioner and the respondent have been childhood friends and knew each other all along.

Copies of the marriage certificate and photographs of the marriage are annexed and attached herewith as Annexure P/2 (Colly).

7. That ever since they got married, the petitioner has faced a lot of mental and emotional abuse from the respondent. It is submitted that the respondent always had heavy mood swings and always used to run away from home whenever the couple had small arguments on any issue. However, the respondent always used to come back home after some time. Further, the respondent is a very egoistic person and whenever the parties had any argument, it was the petitioner who always tried to fix the issues and resolve the problems. The respondent never accepted his mistakes, nor did he ever try to patch things up with the petitioner. That the petitioner has suffered a lot of emotional strain on account of the respondent's behaviour.

8. In 1976, when the respondent was working at New York Presbyterian Hospital, he started having panic attacks due to his bad relationship with his office manager. In order to curb these panic attacks, the respondent started his treatment with a psychiatrist at NYP Hospital. During this time, the respondent also took a medical leave from work for about a month in order to avoid his Boss at work. However, the respondent became extremely violent and started having anger issues after his treatment was over, and, as a result, he often used to get angry with the petitioner over petty issues.

Copies of the reports of the medical treatment of the respondent at NYP Hospital, are annexed and attached herewith as Annexure P/3 (Colly).

9. Thereafter, the parties were blessed with the first child named Ananya on 30.05.1977. Currently she is studying in the 2nd (second) standard at SVKT primary School, Bengaluru. It is submitted that the quarterly school fees for her is Rs. 65,697 (INR Sixty Five Thousand Six Hundred And Ninety Seven Only).

10. It is submitted that the petitioner was also physically harmed by the respondent due to his violent behaviour. It is submitted that the continuous physical and mental abuse by the continuous physical and mental abuse by the health of the petitioner. That on 07.05.1980, the Petitioner suffered from her first anxiety attack and also resulted in high blood pressure in so much as she had to be immediately taken to the hospital and treated upon. She was also put on medication for anxiety attacks. Subsequently, after one week, the petitioner had her second anxiety attack, and during the attack, when the petitioner asked the respondent to give her the medicines for anxiety attacks, the respondent started hitting her, tried to strangle her, and also threw her out of the room. During this course, the Petitioner also got 24 abuse marks on her body due to such treatment of the Respondent.

Copy of the medical reports of the Petitioner are annexed and attached herewith as Annexure P/4.

11. As a result of the continued strained relationship between the respondent, on and the family members of both parties, including the parties themselves decided that it would be beneficial to both parties if they lived separately for some time and thought about their relationship and the future of their kid. It is alleged that since the petitioner was always inclined to improve their relationship, she again contacted the respondent and asked him to meet for dinner on the following day. However, the respondent refused to accept the proposal Respondent refused to the petitioner, stating that it was in a fragile state and that they should not meet. It is submitted that since May 04, 1986, the petitioner left the house and the parties have been living separately since.

12. Besides the physical and mental abuse suffered by the petitioner from time to time at the hands of the respondent, the petitioner has also been treated by the respondent according to his own whims and fancies. The respondent never allowed the petitioner to go out and meet her friends and has deprived her of having a social life since the marriage. It is submitted that the respondent controlled the life of the petitioner to such an extent that he took decisions with respect to what the petitioner should wear and where she would work. The respondent never allowed the petitioner to wear the dresses she intended to wear. As mentioned, the respondent also forced the petitioner and the child. It is submitted that if the petitioner had been allowed by the respondent to pursue her career, she would have been in a very good position in her career. However, she sacrificed her career for her relationship with the respondent. That the respondent has been treating the petitioner

in a very abusive and inhumane manner ever since their marriage. Despite all this, the petitioner has been making efforts to live and build a strong relationship with the respondent, keeping their differences aside.

13. It is reiterated that the respondent has abandoned his wife and his minor kid. In the meantime, the petitioner has made various efforts and written numerous mails and messages to him for reconciliation; however, the respondent has stopped replying to the messages and mails of the petitioner. The petitioner believes that there may be a possibility that the respondent has blocked her mail. The petitioner also tried visiting the office of the respondent; however, the respondent refused to meet.

Copies of the various mails and messages written by the petitioner to the respondent are annexed and attached herewith as Annexure P/5 (Colly).

14. It is submitted that the petitioner is burdened with the responsibility of taking care of a minor daughter single-handedly as the respondent has not paid anything to the petitioner since May 1986. The monthly expenditure of the petitioner is detailed in the table herein below:

S. No.	Nature of Expense	Amount (INR)
1.	School fees	Rs. 65,697/-
2.	Extra-curricular activities of the child	Rs. 10,000/-
3.	Miscellaneous Expenditure for house including maid, maintenance, electricity, etc	Rs. 30,000/-
4.	Expenditure on medical, grocery, and daily need items	Rs. 20,000/-
	Total	Rs. 1,25,697/-

15. It is submitted that these expenditures sought by the petitioner are only with respect to the house and upkeep of the child. The petitioner is not seeking anything for herself.

Copies of the school fee receipts for the child are annexed and attached herewith as Annexure P/6 (Colly).

16. It is humbly submitted that, in contrast to the monthly expenditure of the petitioner towards the house and children has to be met by the petitioner alone. The amount being earned by the petitioner is not sufficient to maintain herself and her children. The Petitioner is in this situation because the Respondent has abandoned them and refused to provide support for the Petitioner and the Children. It is submitted that as per the latest knowledge of the petitioner, the respondent has all the means to support the petitioner and the children, as he earns a salary of Rs. 2,77,443/- per month (INR Two Lakhs Seventy-Seven Thousand Four Hundred and Forty Three Only). Therefore, he has failed to perform his duties towards the petitioner and the children and has failed to maintain them. The petitioner falls squarely under the purview of Section 125 of the CrPC and is before this Honourable court seeking maintenance from the respondent.

Copies of the salary slip of the respondent are annexed and attached herewith as Annexure P/7 (Colly).

17. It is submitted that the petitioner is in dire need of maintenance from the respondent in order to afford the education and other activities of the children. The petitioner is working hard enough to make a living and support herself and the children, but the amount she has is not sufficient for the cause. In the situation that she is not paid maintenance from the respondent, the petitioner and the child would soon be homeless. Moreover, it is a settled principle of law that both parents have a legal, moral, and social duty to provide their children with the best education and a standard of living within their means. The mere fact that the spouse with whom the child is living has a source of income, even if sufficient, would in no way absolve the other spouse of his obligation to make his contribution towards the maintenance and welfare of the child. It is further trite law that Section 125 CrPC is a measure of social legislation and has to be construed liberally towards to afford the education and other activities of the children. The mere fact that the spouse with whom the child is living has a source of income or not, would in no way absolve the other spouse of his obligation to make his contribution towards the maintenance and welfare of the child.

It is further trite law that Section 125 CrPC is a measure of social legislation and has to be construed liberally for the welfare of the wife and daughter. Keeping in mind these legal principles, it is submitted that the petitioner and the children are entitled to maintenance from the respondent in light of their situations described in the foregoing paragraphs.

18. According to the foregoing, the petitioner is entitled to maintenance from the respondent in the amount of Rs. 1,25,697/- (INR One Lakh twenty Five Thousand Six Hundred Ninety Seven only) per month for the upkeep of the child.

19. It is submitted that the Petition is not being presented in collusion with the Respondent.

20. It is submitted that the Petition is being presented without any unnecessary or improper delay on the part of the Petitioner.

21. That this Hon'ble Court has the jurisdiction to entertain the present petition in terms of Section 126 of the Cr.P.C. in so much as the Petitioner and the Children are currently residing in Greater Noida, which falls under the jurisdiction of this Hon'ble Court. It is also submitted that as laid down in *Sm. Satya v. Teja Singh* 1975 AIR 105 and *Dipak Banerjee vs Sudipta Banerjee* (1987) 0 CALLT 491 HC, the petitioner is well within her rights to file this petition to this Honorable court. Applying the rules of Private International law in Maintenance i.e., Lex loci celebrationis or Lex Causae, it is the Indian court that has jurisdiction to try and decide the case. It can be noted from the judgements similar to *Weisberger v. Weisberger* 60 N.Y.S.3d 265, the situation for maintenance in New York is complex and the petitioner is in no situation to afford such proceedings. Moreover the New York courts becomes Forum Non Conveniens in this particular matter.

22. It is humbly submitted before this Honourable Court that no other case has been filed by the petitioner in any other court of law for the same relief as prayed for under this petition.

23. That the cause of action accrued to the petitioner against the respondent, within the jurisdiction of this Court, on 04-05-1986 when the respondent stopped paying for the maintenance of the petitioner and their minor daughter.

24. The current Petition has been filed in good faith and in the interest of justice. That grave prejudice shall be caused to the petitioner if the petition is not allowed.

PRAYER

In light of the facts and circumstances set out above, it is respectfully prayed that this Hon'ble Court may be pleased to:

- a) Direct the respondent to pay an amount of INR 1,25,697/- per month towards the repayment of the home loan and the well-being and upkeep of children including education and co-curricular activities as mentioned in para 19;
- b) Award the costs of the instant petition to the petitioner; and/or
- c) Pass such other and further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case.

AND FOR THIS ACT OF KINDNESS YOUR COMPLAINANT AS INDUTY BOUND, SHALL EVER PRAY.