

Analysis on Law of Domicile

(N.Roja Rani,Advocate,Guntur)

Chapter I

Introduction:

Domicile which is a private international law or conflict of laws concept identifies a person, in cases having a foreign element, with a territory subject to a single system of law, which is regarded as his personal law. Domicile in India is an essential requirement for acquiring Indian citizenship. The term ‘Domicile’ is not defined in the constitution. Ordinarily, it means a permanent home or place where a person resides with the intention of remaining there for an indefinite period¹. Domicile is not the same thing as residence. Residence implies a purely physical fact, the fact of just being and living in a particular place. But domicile is not only residence, it is residence coupled with intention to live indefinitely in the place².

Chapter II

2.1 Definition of Domicile:

“Domicile means permanent home, and if that was not understood by itself no illustration could help make it intelligible”³.According to MORRIS definition in “It is important to identify an individual’s personal law, which governs questions concerning the personal and proprietary relationships between members of a family. Place of birth is an inadequate criteria by which to identify the personal law”⁴. The domicile of a person is in that country in which he either has or is deemed by law to have his permanent home.⁵ The concept of domicile has been explained by a distinguished American Judge, Oliver Wendell Holmes J, “the very meaning of domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain right and duties that have attached to it by the law may be determined”⁶.All authors explained in

¹ Burgin and Fletcher: Conflict of law, 3rd (End), p 60.

² Dicey: Conflict of Laws, 6th (End), p 78; Central Bank of India v. Ram Narnia, AIR 1955 sc 36.

³ Paras Diwan: Private International Law,4th (End),p145.

⁴ Morris, the Conflict of Laws, 7th Edition, p29.

⁵ AIR 1955 SC 36, (1954), Cr.LJ 331

⁶ Williams V.Osenton(1914).

same way. We are following common law for concept of domicile because there is no proper law in India.

2.2 General principles of Domicile:

Under both Indian and English private international law there are four general rules in respect of domicile⁷.

- i. No person can be without a domicile;
- ii. No person can at the same time have more than one domicile;
- iii. An existing domicile is presumed to continue until it is proved that a new domicile has been acquired; and
- iv. Domicile denotes the connection of a person with a territorial system of law.

2.2.1 No person can be without a domicile: This rule is based upon the practical necessity of connecting every person with some legal system by which questions affecting his family relations and family properties are to be determined. “It is a settled principle”⁸. In case of *Udny vs. Udny*⁹ “that no man shall be without a domicile, and secure this result the law attributes to every individual as soon as he is born, the domicile of his father, if the child is legitimate and the domicile of mother if illegitimate this has been called the domicile of origin and is involuntary. Domicile of origin prevails until a new domicile has been acquired. But the moment a person loses his acquired domicile his acquired domicile, the domicile of origin springs back to him”¹⁰.

2.2.2 A person cannot have more than one domicile: At any given time through dual citizenship is permitted by several countries. Main object of this rule is the same as that of the first time to connect a person with a definite legal system. Domicile signifies connection with a territorial subject to a single legal system of law. What is sometimes called a “law district”¹¹. Like a federal state where the legislative authority is distributed between central and state legislatures, the law district is, generally the state where the concerned person has established his home. Like citizenship domicile is also one for the whole of India, Clarifying the impression created in *D.P*

⁷ Paras Diwan: Private International Law, 4th (End), Deep & Deep Publication, p145.

⁸ Ibid, p153.

⁹ *Udny V Udny*, (1869) L.R. 1SC .

¹⁰ Ibid, p152.

¹¹ Private international law, Author- Cheshire and North's, oxford publication, p64.

*Joshi VS. Madhya Bharat and N.Vasundara VS. State of Mysore*¹² that as state have independent power to make laws with respect to marriage, divorce, succession, etc... they may create different legal system for the purpose of domicile, the supreme court in *Pradeep Jain vs. Union of India*¹³ held that in these two cases the word domicile was used to convey the India the idea of intention to reside permanently or indefinitely” for the purpose of admission to medical or other technical institutions within a state and not in the technical sense in which it is used in private international law.

2.2.3 Presumption in favor of an existing domicile: An existing domicile is presumed to continue until it is proved that new domicile has been acquired. Hence the burden of proving a change of domicile lies invariable on those who allege that a change has occurred. If the evidence adduced is conflicting or is not convincing, then court has to decide in favor of existing domicile¹⁴.

2.2.4 Domicile is determined according to English law: In a case involving foreign element, the question as to where a person is domiciled is to be determined according to English concept of domicile and not according to foreign concept. In other words, for the purpose of English Private International Law, domicile means domicile in English sense. Thus in the eye of English law, a person domicile in England may acquire a domicile of choice in Frances if he satisfies the English rules, although he may fail to satisfy the French rules¹⁵.

Chapter III

3. Domicile of Independent Persons: Domicile of an Independent natural persons falls under the following two categories:

- A) Domicile of origin, and
- B) Domicile of choice.

A) Domicile of origin:

¹² AIR 1955 Sc 334, AIR 1971 SC 1439.

¹³ (1984)3 SCC 654.

¹⁴ Supra note1

¹⁵ Private international Law, Author-Paras Diwan, Publication- Deep &Deep, 4th Edition, p187.

- a. Which is the domicile assigned by law to a child when he is born? There are two kinds of domicile, Domicile of origin and domicile of choice. Every person is born with a Domicile of origin. It is a domicile received by him at his birth. The domicile of origin of every person of legitimate birth¹⁶ is the country to which at the time of his birth his father was domiciled. Hence, the domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which its parents are residing, or the country to which its father belongs by race or allegiance or the country of the infant's nationality¹⁷. In the case of a posthumous child, the rule in English law is that such a child has for domicile of its mother and not of its father. In India the rule appears to be different, for here the domicile of the posthumous child will be that of the country in which its father was domiciled at the time of his (father, s) death.¹⁸ An independent person is allowed to give up his domicile of origin. But the domicile of origin prevails until new domicile has been acquired¹⁹. Indian decisions have broadly adopted the rules evolved by English courts: *Kedar Pandey v. Narain Bikram sah*²⁰ every child Acquires at birth acquires at birth a domicile of origin based on that of his father if the child is legitimate, and that of the mother if the child is illegitimate. The decision relies, though not for this proposition, on English decisions on conflict of laws. There is no reference in the judgement, which did not relate to a conflict of laws situation at all but to article 5 of the constitution, and Section 7 of the Indian Succession Act 1925. *Yogesh Bhardwaj v. State of Uttar Pradesh*²¹ the domicile of origin can be transmitted through several generations no member of which has ever resided for any length of time in the country of the domicile of origin. The character of the domicile of origin is more tenacious, and its hold stronger and less easily shaken off. *Central Bank of India v. Ram Narain*²² The domicile of origin, which the law attributes to him, adheres till he acquires another domicile; the domicile of origin adheres to him even if he has left the country with the intention of never returning there till he has acquired a domicile

¹⁴ Kedar Pandey V. Narain Bikram.

¹⁷ Dicey: Conflict of Laws, 6th (End), p.78.

¹⁸ Indian Succession Act, 1925, s.7. & D.P Joshi v. State of M.B. and Pradeep jain v. Union of India, (1984)3SCC 654.

¹⁹ Indian Succession Act, 1925, S.9.

²⁰ AIR 1966 SC 160.

²¹ AIR 1991 SC 356.

²² AIR 1955 SC 36.

elsewhere by settling in that place with the requisite intention. Both England concept and Indian concept both are similar to each other. In case of England the concept of domicile of origin is a creation of the Common Law. It attaches, as a matter of law, to all persons. It is attributed by law to all persons at birth, depending upon the appropriate parent through whom it is traced in law. It will be based on the father, in the case of legitimate children born during the lifetime of the father, and the mother in the case of posthumous and illegitimate children.²³ Domicile of origin has no necessary connection with the place where the child is born, and it is theoretically possible for persons to enjoy a domicile of origin for several generations even if none of the persons has resided in such country for any appreciable length of time.²⁴ the domicile of origin continues to attach to each person till he obtains a different domicile called domicile of choice, or till the law attaches a different domicile called domicile to him, as when a woman, on her marriage, was regarded at common law to have, by such marriage, acquired the domicile of her husband²⁵.

B).Domicile of choice:

In Indian courts follow the common law rules. Which is the domicile which any person can acquire? Every individual person can acquire a domicile of choice by combination of (I) actual residence in particular place, and (II) intention to remain there permanently or for an indefinite period²⁶.while the domicile of origin is received by operation of law at birth, the domicile of choice is acquired by the actual removal to another country accompanied by his place of residence or settlement, a permanent home²⁷. The traditional statement that to establish domicile there must be a present intention of permanent residence merely means that so far as the mind of the person at the relevant time was concerned, he possessed the requisite intention. The relevant time varies with the nature of the inquiry. It may be past and present.²⁸ Several decisions of Indian courts illustrate these rules. In *Central Bank of India v. Ram Narain*,²⁹ the Supreme Court cited with approval *Craignish v. Hewitt* in which it was held that domicile of choice is

²³ The provision related to section 7 of the Indian Succession Act 1925.

²⁴ Dicey Morris, Conflict of Law, 13th (Edn).

²⁵ Ibid, page 85

²⁶ Ibid, p. 89.

²⁷ Private international Law, Author-Paras Diwan, Publication- Deep &Deep, 4th Edition, p165.

²⁸ Sankaran Govinda vs. Lakshmi Bharathi, (1975)3 SCC 351.

²⁹ AIR 1955 sc 36.

acquired if a person has established a fixed habitation in a place without any present intention of removing from it. Domicile of choice is a combination of residence and intention. Residence, which is a physical fact, means bodily presence as an inhabitant. Such residence must be combined with an intention to reside permanently or for an unlimited time in such place. Even a residence for a short period would suffice if it is coupled with requisite intention.³⁰ Mere residence, even for ten years, is not enough if it cannot be established that the person had the requisite animus manendi, the intention to live permanently or for an indefinite period.³¹ When a person, whose domicile of origin was British, came to India as a missionary and lived in India for over 60 years, with only short visits to Britain, it was held that he had acquired a domicile of choice in India. A person born in Goa, whose domicile of origin was in Goa, who had established a business in, acquired a house in, and lived in, Bombay, for over 50 years with only occasional short visit to Goa, had established a domicile of choice in Bombay, the requisite intention being established from his conduct.³² Where Hindus, whose domicile of origin was India, went to Sweden where they acquired Swedish nationality, and then to Australia, but there was no evidence that they had intended to make Australia their permanent home, their domicile of origin continued, and, consequently, relief could be granted under Hindu Marriage Act 1955.³³ The question of domicile has been considered in several decisions arising under the Indian Divorce Act 1869, under which a court only had jurisdiction to grant matrimonial relief if the parties were domicile in India. It has been held that if the domicile of origin was British, it had to be established that the person had acquired a domicile of choice in India. And a declaration to that effect was not, by itself sufficient.³⁴ In case of England every person other than a dependent person can acquire a domicile of choice by combining actual residence in a place with an intention to reside permanently in that place. Any circumstances, which evidence of a person's residence, or intention to reside there permanently or indefinitely, must be taken into consideration to determine whether he has acquired a domicile of choice. In determining whether a person has the requisite intention to reside permanently or indefinitely, the court may have regard to the motive which induced him to take up such residence, as also whether he had freely

³⁰ Yogesh Bhardwaj v. State of U.P, AIR 1991 SC356.

³¹ Louis de Raedt v. Union of India, AIR 1991SC 1886.

³² Carolina Dos Santos v. Dominie Joseph Pinto.

³³ Sondur Rajni v. Sondur Gopal (2005)4Mah LJ 688.

³⁴ Frinch v. Elizabeth Frinch, AIR 1943 Lah 62.

done so, or that such residence was precarious.³⁵ Whether the person has set up a matrimonial home in a place is an important factor, but it is not decisive. A declaration by the porosities of his intention is an important, but not a decisive factor, in deciding whether a person has or has not formed a definite intention to make a place his permanent home. There are very many decisions of English courts on when a domicile of choice could be said to have been acquired³⁶. A residence in England, which had been obtained by lies, impersonation and fraud and was, therefore, illegal would not be regarded as residence which could confer a domicile of choice.³⁷

Chapter IV

4). Domicile of dependents:

Which means that the domicile of the dependent person/s is dependent on, and usually changes with, the domicile of someone else? The object of determining a person's domicile is to connect that person with some legal system for certain legal purposes. In General at Common Law, dependents, that is, married women, 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 provided that wives are dependents of their husbands, minors the dependents of the parent through whom the minor derives his domicile of origin, the father in the case of legitimate children born whilst he was alive and the mother in the case of both illegitimate children and legitimate children born after the death of the father,³⁸ whilst they remain dependents, dependent persons cannot independently change their domicile of origin if on the other hand the husband or the appropriate parent change his or her domicile, the domicile of the dependent usually change with the domicile of such persons.

4.1) Domicile of Married Women: Under English common law, the domicile of a married woman was the same as and changed with the domicile of her husband. This rule was considered as absolute admitting of no exceptions, whatever are the circumstances. Historically it was based upon the ancient maxim of the common law that husband and wife was one and the same person

³⁵ Dicey & Morris, Conflict of Laws.

³⁶ Inland Revenue Commrs v. Bullock.

³⁷ Puttick v. Attorney – General (1980).

³⁸ Section 7, Indian Succession Act 1925.

in the eye of the law³⁹. The above rule of unity of domicile of husband and wife had been subject to vigorous criticism both academic writers and judges. In case *In Puttick v. A.G.*⁴⁰ the petitioner, a German national with a German domicile of origin, was arrested in Germany and charged with a number of serious offences there, while on bail, she absconded and using an illegally obtained passport from a German national, came to England and married an English man in 1975. The question before the court was whether she had acquired an English domicile. It was held that the rule of unity of domicile of husband and wife had been abolished by the Domicile and Matrimonial Proceedings Act, 1973 and that, therefore, she did not acquire a domicile in England. The court further held that she did not and could not acquire a domicile of choice in England as she was staying in England to avoid trial in Germany and not to set up a permanent home. The illegal entry and residence according to the court, barred her from acquiring an English Domicile of choice. But in India the now completely outmoded legal concept of the unity of domicile of the husband and wife continues to be in force unaltered. Section 15 & 16 of the Indian Succession Act are based upon the old English rule. The common law countries earlier followed English Common Law Rules. The rule that married women had the domicile of their husband has however, been abolished in Australia, Canada, the Republic of Ireland, and New Zealand so that in all these countries, a married woman is treated as having an independent domicile like any other person.

4.2) Domicile of Legitimate Children in India: At common law, where legitimation by subsequent marriage was effective, a legitimated child is to be treated as if it was legitimate. The rule of legitimation by subsequent marriage is unknown in Indian law, though Muslims can acknowledge that an illegitimate child is legitimate; this can however, be only done if it is uncertain whether the parties were married, and not if it is established that they were not⁴¹.

4.3) Domicile of Illegitimate Children: At common Law, in the other Common Law countries, and in India, the domicile of an illegitimate child was that of his mother. In Australia the status of illegitimacy no longer subsists in law; the domicile of an illegitimate child, called ex-nuptial child is determined the same way as that of a nuptial child, its domicile is that of the father, if the

³⁹ Private international Law, Author-Paras Diwan, Publication- Deep & Deep, 4th Edition, p165.

⁴⁰ 1979)3 All E.R 463.

⁴¹ Atul Setalvad, Conflict of Laws, page.136.

parents are living together and with the parent the child is living with if the parents are separated⁴².

4.4) Domicile of mentally Deficient persons: At common law , a person who is mentally retarded cannot acquire domicile of choice , and retains the domicile he had before he began to be legally treated as insane, if he was born mentally retarded ,or becomes retarded when child, he is to be treated as a dependent child. That is also law in Australia and Canada. There are no Indian decisions on the subject, through S.8 of the Indian Succession Act 1925 provides that a lunatic cannot acquire a domicile independently⁴³.

4.5) Domicile of Adopted child: What is the domicile of dependence of an adopted child? Does the domicile of the minor child change to that of the adopting parent? Or does it continue to be that of the natural parent? There is no English authority on this question it has been suggested by Dicey that the domicile of an adopted infant is the same and change with the domicile of the adopting parents. These accord the principle that on adoption, the legal consequences of the natural relationship of the parent and child are extinguished and re- established as between the adopter and child. In Indian law there is Madras High Court decision that the domicile of the adopted child is the domicile of the adopting parent.⁴⁴

Chapter V

Domicile of origin and domicile of choice contrasted: In case of English law, the domicile of origin is fundamentally different from domicile of choice. In the words of Cheshire it differs in its character, in the condition necessary for its abandonment and its capacity for revival⁴⁵.

The domicile of origin when compared with domicile of choice is much more enduring and less easily shaken off, as already seen in cases like *Winans v. A.G*, displace a domicile of origin by a domicile of choice.

Domicile of choice is lost by removal “*animo non revertendi*”⁴⁶”. Here the test of intention is much less rigorous than in the case of displacing the domicile of origin. Mere absence of any

⁴² Ibid ,p137.

⁴³ Ibid

⁴⁴ Paras Diwan, Indian and English Private International Laws, p.142.

⁴⁵ Ibid ,p143.

⁴⁶ Ibid.

intention to return to the country of choice will sufficient. The domicile of choice is acquired by free will; likewise, it can be abandoned by free will. The domicile of origin, on the other hand is imposed by the operation of law. In other words the domicile of origin is not a matter of free will and cannot be extinguished by abandonment. One cannot lose a domicile of origin by removal *animo nonrevertendi*⁴⁷. The domicile of origin continues to be in operation until it is displaced by a domicile of choice. In leading case *Bell v. Kennedy*⁴⁸ Bell was born in Jamaica of Scottish parents, his domicile of origin being Jamaica. He was educated in Scotland, but returned to Jamaica on attaining majority about 14 years later he returned to Scotland without any intention of returning to Scotland when his wife died. After her death he succeeded in locating a suitable estate which he purchased and it was admitted that at the time of the trial he had acquired a Scottish domicile but the question in the case was whether he was domicile in Scotland at the time of his wife death it was held that Bell was domiciled in Jamaica at the time of his wife's death. Although he had left Jamaica for good and been residing in Scotland looking for a suitable place to settle down, evidence showed that at the time of his wife's death, his mind was vacillating with regard to the future home. It was held therefore that since he had not at that time acquired a Scottish domicile of choice; he retained the Jamaican domicile of origin. As at present, one important point of distinction between domicile of origin and domicile of choice is that the former is never lost and is in a position to revive whereas the latter cannot revive and is lost forever the moment a person leaves the country of his choice, *animo non revertendi*.

Chapter VI

Comparison between the Domicile and Nationality:

It is common in private international law practice for the court to face some setbacks in determination of whether domicile or nationality is a determining factor as to the question of which law should be applied. Nationality represents person's political status, by virtue of which who owes allegiance to some particular country⁴⁹. Domicile indicates his civil status⁵⁰ ... a country in which a person has established his permanent home. Courts have, however applied either of them to reach just decision, and in picking which should be used among nationality, and

⁴⁷ By going away from the domicile of origin with the intention of never returning.

⁴⁸ 1868 L.R.S.C Divi 307.

⁴⁹ Cheshire and north, Private international law p159

⁵⁰ Ibid

domicile, they have been insuring not only justice is done, but seen to be done, that is to say whenever courts selected a determinant among the two, courts gave reasons as to why one is entertained and not the other; those reasons are merits and demerits of those determinants.⁵¹

Merits of domicile:

- ✓ Domicile is the only fitting determinant in nations formed by union of states, or federal form of nations such as United Kingdom, Australia and the United States of America⁵².
- ✓ It is more natural and appropriate, as a determinant of personal law domicile is useful in the sense that, if a person has decided to abandon his country “of origin”, he has also (automatically) abandoned laws of that country. As natural justice requires one to judge by laws which bind him, domicile is appropriate.
- ✓ Domicile only practical test in certain political units such as UK, US where persons of same nationality but different legal systems

Demerits of Domicile:

- Irrational result may ensure, long residence is not equivalent to domicile if accompanied by the contemplation of some certain event the occurrence of which will cause a termination of residence⁵³.
- Legal or social uncertainties may arise and cause one’s permanent home to be terminated, expires of living permits, outbreak of civil wars, and ect, a good example which may cause termination domicile.
- Thirdly domicile is hardly ascertainable, a person should state his intention in order to ascertain domicile, practically intention of a litigant is elusive, this make it hard to identify with clarity, it is for the court to decide after going thoroughly through given facts.

Merits of Nationality:

- ✓ It is easily ascertainable; there are opaque proofs of nationality which are understood without application of complex legal technicalities. Nationality depends, apart from

⁵¹ Ibid,p160

⁵² Cheshire and North’s ,Private international law (2006), p 160

⁵³ Ibid p160

naturalization, on the place of birth or on parentage⁵⁴, and registration. The courts therefore meet the advantage of nationality by way of easy ascertainability.

- ✓ Nationality is more stable than domicile; this is because nationality cannot change without the formal consent of the State of new nationality⁵⁵, this make nationality stable determinant.

Demerits of Nationality:

- Applying the test of nationality may point to a country in which a litigant has lost all connection to, or which perhaps he has never been connected. This for example a Tanzania male domiciled in the UK for the whole of his life, he has technically lost connection, and his children (if any) who are below 18 years of age are regarded Tanzanian until they reject their Tanzania citizenship, these children are perhaps have no connection with Tanzania, applying Tanzania laws basing on nationality to these subject is unjust⁵⁶.
- Nationality is erroneous sometime, in the eyes of English law, no person can be without domicile, no person can have more than one domicile at the same time, and on the other hand, a person may be stateless or may simultaneously be a citizen of two or more countries⁵⁷.
- Nationality is not useful in political sets such as federal states and unions, for the there are some circumstances in which there is no law applicable thought-out the nation, rather law according to states.

Finally; private international law is discipline like other topics of law which seek justice in its determination, advocating nationality against domicile and vice versa depends on the circumstances of the facts in the litigation.

6.1) Commercial Domicile OR Quasi Domicile: Commercial Domicile is in no sense a true domicile. It is merely a legal concept used in the time of war as a test of enemy character. Commercial domicile attaches to any person or firm voluntarily residence or carrying on business in enemy territory or even enemy occupied territory. This concept has been principally

⁵⁴ Supra, p 159

⁵⁵ Moris, (2005) conflicts of law, P 46

⁵⁶ Ibid

⁵⁷ Supra, p 161 referring to Torok v Torok (1979) 1 All ER 101, (1973) 1 WLR 1066

used to determine the liability of property to seizure. The main points of distinction between ordinary or civil domicile and commercial domicile are following:

1. Commercial domicile comes into effect only during war time whereas a person should necessarily have the ordinary domicile throughout his life.
2. Residence and intention are not essential in the case of commercial domicile unlike the case of ordinary domicile. A person may not reside in enemy territory but if he carries on business there, he gets invested with commercial domicile.
3. Where no person can have more than one operative domicile for the same purpose, he may have any number of commercial domiciles. It may be noted that since commercial domicile is not domicile in the true sense , the fact that a person may have an ordinary domicile and one or more commercial domiciles at the same time constitutes no exception to the general principle that no person can have more than one operative, domicile at the same time.

CONCLUSION: The law of domicile in India is crystal clear and is free from any ambiguities. The same is important for resolving the “conflict of laws” in India. There seems to be an ignorance of the concept in its true perspective in India. There is an urgent need to spread “public awareness” in this regard. Particularly in India there is lack of provisions with regarding to domicile. Decided cases are based on English laws only. But English laws and Indian laws both are similar to each other.

Reference

Books:

1. Cases and materials on Private International Law, Author – J.H.C Morris.
2. Conflict of Laws, Atul M Setalvad, Lexis Nexis Butterworths Wadhwa, Nagpur, 1st Edition, Reprint 2011, Page 342.
3. Principles of Conflict of law, Author-George Wilfred Stumbees , 2nd Edition.
4. The Conflict of Laws, Author- David mc clean, 4th Edition.
5. Conflict of Law, Author – Eugene F. Scoles, West publishing Co, 2nd Edition.
6. Private international law, Author- Cheshire and North's, oxford publication.

List of Act:

1. Dissolution of Muslim Marriages Act1939.
2. Domicile and Matrimonial Proceeding Act,1973
3. Hindu Marriage Act,1955
4. Matrimonial Causes Act,1857
5. Special Marriage Act,1954.