

FOREIGN DIVORCES : ENGLISH LAW AND PRACTICE (1988). By David Gordon. Gower Publishing Company Ltd., UK. Pp. viii+229.

AS A result of post-war migration sizeable communities of different ethnic origin from the host society have now come to live in the United Kingdom. The population, therefore, is becoming increasingly multi-racial. English law has responded to this changing social milieu by enacting rules that recognise foreign law and customs in order to promote international comity and certainty. The legislation giving recognition to foreign divorces is an important part of that creative response by the government.

Foreign divorces are also granted by the decree of a civil court by compliance with a procedure not unlike that which exists in English law. The book¹ under review, therefore, details the foreign law governing the types of divorce most likely to be considered and understood by English courts and advisors to the immigrant community. Presenting the material in a simplified and intelligible form, it usefully serves the purpose for which it is written. It states:

[T]he provisions of the newly enacted Family Law Act, 1986 and the Matrimonial and Family Proceedings Act, 1984 give rise to many unanswered questions and it is hoped that this book will help advisors to answer those questions and unravel the complexities of the relevant law.²

The chief merit of the author lies in clearly grasping the subject, clarifying and analysing the topics. He has discussed not only landmark decisions of the House of Lords and Court of Appeal in the United Kingdom but also those of the Supreme Courts of India and Pakistan which have given a new dimension to the law of divorce. Treatment of the subject is comprehensive with rich comparative material and incorporates up to date developments. The "introduction" introduces the reader to three jurisdictional links of the spouses as used in English legislation,³ *i.e.*, nationality, habitual residence and domicile. The author considers that "the legal definition of each of these factors is a necessary first step to the interpretation of the rules for the recognition of foreign divorces."⁴

The book is divisible into two parts.⁵ The first part, concentrating

1. David Gordon, *Foreign Divorces : English Law and Practice* (1988).

2. *Id.*, preface, vii.

3. See, Recognition of Divorces and Legal Separations Act 1971; Domicile and Matrimonial Proceedings Act 1973; Matrimonial and Family Proceedings Act 1984; and Family Law Act 1986.

4. *Supra* note 1 at 1.

5. *Ibid.* Part I runs to 40 pages and part II to 157.

on foreign law governing judicial and extra-judicial divorces obtainable by compliance with the rules and customs of Islam, Hinduism and Judaism, is again divisible into four sections. The first section, which consumes a major portion, contains an explanation on judicial, extra-judicial and consequences of divorce in Muslim law. The author, while explaining these consequences states that "In Shi'i law, the husband may fix any sum as dower, even one he cannot afford, whereas in Sunni law there is a fixed minimum sum."^{5a} It is true that traditional *Hanafi* and *Maliki* jurists developed a minimum limit to the specified dower⁶ and no maximum limits were laid down by the early jurists. However, in India and Pakistan, as in most Middle East countries, the recent trend has been for very large dower sums being announced since they are considered as an insurance against the possibility of an unjustified divorce by the husband or his early death. The *Shias* in India and Pakistan consider it as a point of honour not to stipulate for a sum higher than the minimum fixed by the Prophet for his favourite daughter Fatima, the wife of Ali, namely 500 *dirhams*. The low amount which the Prophet demanded for his daughter is considered to be very auspicious by all *Shias* and is termed the *Sharia mahr*.

The author seems to have confused dower with dowry when he states, "in a case where the marriage is unconsummated, the wife is only entitled to half of the dowry sum, and if the marriage is dissolved by the wife's renunciation of Islam, she forfeits her dowry."^{6a} These are two different and distinct legal concepts in Muslim law. The basis of the dower in Muslim law is the definition adopted by Abu Zahra when he states, "the dower is a due which the husband must pay to the wife in accordance with the marriage contract, but it is not a condition which affects the validity of the contract nor is it an essential requisite. Therefore, if the dower is not mentioned in the contract, the contract is still valid."⁷ Dowry is a term used to describe any property or valuable security, given either directly or indirectly by one party to the other party to the marriage or by the parents of either party or by any other person before or at any time after the marriage in connection with the marriage of the said parties. It has in fact come to mean anything given by the girl's family to the boy's family before, during or at any time after the marriage. Dowry in the sense in which it prevails among Hindus does not usually exist among Muslims. The dowry according to Prophet's tradition and behaviour is provided from the dower paid by the husband and no burden is placed on the girl's parents.⁸

The author in the second section discusses Hindu law and states that

5a. *Id.* at 24.

6. The sum was 10 *dirhams* in *Hanafi law* and 3 *dirhams* in *Maliki law*. A *dirham* is the name of a silver coin 2.97 grammes in weight and is usually valued at 20-25 *naiya paisa*. Ten *dirhams* have been valued at 6S 8d. and three *dirhams* at 2S.

6a. *Supra* note 1 at 24.

7. Quoted in M.K. Khadduri and H. Liebesny (ed.), *Law in the Middle East* (1955).

8. Sheikh Abrar Hussain, *Marriage Customs among Muslims in India* 135 (1976).

"Hinduism is the predominant religion in India and in modern times, both customary and judicial divorces are common amongst the Indian Hindu community."⁹ A major portion of the discussion is devoted to customary extra-judicial divorce while judicial divorce and its consequences, in Hindu law are discussed briefly. The author has not done justice to the Hindu law of divorce. The edition is said to have come out in 1988. The glaring omission in the book is not only its neglect to discuss the landmark decisions of the Supreme Court in India but also amendments in the Hindu Marriage Act of 1955. Again one cannot fail to notice the near total exclusion of the grounds on which a Hindu wife alone can claim divorce.¹⁰

While discussing the consequences of divorce in Hindu law, the author has committed an error by stating that "If a dowry is paid on marriage, and the marriage is later dissolved, the wife is not entitled to recover any of the dowry sum."¹¹ A salutary provision of the Dowry Prohibition Act 1961 is section 6 which provides dowry to be for the benefit of the wife or her heirs. The property is to be held by any other person as a trustee for the wife. If he does not transfer it to her, he commits breach of trust entailing penal liability. The Punjab and Haryana High Court in *Bhai Sher Jang Singh v. Virinder Kaur*¹² held that whatever property is given to the wife by way of gift or will, constitutes her *stridhan* and she is its absolute owner. Any person, who holds the property of his wife and denies it to her, is guilty of criminal breach of trust under section 406 of the Indian Penal Code 1861. However, the same High Court failed to follow these observations in *Vinod Kumar v. State of Punjab*.¹³ On the one hand, it held that the wife is the sole owner of *stridhan* and, on the other, that if her dowry articles were dishonestly held by the husband or by her in-laws, she had no remedy. The Supreme Court settled the controversy in *Pratibha Rani v. Suraj Kumar*,¹⁴ stating that gifts and other presents made to the wife at the time of or before marriage by the parents or other persons, constitute her *stridhan*.¹⁵

The third section, examines the Jewish law of divorce. In Judaism there is only one form of divorce, known as the *ghet*, which is consensual and extra-judicial. *Ghet* is purely an act between the parties to a marriage, although in practice it takes place in front of a *Beth Din*.¹⁶

In the fourth section, the author deals with the problem of the recalcitrant spouse,¹⁷ who could equally be a Hindu or member of another religion but the discussion on this matter mainly centres on Muslim and Jewish

9. *Supra* note 1 at 30.

10. *See*, s. 13(2), Hindu Marriage Act.

11. *Supra* note 1 at 33.

12. 1975 Cri.L.J. 493 (Punj. & Har).

13. A.I.R. 1982 Punj. & Har. 372.

14. A.I.R. 1985 S.C. 628.

15. *Id.* at 631-34.

16. A rabbinical court usually consists of three rabbis respected for their knowledge of Jewish law.

17. *Supra* note 1 at 46.

laws which recognise extra-judicial divorce. The author mentions that if Muslims and Jews wish to obtain a valid divorce in England, they must petition the civil courts for a decree of divorce.¹⁸ He further states that some of them have taken advantage of this requirement and, having obtained a civil divorce, have refused to agree to or grant, a religious dissolution.¹⁹ The consequence of such action is that the parties are unable to remarry in a religious ceremony since they remain married according to their religion even though they are divorced in English law and thus become parties to a "limping marriage".²⁰ The author suggests reform of English law by legislation so as to tackle the problem of the recalcitrant Jewish or Muslim spouse.²¹

Part II of the book, which focusses attention on the rules in English law governing recognition and consequences of recognition of a divorce obtained in accordance with the rules of foreign law, is further sub-divided into eight sections. The present recognition rules are contained in the Family Law Act 1986, which governs recognition of foreign divorces throughout the United Kingdom. In order to comprehend fully the complex provisions of the Family Law Act, the various distinctions therein between divorces obtained by "judicial or other proceedings" and those obtained "otherwise than by proceedings", and "the public policy considerations" on which it is based, the author thinks it necessary to consider in section five of the book briefly the recognition rules at common law and the legislation in force prior to the Family Law Act. In sections six, seven and eight, he examines the general scheme of the recognition of foreign divorces, classification of divorces and the public policy considerations under the Family Law Act respectively.

As an alternative to recognition under the statutory rules contained in the Family Law Act, it is possible that a foreign divorce may be "incidentally recognised" in English law. The author states that incidental recognition may occur if one of the parties to a foreign divorce has remarried or both have done so, or if it has been recognised by the judgment of a foreign court, and subsequently, that judgment is recognised by an English court.²² Merits of each of these arguments have been considered in section nine, and indicates that it is possible, if one party has remarried, that a foreign divorce may be incidentally recognised though this is unlikely since English courts appear anxious to uphold the policy contained in the Family Law Act even at the expense of creating limping marriages.²³ The author has made use of the cases and legislation on recognition to support the view that English law pays too little regard to customs and social

18. *Ibid.*

19. *Ibid.*

20. *Ibid.*

21. *Id.* at 50.

22. *Id.* at 149.

23. *Id.* at 155.

values of non-English religions and societies. Section ten discusses the practical consequences of non-recognition of foreign divorces and emphasises the unfortunate results of the creation of a limping marriage. He asserts that non-recognition creates uncertainty of status and denies divorced parties the right to enter the United Kingdom to marry and claim various financial benefits.²⁴ The author suggests that consequences of non-recognition are a greater evil than those flowing from the recognition of a foreign divorce which offends a principle of English public policy and that a court exercising its jurisdiction under the Family Law Act should give greater weight to the problems created by non-recognition.²⁵

The Matrimonial and Family Proceedings Act 1984 enables an English court to award maintenance and proprietary relief to the parties to a foreign divorce which is capable of being recognised in English law. In section eleven, reforms introduced by the Act have been welcomed as the author considers these set out to fill a major gap in the law which encouraged the non-recognition of foreign divorces on public policy grounds.²⁶ However, on close analysis, he points out that these reforms are uncertain and shows that while the general policy aims are "obviously right", the wording of some of the provisions, notably section 12, is "regrettably unclear". In his view if section 12(1) of the Act is interpreted in line with section 46²⁷ of the Family Law Act, the former Act will be of no help to those who are divorced by a foreign extra-judicial divorce within section 46(2) of the Family Law Act.²⁸ The author, pleads that the distinction between different forms of unilateral and consensual extra-judicial divorce should not be relied upon to deny the parties to these divorces of the rights of an English divorce to claim financial and proprietary relief.²⁹

The parties to a foreign divorce sometimes live in different countries with the result that a divorcee awarded maintenance in UK under the Matrimonial and Family Proceedings Act or in a foreign country which granted or recognised the divorce, may have difficulty in enforcing the maintenance order against the other spouse. To facilitate its enforcement statutory rules exist in UK. The author, in section twelve, examines the rules under various statutes³⁰ governing the grant and enforcement of maintenance and custody orders.

24. *Id.* at 162.

25. *Ibid.*

26. *Id.* at 165.

27. The grounds for recognition are contained in it. If a divorce is obtained overseas and "by means of proceedings," its recognition is governed by section 46.

28. *Supra* note 1 at 191.

29. *Ibid.*

30. The Maintenance (Facilities for Enforcement) Act 1920, the Maintenance Orders (Reciprocal Enforcement) Act 1972 and the Civil Jurisdiction and Judgments Act 1982.

Lastly, the book contains five appendices and to make it more fruitful, a subject index has been given at the end. It is highly informative, very well written and the style lucid which makes it readable. It has excellent printing and get up. As legal literature on recognition of foreign divorces in the United Kingdom is scarce in India, it will be a welcome addition to the libraries in this country.

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