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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. DARRELL L. GAVRIN MM PART 52
Acting Justice

NAVPARKASH SANDHU

Plaintiff,

- against -

INDEX
NUMBER ..7956/00..

MOTION
DATE ..11/6/00..

MOTION
CAL.NUMBER ...15...

RIPJIT DHILLON

Defendant.

The following papers numbered 1 to 8 read on this motion:

	PAPERS NUMBERED
Order/Show Cause-Affid(s)-Exhibits - Service.....	
Notice of Motion/Affid(s)-Exhibits.....	1-4
Notice of Cross Motion/Answering Affidavits-Exhibits.....	5-7
Replying Affidavits - Exhibits.....	8
Other.....	

The defendant moves to dismiss pursuant to CPLR §3211[a][8] for failure to obtain personal jurisdiction over the defendant and pursuant to CPLR §327 on the ground of *forum non conveniens*.

FACTS

The plaintiff/husband and defendant/wife were married in Chandigarh, India on April 10, 1988. Both parties are native citizens of India, although the plaintiff has been a legal resident of the United States since 1995. The Plaintiff moved to the United States in January 1995 and took up residence in the State of New York. In July 1996, he obtained employment as a physician at the New York University Medical Center where he continues to be employed to this date. In September 1996, the defendant and the parties' infant issue arrived in the United States and they established a residence in New Jersey. The infant issue was born to the parties on January 5, 1989 in Punjab, India. For reasons that are in dispute, the defendant left the marital residence in New Jersey on or about April 14, 1997 and returned to India with the parties' child where she took up residence with the plaintiff's parents. Subsequently, the plaintiff returned to New York City where he has

resided continuously for approximately the past three and one-half years.

On April 5, 2000, the plaintiff filed a summons and complaint commencing this divorce action alleging cruel and inhuman treatment. As ancillary relief to the divorce, the plaintiff seeks, *inter alia*, visitation with the infant issue away from the custodial residence and a declaration that the Family Court have concurrent jurisdiction over any future issues of maintenance, child support, custody and visitation. An affidavit of service annexed to the plaintiff's papers in opposition to the motion indicates that the summons and complaint were personally delivered to the defendant on June 30, 2000 at her residence in India.

JURISDICTION OVER THE ACTION AND THE DEFENDANT

As an application to dismiss on the ground of *forum non conveniens* presupposes that a court has jurisdiction over an action (*see, Sarfaty v. Rainbow Helicopters, Inc.*, 221 A.D.2d 618 [2d Dept. 1995]), the Court will first address that issue. In her affidavits, the defendant does not contest that she was, in fact, personally served with the summons and complaint. However, she avers that since she was not served within the State of New York this Court lacks jurisdiction over her. Upon review, the Court finds defendant is partially correct in her assertion.

In a matrimonial action, (CPLR §105[p]), "[s]ervice may be made without the state . . . in the same manner as service made within the state" (CPLR §314[1]) since actions affecting marital status involve an exercise of *in rem* jurisdiction. The marital status of the parties is considered a "res" that is located where either of the parties is domiciled. (McLaughlin, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C314:2 at 438) The Court's *in rem* jurisdiction in matrimonial actions is defined and limited by the durational residency requirements of Domestic Relations Law §230. In the case at the bar, the durational residency requirement under DRL §230 [5] has been satisfied as it is undisputed that the plaintiff has been domiciled in New York State for over three years. Thus, this Court has *in rem* jurisdiction over the parties' marriage and the personal service upon the defendant in India was valid. (*see*, CPLR §314[1])

In the instant action, however, the Court's jurisdiction is limited solely to deciding whether a divorce on grounds sought by the plaintiff should be granted. There is no jurisdiction on which to base a ruling on the ancillary relief sought by the plaintiff. It is well settled that *in personam*, not *in rem* jurisdiction must be attained before issues like equitable distribution, maintenance, child support and custody may be resolved by this Court. (Siegel, New York Practice §102).

In this case, the plaintiff seeks, *inter alia*, visitation with the eleven year old infant away from the custodial residence. The sole jurisdictional statute in all custody proceedings in New York is found

in the Uniform Child Custody Jurisdiction Act, codified under Domestic Relations Law §75-d. Based on the facts as presented, none of the jurisdictional bases under DRL §75-d apply. This state has never been the home state of the child nor is there evidence that the child has ever been present in New York. (DRL §75-d[a], [c]) The child does not appear to have a significant connection with this state nor is there within the state any evidence concerning the child's care training or personal relationships. (DRL §75-d[b]) Finally, while it appears that no other state (DRL §75-c[10]) has jurisdiction, it is plainly not in the best interest of the child that a New York court assume jurisdiction especially considering that there is no proof in the papers that the infant ever resided in New York State. (DRL §75-d[d])

Further, the plaintiff seeks a declaration that the Family Court have concurrent jurisdiction over any future issues of maintenance, child support, custody and visitation. With respect to the issues of maintenance and child support, a New York court can not exercise personal jurisdiction over the defendant under the circumstances presented. (CPLR §320[b]) Section 302[b] of the Civil Practice Laws and Rules provides that personal jurisdiction over non-resident spouses in proceedings for, *inter alia*, maintenance and child support exists when the plaintiff is a resident or domiciliary of New York and when either: [1] New York was the matrimonial domicile before the separation, [2] the defendant abandoned the plaintiff in New York, or [3] the claim for maintenance or child support accrued under the laws of or under an agreement executed in New York. None of these factors have been satisfied in this case.

Accordingly, based on the foregoing the Court lacks jurisdiction to grant the aforementioned ancillary relief requested by the plaintiff.

FORUM NON CONVENIENS

The next issue the Court will address is the motion to dismiss on the ground of *forum non conveniens*. Preliminarily, the Court notes that application of the doctrine of *forum non conveniens* is not precluded because this action is based solely on *in rem* jurisdiction. (*Vaage v. Lewis*, 29 A.D.2d 315 [2d Dept. 1968]) "The doctrine of *forum non conveniens* permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that 'in the interest of substantial justice the action should be heard in another forum' (CPLR §327)" (*National Bank & Trust Co. of N. Am. V. Banco De Vizcaya*, 72 N.Y.2d 1005, 1007[1988]) The doctrine is a flexible one which rests upon the exercise of justice, fairness and convenience. (*Islamic Republic v. Pahlavi*, 62 N.Y.2d 474, 479 [1984]) The party challenging the appropriateness of the forum bears a heavy burden. (*Banco Ambrosiano v. Artoc Bank*, 62 N.Y.2d 65, 74 [1984]) "[R]elevant private or public interest factors which militate against accepting the litigation" must be presented to the court. (*Islamic Republic*, supra) Factors to be considered by the court are "the residency of the parties,

the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts, with no one single factor controlling." (*Wentzel v. Allen Machinery, Inc.*, ___ A.D.2d ___, 2000 App. Div. LEXIS 12286, at *3 [2d Dept. Nov. 27, 2000])

The residence of the plaintiff in New York and the satisfaction of the durational residency requirement under DRL §230[5] ordinarily would create a substantial nexus with this State. (see, *Burbon v. Burbon*, 259 A.D.2d 720, 722 [2d Dept. 1999]) Yet, in the case at the bar, this connection is overridden by other, more compelling factors. The parties were not married in New York and they never resided here as husband and wife. Moreover, the parties only resided together in the United States for approximately seven months. Their minor child has no demonstrated connection to this state and the occurrences forming the basis of the plaintiff's cause of action for divorce all transpired in New Jersey.

An alternative forum, namely India, to which the parties and their marriage are more substantially linked, exists for the resolution of this dispute. To summarize, both parties are native citizens of that nation, were married there, resided there as husband and wife for nearly seven years and their minor child was born and continues to reside there. The Court recognizes that the plaintiff will incur a hardship by having to pursue a divorce in India. However, this is not a compelling enough reason for this Court to retain jurisdiction as the defendant would be subjected to a far greater burden if forced to come to New York. The parties affidavits reveal that the plaintiff, as a practicing physician, is in a vastly superior financial position than the defendant. He is better equipped financially to hire and retain competent counsel in India as well as travel to that nation whenever necessary and required. Furthermore, if forced to proceed in the United States, the defendant, as custodial parent of a minor child, would be forced to either travel with the child or leave the child behind in India for the extended periods necessary to travel to the United States.

Finally, while the burden on the Court to hear this divorce proceeding without considering any ancillary relief would be minimal, in light of the lack a sufficient nexus with New York State, retaining this action on that basis alone would be an improvident exercise of discretion. (see, *Wentzel v. Allen Machinery*, supra)

Accordingly, the defendant's motion to dismiss on the ground of *forum non conveniens* is granted.

A copy of this order has been mailed to the parties and/or their respective counsel.

Dated: December 12, 2000

DARRELL L. GAVRIN, A.J.S.C.