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“Dharma is to protect the Needy”

Article on

Critical Analysis of Execution of Foreign Divorce Decree

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“A foreign judgment is not regarded as conclusive if the proceedings in which the judgment was obtained is opposed to natural justice”¹

Abstract

This paper deals with the problems that arises during the execution of a divorce decree obtained in foreign court, and also tries to find out the solution that is available to the aggrieved party. Primarily, this paper focuses on explaining the issues that makes it difficult to execute the divorce decree i.e.,

- 1) Lack of jurisdiction of foreign courts,
- 2) Violation of principle of natural justice and
- 3) The role it plays in being detrimental to a gender with the help of case laws and relevant provisions of different legislation.

Recognition of these factors results in acceptance of the need and importance of a new and definite regulations in the field of private international law and specially, foreign divorce decree. Finally, the paper ends with a note of how things can be improved with an active role of the state in changing the law and accepting the conventions that exist for the advancement of individuals and society at large.

¹ R. Vishwanathan v. Abdul Wajid, AIR 1963 SC 1.

INTRODUCTION

Mankind has a tendency of continuously growing and evolving. Mobility being an important attribute of human beings, it necessitates the urgency of an individual moving from one country to another. There's seven billion people residing in different parts of the world, governed by their respective municipal laws. This works adequately when an individual's place of domicile and residence, both are the same. But after moving from one country to another, the places differ and conflicts arises. This creates a responsibility on part of the law and legislation to be flexible, so that it may not become detrimental to the aggrieved people.

Private International law is a branch of law that deals with the matter in conflict between different individuals, either residing in foreign countries or involved in an issue that has some foreign features in it. In India, there's no special law regarding international law, instead, various provisions are scattered among different statutes in bits and pieces. The Supreme Court of India has also through various judgments established different basis to recognize and enforce foreign decree in India.

Several general provisions are laid down in different legislations in India. Section 13, Section 14 and Section 44A of the Code of Civil Procedure 1908, Section 41 of The Indian Evidence Act 1872 etc., are very few examples of the general provisions that are applicable on the foreign judgments in India. But all these general provisions sometimes fail to resolve the disputes arising out of specific situations. Marriage as an institution is an important part of human civilization. In India, it is even more significant as the expectations are highly specific and demanding. Marriages in India are governed by different personal laws of people of varied faith. Hindu Marriage Act 1955, Muslim personal laws, Indian Christian Marriage Act 1872, Parsi Marriage and Divorce Act 1936 are examples of such laws. Apart from these, The Special Marriage Act 1954 applies to all inter-faith marriages. These legislations are applicable throughout India.

Every so often, citizens of India get married under their respective personal laws and then move abroad. After which some conflict arises and the parties then obtain a divorce decree from Foreign court. Till here, everything functions properly but the real problem arises during the execution of that divorce decree through Indian Courts. The issue of maintainability of such divorce decree obtained in foreign courts often emerges before the Indian Judiciary. Due to absence of a specific legislation on the field of foreign divorces, a situation of

uncertainty among the parties related to their marital status appears. It often leads to a complex situation where two people are married in one country and divorced in another.

In the case of *Satya v. Teja Singh*², it was held that the divorce decree granted by the Nevada court lacked jurisdiction and thus couldn't be enforced in India. The judgment was obtained through a civil proceeding and should be validated by Section 13 of The Code of Civil Procedure 1908. As per section 13, "every foreign decree is conclusive other than those obtained by-

- (a) Any Court lacking competent jurisdiction,
- (b) When the case hasn't been decided on its merits,
- (c) When it is visible prima facie that either incorrect view of international law is taken, or the recognition of Indian law is refused when it is applicable,
- (d) When the decree is obtained in a proceeding which was against natural justice,
- (e) When the decree has been obtained by committing fraud,
- (f) When a foreign judgment is in breach of any Indian law."

In the above-mentioned situations, any foreign decree won't be enforceable in India. It is inferred that any foreign law or any foreign judgment shouldn't offend our public policy.³

In the present case, the husband went to Nevada solely with the purpose of obtaining a divorce decree through misrepresentation of him being domiciled in the state, to the court. He then immediately left Nevada after obtaining the decree, thus confirming his Malafide intention of playing fraud on the Court just to obtain the decree. The Supreme Court of India observed that the husband wasn't a bonafide holder of the divorce decree, declared the matter in issue to be out of the jurisdiction of the Nevada Court and thus, held the judgment null and void.

Each nation because of the variance in their culture differs with others in respect of their rules and regulations. And, so the private international law of every country differs from each other as well, but due to the existence of the Principle of Comity of nation, certain laws are considered as common out of mutual respect towards other sovereign countries, and thus, are recognized by Indian courts.

² *Satya v. Teja Singh*, AIR 1975 SC 105

³ *Ibid.*

But if a provision of an Indian legislation expressly limits the jurisdiction of any court through any means, then the judgment won't be conclusive and will stand void. Section 41 of The Evidence Act 1872, provides that, for a judgment to operate as a conclusive proof, it should have been delivered by a Competent Court. Competent Court refers to a Court that has jurisdiction over the parties as well as the subject matter.

Thus, in this case, the Nevada Court wrongly assumed the jurisdiction and for that reason the judgment isn't conclusive and therefore it is not enforceable in India. In private international law, it is a settled principle that no judgment delivered by a foreign court will be recognized in India if the court doesn't have the jurisdiction in the international sense.⁴ The issue of jurisdiction could be solved by the general provisions of the private international law, but the specific disputes arising out of the personal problems of individuals demand the existence of specific legislation dealing with such situations. People of India often get married under their specific personal laws and then move outside, creating an existence of some special circumstances that needs to be dealt with sensitively.

In the case of *Y. Narasimha Rao v. Y Venkata Lakshmi*⁵, the husband satisfied the minimum requirement of residence with an intention of obtaining a decree of divorce from a foreign court, on a ground that isn't mentioned in the 1955 Act⁶. The husband and wife, in this case, got married as per the Hindu Law and then separated after a few years of marriage. The husband then filed a petition for obtaining divorce decree from the Circuit Court St. Louis Country, Missouri, USA on the basis that he has been residing in the State of Missouri for not less than 90 days. The wife denied submitting to the jurisdiction of the foreign Court. She also raised questions on the maintainability of the divorce petition. The Court anyway assumed jurisdiction on the basis of the husband's 90 days residence in the state of Missouri and dissolved the marriage on the ground of irretrievable breakdown of marriage. Few years after the dissolution of marriage by the Missouri Court, the husband remarried, after which the first wife filed a criminal complaint of bigamy⁷ against the husband. The husband then filed a petition of discharge of the complaint against him on the basis of the decree granted by the Missouri Court. The Magistrate discharged the complaint against him as the wife was unable to make a prima facie case. She then filed a

⁴ Sankaran Govindan v. Lakshmi Bharathi (1975) 3 SCC 351 at p. 368: AIR 1974 SC 1964 at p. 1766.

⁵ 1991 SCC (3) 451.

⁶ S. 13, Hindu Marriage Act, 1955.

⁷ S.494, Indian Penal Code, 1860.

Criminal Revision before the High Court. The High Court found that the magistrate acted on the Photostat copy of the foreign decree and since the Photostat copy was not admissible evidence, the order of the Magistrate was set aside. The husband, distressed by this decision of the High Court filed an appeal in the Supreme Court. The Hon'ble Court found in its observation that the foreign court was lacking the jurisdiction of the matter in issue, as neither the marriage was performed under the jurisdiction of the Court, nor any of the parties resided together within the boundaries of the State. The Missouri Court on the basis of assertion made by the Appellant husband about his residence, assumed jurisdiction and granted the decree. But as stated, Residence doesn't mean staying at a place temporarily with an intention to obtain the decree, instead, it is meant to be either habitual residence or intended to be of permanent nature.⁸ The Respondent wife also didn't consented to the jurisdiction of the Court. Further, both the parties were Hindus and got married under the Hindu Marriage Act 1955⁹, but the ground, 'marriage being irretrievably broken down', on which the divorce was granted by the foreign Court is not one that is available in the Indian act¹⁰. It is a settled position by Indian Courts that a decree on a law which is not recognized in India, will not be enforceable within the country. Thus, it was held by the Hon'ble Court that the foreign decree was not enforceable in India and so, the appeal was dismissed.

The case of *Y. Narasimha Rao v. Venkata Lakshmi* threw some light on one of the many problems arising in the Indian matrimonial relations due to the foreign divorce decree. Marriage in India is not just considered as a union of two individuals, but a union of two families coming together and getting connected for their whole life. Thus, for this reason, the state plays a special role to keep the institution of marriage as intact as possible through various legislation on personal laws. But sometimes these laws remain to be a little backward when compared with the changing time. The procedure of obtaining a divorce decree in India is a bit more arduous than various developed countries. Due to lack of uniformity, there are several personal laws in existence. The matrimonial jurisdiction is exercised by the Competent Court and such competency is tested by the religion of the parties. In such a situation, there exists a need for the legislation to be up to date, as with the growing change, people's expectation and demand from a marital relationship also changes. There's a ground of irretrievable breakdown of marriage on

⁸ Supra 2.

⁹ S 7, Hindu Marriage Act, 1955.

¹⁰ S 13, Hindu Marriage Act, 1955.

which one cannot obtain a divorce decree in India, but can in some of the foreign countries. This creates a situation when a divorce decree obtained on this ground is valid outside India, but is void within the country. This is a highly complex situation for the parties, and the Indian Judiciary as well. The Supreme Court of India, in various judgments, has also seriously recommended to the Indian Legislature to amend the personal laws and include the irretrievable breakdown of marriage as another ground to obtain divorce.¹¹ The Law Commission of India has also submitted its report on the need of including irretrievable breakdown of marriage as another ground to obtain divorce.¹²

Inclusion of the ground for dissolution of marriage within the boundaries of India would not just solve this complex situation of executing a foreign decree obtained on this particular ground, but would also solve the problems that occurs when the marriage of the two individuals has broken down completely, but there's no mutual consent for dissolving the marriage.

Principle of Natural Justice

Getting divorce by obtaining a decree from a foreign Court is not just difficult when it comes to its execution, but has even more serious problems connected to it. The major one is it being opposed to the principle of natural justice. The common practice is of one party who doesn't want to continue the marriage and is living in another country, filing a divorce petition and the Court after assuming the jurisdiction, granting the decree ex-parte. After the summon being served to the respondent, the appearance sometimes is not made before the court because of several justifiable reasons. Most of the time in such a situation, the respondent lives in India, while the petitioner residing in another country files a petition and obtains the decree ex-parte as the respondent is not able to appear before the court either because of the financial conditions, or social responsibilities. It is a well-established law that a foreign decree is not enforceable within the boundaries of India if it stands opposed to the principle of natural justice.¹³ The circumstances around the respondent which is responsible for the non-appearance is completely disregarded by the Court thus, defeating the ultimate right of being heard.

In few of the cases, the petitioner intentionally creates some circumstances due to which

¹¹ Naveen Kohli v. Neelu Kohli AIR 2006 SC 1675.

¹² Law Commission of India, Seventy- one Report on The Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a ground of divorce (1978); and, Law Commission of India, Two hundred Seventeenth Report on Irretrievable Breakdown of Marriage- Another ground for divorce (2009).

¹³ S.13, Code of Civil Procedure, 1908.

the respondent is unable to appear before the court, and accordingly obtains the divorce decree with ease. At times, the respondent answers to the summon and questions the jurisdiction of the Court but then the Court assumes jurisdiction and continues the proceedings, ignoring the primary issue of jurisdiction. Such decree is held to be against the principle of natural justice and thus, is null and void.¹⁴

Gender Detrimental

With increase in the movement from one country to another in search of education, job, and a better standard of living, there's also an increase in the number of NRI Marriages. Broadly, NRI Marriage is a marriage between an Indian Woman living in India and an Indian Man, residing in a foreign country who is either an Indian citizen or citizen of that foreign country. The woman in such marriages often holds a vulnerable position. The number of these women being harassed both mentally and physically, subject to domestic violence, desertion and abandonment is high. To handle such grave situations, the Government of India nominated the National Commission for Women as the national coordinating agency to deal with issues pertaining to NRI Marriages. The Commission in 2009 set up an NRI Cell.¹⁵ The number of complaints of women being deserted by their husbands in an NRI Marriage received by the National Commission for Women is far more than the Ministry of Overseas Indian Affairs. One of the major concerns of the aggrieved women in case of a NRI Marriage is ex parte Foreign Decree on Divorce and child custody.

The issue arises as the NRIs are not just governed by the Indian laws but also by the laws of the country they reside. In such cases, the NRI husbands take advantage of the liberal divorce proceedings in many foreign countries as per their convenience and obtain a divorce decree through fraudulent representation to the foreign Court. The consequences of such a decree is faced by the women by not getting maintenance, or losing the custody of her child, and then getting trapped in long and heavy burdened legal proceedings with so little economic and social support.

The Supreme Court of India in the case of *Y Narsimha Rao v. Y Venkata Lakshmi*¹⁶ held

¹⁴ Hemavati Shivashankar v. Dr Tumkur S Shivashankar, Regular First Appeal No. 702 of 2002.

¹⁵ National Commission of Women- Annual Report 2018-19.

¹⁶ Supra 5.

that the jurisdiction and grounds of granting divorce by the foreign court, both must be as per the matrimonial law under which the marriage of both the parties took place. And thus, the decree granted by the foreign court is not binding on the wife if it doesn't follow these requirements.

So, the Indian Judiciary and the different statutory institutions from time to time has tried to work towards the betterment of the complex situations that arise due to the existence of the foreign divorce decree, but due to the absence of a legislation specifically targeted towards these situations, a lot of issues remain unsolved with no clarity.

CONCLUSION

The Foreign Marriage Act, 1969 provides for the provisions for the citizens of India when they get married in another country. Section 4 of the Act explains the conditions to be followed in order to solemnize a foreign marriage. According to the Act, the Government of India authorises a foreign officer to perform the foreign marriage. By virtue of section 23 of the Act, the Central Government has the power to recognize any marriage solemnized under the law of foreign countries, within the boundaries of India. Thus, the Foreign Marriage Act, 1969 recognizes the foreign marriage of a citizen of India, but it doesn't include any provision to recognize the foreign divorce of the citizens of India. The other personal laws also don't provide any provision for the recognition of the foreign divorces.¹⁷ It, therefore, becomes necessary to draft a legislation on this subject to establish the legal position in this regard.

The Hague Conference on Private and International Law concluded a convention on the Recognition of Divorces and Legal Separations on 1 June 1970. The convention deals with the recognition of a foreign divorce decree obtained in one contracting state, by another contracting state. Article 1 of the conventions clearly mentions that it doesn't apply to order on pecuniary obligations and custody of children.¹⁸

Article 2 of the Convention provides for the circumstances under which if a divorce decree is granted by the court of a contracting state, it would be valid in another contracting state.¹⁹

Thus, the convention provides for a set of rules that, if applied, would ascertain at least

¹⁷ Law commission of India- Sixty Fifth Report on Recognition of Foreign Divorce Decree in India (1976).

¹⁸ *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separation, HCCH.*

¹⁹ Ibid

some of the issues that arise in recognizing a foreign divorce decree in India. At present, India is not a signatory party of the Hague Convention but the Convention is open to all countries and can be acceded later.

But as there exist some of the difficulties with the provisions of the Hague Convention²⁰ Because of it being a little too vague, the solution lies in adopting the crux and amending it as per our convenience while drafting the legislation, as has been recommended by the Law Commission.²¹ The Law Commission in its 65th report has submitted the need for legislation on the topic of recognition of foreign divorce. The recommendation was known as *The Recognition of Divorces and Legal Separation Bill, 1976*. At that time, the bill was limited to a colony or other dependent territory of the United Kingdom.²² Section 4 of the bill provides for the conditions which, if, are satisfied, the jurisdiction of the foreign court would be valid and so, a foreign divorce decree would be recognized in India. Thus, the bill covered most, if not all, of the complex situations arising out of the execution of such decree in India. Though it wasn't implemented then but can be now with some reasonable amendments as per the need of our country. The easiest solution to the complex situation is not to recognize any foreign decree and the only way to obtain a divorce decree would be from Indian Courts. But, with such an increase in people's movement from one country to another, it would be quite unreasonable and could also possibly lead to an increase in desertion of a spouse in India, while themselves living in a foreign country, without dissolving the marriage.

Also, in the present situation of the recognition of a foreign decree, there's no certainty of it being conclusive and can be declared void at any point of time. In such situations, the lives of people get completely disrupted. A person after obtaining a divorce decree from foreign, may marry someone else after sometime, and then could be charged with a criminal offence of bigamy by the earlier spouse in India. And if the foreign divorce is declared void, the second marriage becomes illegitimate, seizing all the rights arising out of the marital relationship. Thus, the life of all the people involved always remains at an edge of a cliff. Therefore, it is important for the legislature to draft a law that would provide some certainty to the people obtaining a divorce decree in accordance with the law and principle of natural

²⁰ Ibid

²¹ Supra 17.

²² S.2 (a), The Recognition of Divorces and Legal Separation Bill, 1976.

justice.

