

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

COMPLICATIONS IN EXECUTING A FOREIGN DIVORCE DECREE IN INDIAN COURTS

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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

Mankind has a tendency of continuously growing and evolving and mobility being an important attribute of human being, it necessitates the urgency of an individual moving from one country to another. There's seven billion people residing in different part of the world, governed by their respective municipal laws. This works adequately when an individual's place of domicile and residence, both are same. But after the movement from one country to another, the places differ and the conflict arises. This creates a responsibility on the part of the law and legislation to be flexible, so that it doesn't 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. Supreme Court of India has also through various judgments established different basis to recognise and enforce foreign decree in India.

Several general provisions are laid down in different legislation 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 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 the 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, Special Marriage Act 1954 applies to all the inter-faith marriages. These legislations are applicable throughout

India

Every so often, citizen of India gets married under their respective personal laws and then move abroad. After which some conflict arises and the parties then obtain a divorce decree from a 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 proceedings 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 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 judgement 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 judgement 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, the judgment being null and void.

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

³ *Ibid.*

Each nation because of the variance in their culture differ with others in respect of their rules and regulations. And, so the private international law of every country differ from each other as well, but due to the existence of Principle of Comity of nation, certain laws are considered as common out of mutual respect towards other sovereign countries, and thus, is recognised by Indian courts. 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 would 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 so, is not enforceable in India.

In private international law, it is a settled principle that no judgment delivered by a foreign court would be recognised 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 problem 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 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 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 question on the maintainability of the divorce petition.

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.

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 then 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 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 an admissible evidence, the order of the Magistrate was set aside.

The husband, distressed by this decision of the High Court, then 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, is meant to be either habitual residence or is 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 of the 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 recognised in India, will not be enforceable within the country. Thus, it was held by this 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 are an union of two families

⁷ S.494, Indian Penal Code, 1860.

⁸ Supra 2.

⁹ S 7, Hindu Marriage Act, 1955.

¹⁰ S 13, Hindu Marriage Act,1955.

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 remains to be a little backward when compared with the changing time. The procedure of obtaining a divorce decree in India is a bit 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 situation, there exists a need of 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 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 in 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 judgements, 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 it's 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

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).

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 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 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 moment 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 situation, 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

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

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

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

more than the Ministry of Overseas Indian Affairs. One of the major concern 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 case, the NRI husbands take benefit 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 decree is faced by the women by not getting maintenance, or losing the custody of her child, and then getting trapped in a long and heavy burdened legal proceedings with so little economical and social support.

The Supreme Court of India in the case of *Y Narsimha Rao v. Y Venkata Lakshmi*¹⁶ held that the 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 party 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 to betterment of the complex situation that arise due to the existence of the foreign divorce decree, but due to the absence of a legislature specifically targeted towards the situation, 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 marrying 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 authorizes a foreign officer to perform the foreign marriage. By virtue of section 23 of the Act, the Central Government has the power to recognise any marriage solemnized under the law of foreign countries, within the boundaries of India. Thus, the Foreign Marriage Act, 1969 recognises the foreign marriage of a citizen of India, but it doesn't include any provision to recognise the foreign divorce of the citizens of India. The other personal laws also doesn't provide any

¹⁶ Supra 5.

provision for the recognition of the foreign divorces.¹⁷ It, therefore, becomes necessary to draft a legislature on this subject so that to establish the legal position.

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 some of the issues that arise in recognising 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 of a 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, is satisfied, the jurisdiction of the foreign court would be valid and so, a foreign divorce decree would be recognised in India. Thus, the bill covered most, if not all, of the complex situation arising out execution of 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.

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.

²⁰ Ibid.

²¹ Supra 17.

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

The easiest solution to the complex situation is to not recognise 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, 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 gets 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 legislation 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 justice.

