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Legal Status of Foreign Decree of Divorce for Hindu Couple Married in India

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1. Introduction

A Hindu boy and a Hindu girl fell in love, got married in India, moved abroad and lived happily ever after. How we wish that all love stories had such a happy ending! Unfortunately, life sometimes takes a different turn. After moving abroad, there are occasions when relations between the husband and wife turn sour. At such a time, either the husband or the wife (or sometimes both) wish to get divorced. If the divorce is by mutual consent, there are hardly any legal issues involved. However, if one wants divorce and the other person does not, the courts get involved. Often it seems natural to get divorced from the country where one is living especially if that country's divorce procedures are easier and less time consuming compared to India. The big question at this point is whether such a decree of divorce is valid. This article examines this question from the perspective of Indian laws.

2. Typical Conditions

The following conditions are typically relevant for the cases which are being dealt by this article:

a) Both husband and wife are Hindus

b) Both are born and brought up in India

c) Both move abroad after they reach adulthood

d) Marriage takes place in India as per Hindu marriage customs and traditions.

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e) One of the two (husband / wife) files for divorce in a foreign court

f) The divorce is not by mutual consent

Given the above conditions there are two possibilities –

(i) The person who did not apply for divorce did not attend the divorce proceedings in the foreign court; and

(ii) The person who did not apply for divorce attended and actively participated in the divorce proceedings in the foreign court

Let us examine the two possibilities one by one.

Before we take the discussion further, it is worthwhile to understand the concept of "domicile". Domicile determines the law that will be applicable to an individual. A person may be resident and citizen of a country, while his domicile is somewhere else. The general rule is that "domicile is where the heart is". In general, we can say that in the case being considered by us, the couple remains domiciled in India even though they might have moved their residence to some foreign land. The domicile may be India even if the person after moving to the foreign land acquires foreign citizenship. This is often true because first generation migrants from India retain India in their heart.

It is interesting at this point to discuss a case[2] where a man domiciled in India moved to USA, got a divorce from a court at Nevada, USA by pleading domicile of Nevada even though he had not lived in Nevada and never lived in Nevada after the divorce. The wife challenged the divorce in India on the ground that the jurisdiction of the Nevada court was obtained by fraud. Supreme Court of India accepted the plea of the wife and refused to recognize the divorce obtained in Nevada. The following extract from the judgment makes the position very clear.

> Under Section 13(e), Civil Procedure Code, the foreign judgment is open to challenge "where it has been obtained by fraud". Fraud as to the merits of the respondent's case may be ignored and his allegation that he and his wife "have lived separate and apart for more than three (3) consecutive years without cohabitation and that there is

[2]Satya vs. Teja Singh; Decided on 1 October 1974; MANU/SC/0212/1974, AIR1975SC105, 1975CriLJ52, (1975)1SCC120, [1975]2SCR197

> no possibility of a reconciliation" may be assumed to be true. But fraud as to the jurisdiction of the Nevada court is a vital consideration in the recognition of the decree passed by that court. It is therefore relevant that the respondent successfully invoked the jurisdiction of the Nevada court by lying to it on jurisdictional facts.

The lesson from the above case for NRI's is that lying about domicile and trying to obtain a divorce from a foreign court is a futile exercise.

3. Divorce Proceedings Not Attended

It is not uncommon to hear about cases either the husband or the wife filed for divorce in a foreign court, while the spouse did not attend the proceedings either due to notice not being served or due to some other reason. In such a situation, the case of Y Narasimha Rao[3] is relevant.

Y. Narsimha Rao and Y. Venkata Lakshmi were married in Tirupati, India as per Hindu customs in 1975. They separated in July 1978. Mr. Rao filed a petition for dissolution of marriage in the Circuit Court of St. Louis County Missouri, USA. Mrs. Lakshmi sent her reply from India under protest. The Circuit Court passed a decree for dissolution of marriage on February 19, 1980 in the absence of Mrs. Lakshmi. Mr. Rao had earlier filed a petition for dissolution of marriage in the sub-Court of Tirupati. Later, he filed an application for dismissing the petition in view of the decree passed by the Missouri Court.

On 2 November 1981, Mr. Rao married another woman. Hence, Mrs. Lakshmi filed a criminal complaint against Mr. Rao for the offence of bigamy. The Supreme Court refused to accept the divorce decree granted by the court at Missouri, USA. While deciding the case the Supreme Court laid down the law for foreign matrimonial judgments in this country. The relevant extract from the judgment is as follows:

> The jurisdiction assumed by the foreign court as well as the ground on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent

[3]Y. Narasimha Rao and Ors. Vs. Y. Venkata Lakshmi and Anr.; Decided on 9 July 1991; MANU/SC/0603/1991, 1991(2)Crimes855(SC), II(1991)DMC366SC, JT1991(1)SC33, 1991-2-LW646, (1991)3SCC451, [1991]2SCR821

> voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

The key rule laid by the Supreme Court can be summed up as follows: If a couple is married under Hindu law, (a) the foreign court that grants divorce must be acceptable under Hindu law; and (b) the foreign court should grant divorce only on the grounds which are permissible under Hindu Law. **The two conditions make it almost impossible for a Hindu couple married in India to get a legally valid divorce from a foreign court since no foreign court is an acceptable one under Hindu Marriage Act and also because no foreign court is likely to consider the provisions of Hindu Marriage Act before granting divorce.**

The exceptions that Supreme Court has permitted to the above rule laid by it are as follows in a case where husband has filed for divorce in a foreign land:

A) The wife must be domiciled and permanently resident of that foreign land AND the foreign court should decide the case based on Hindu Marriage Act.

B) The wife voluntarily and effectively attends the court proceedings and contests the claim on grounds of divorce as permitted under Hindu Marriage Act.

C) The wife consents to grant of divorce

Exception A seems almost impossible. Exception B is examined in the next section. Exception C means that the divorce is obtained by mutual consent and therefore the courts of India do not want to interfere with it.

In a recent case (March 2012), Sunder and Shyamala tied the knot in Vellore district in 1999, Sunder went to the USA within a year and did not communicate with Shyamala after that. In 2000, she received summons from Superior Court of California, which subsequently granted divorce despite the wife's defence statement. Madras High Court held that the Superior Court of California was not a court of competent jurisdiction to decide the matrimonial dispute in this case.

4. Divorce Proceedings Attended

In general, it can be said that if the partner contesting the divorce actively attends the divorce proceedings in the foreign court, the chances of his or her being able to later successfully approach Indian courts against an unfavorable judgment of the foreign court are very low. Indian courts, or for that matters courts anywhere in the world, do not wish to encourage court-shopping.

The well-accepted universal principle of law can be stated as – **If someone has accepted the authority of a court, it cannot be open to the person to later question the authority of the court.**

A similar matter came up before Supreme court of India in the matter of Mrs. Anoop Beniwal[4]. The lady attended the court proceedings in UK and later contested the divorce granted by the UK court. Supreme Court refused to grant her any relief. Relevant extract from the judgment is as follows:

> 42. Factually the plaintiff herein and the respondent in the proceedings in England did have the opportunity to defend the suit held against her. She led evidence in those proceedings. She just happens to have failed to have a decision in her favor. An opportunity of hearing having been granted, it is not right to assert that the proceedings in England were opposed to natural justice. Nor is it proper to say that the judgment by a Court of England has not been given on the merits of the case. In my view, the assertions made in the "Particulars" annexed to the petition, it has been shown to me, and reproduced here above, could be made under S. 13(l) (ia) of the Hindu Marriage Act regarding treatment of the petitioner with cruelty. The claim in the proceedings in England cannot Therefore, be said to be founded on the breach of law in force in India.
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> 43. There is no assertion that the judgment has been obtained by fraud.

The notable point in the above case is that (a) the women had accepted the authority of the Court of England and (b) the Court of England had granted divorce on grounds which are akin to the ground of cruelty as provided in Hindu Marriage Act. Hence, both the conditions necessary for being an exception B as provided under Y. Narasimha Rao case discussed in the previous section are fulfilled.

[4]Mrs. Anoop Beniwal vs. Dr. Jagbir Singh Beniwal; Decided on 25 October 1989; MANU/DE/0044/1990, AIR1990Delhi305, I(1990)DMC239, 1989RLR554

5. Consequences of Invalid Decree of Divorce

It is not unusual for one of the partners to obtain a decree of divorce from a foreign court while the other partner is either in India or in some other part of the world. The partner who has obtained divorce may feel comfortable in the thought that the other partner has neither protested not contested the decree of divorce. However this comfort may be a false one.

Assuming that the husband has obtained the decree of divorce from a foreign court, some consequences that may be faced by the man in due course are as follows:

a) **If he remarries, he may be prosecuted for bigamy**. There is no time limit for the first wife to file a complaint with the police against the husband in the matter of bigamy. We have seen in the case of Y Narasimha Rao[5] that the couple separated in 1978, the man remarried in 1981 and ten years later, Supreme Court ordered for bigamy proceedings to be started against the man. Bigamy is punishable under section 494 of Indian Penal Code with imprisonment of seven years.

b) Wife (divorced as per foreign law) **may file for maintenance**.

c) In case the man dies without making a will, the **first wife will have the right to her share in the property of the man** while the second wife will get nothing because her marriage will not be considered legitimate.

It may be noted that the above may be faced by the man even though he may have acquired the citizenship of the foreign country (assuming that his domicile or his heart remains Indian).

If a women gets divorce from a foreign court and remarries, her new husband may be prosecuted under section 497 of Indian Penal Code under which he may face imprisonment of five years. The wife will, of course, be liable for punishment under section 494 of Indian Penal Code for bigamy.

[5] Y. Narasimha Rao and Ors. Vs. Y. Venkata Lakshmi and Anr.

6. Conclusion

To sum up one can say that exceptions aside, a Hindu couple married in India must seek divorce from an Indian court only.

The two notable exceptions (when a foreign decree of divorce is valid) are (a) when the couple decides to take divorce by mutual consent and (b) when the person who is contesting divorce attends divorce proceedings and the foreign court grants divorce on grounds that are permitted grounds of divorce under Hindu Marriage Act.

One should not draw comfort from inaction of the person who did not participate in divorce proceedings. The implications of an invalid divorce may appear many years later and even may arise after the death of the person who got the invalid divorce from a foreign court.

7. Postscript – Custody of Children

Custody of children is often a contentious issue at the time of divorce. Courts in India have adopted the principle that welfare of the child must be of paramount importance.

The issue of guardianship of children is the subject of Guardians and Wards Act, 1890. Section 9 of the said Act reads as follows:

> 9. **Court having jurisdiction to entertain application** - (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having Jurisdiction in the place where the minor ordinarily resides.

It is clear from the above that in case a child is born in a foreign land and is living there, an application asking for guardianship of the child cannot be made before a district court in India. However, if the child has come to India and is living in India either temporarily or permanently, the court in India may have jurisdiction. It is however, essential that the child should not have been brought to India in violation of orders of any court in the foreign land. In general, courts in India will not interfere if a

foreign court is already seized of the matter and the parties have accepted the jurisdiction of the foreign court. Indian courts do not encourage forum-shopping.

Two recent cases illustrate the position adopted by Honourable Supreme Court of India.

Ruchi Majoo vs. Sanjeev Majoo[6]

Sanjeev (husband), Ruchi and their child Kush (aged about 11 years) were American citizens of Indian origin. Ruchi and Kush returned to India with Sanjeev's consent. Sanjeev visited India when his wife and child were in India. During his stay in India, he agreed about his wife staying in India along with their child. Subsequently, he went to USA. Once he was in USA he started pressing his wife to return to USA. He also filed a petition for divorce and for custody of Kush before a court in USA. Ruchi filed an application in the District Court, Delhi under section 9 of Guardians and Wards Act for custody of Kush. The District Court granted her the custody of her son. However, when the matter went in appeal to the High Court, the High Court overturned the district court on the ground that the Delhi court had no jurisdiction since all the persons were American citizens.

Ruchi filed an appeal before the Honourable Supreme Court (SC) of India. The three issues that were before the SC are summed up as follows:

> 4. Three questions fall for determination in the above backdrop. These are (i) Whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same, (ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of Courts and (iii) Whether the order granting interim custody to the mother of the minor calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court. We shall deal with the questions ad seriatim:

The decisions of the SC on the above three questions are as follows:

[6] MANU/SC/0621/2011; AIR2011SC1952 decided on 13th May 2011

a) The SC decided that the High Court erred in deciding that the courts in India did not have jurisdiction. The SC decided that the child Kush was "ordinarily resident" in India and hence the Delhi court had jurisdiction in the matter.

b) The SC rejected the argument based on comity of courts. The SC gave higher importance to the welfare of the child. Relevant extracts from the judgment makes the point abundantly clear.

33. Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, Courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its Parens Patraie jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision. Judicial

42. We have while dealing with question No. 1 above held that the Court at Delhi was in the facts and circumstances of the case competent to entertain the application filed by the Appellant. What needs to be examined is whether the High Court was right in relying upon the principle of comity of courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that `comity of courts' principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Decisions of this Court in Dhanwanti Joshi, and Sarita Sharma's cases, (supra) clearly support that proposition.

c) On the issue of visitation rights to the father, the SC once again accorded highest priority to the welfare of the child and granted visitation rights to the father even though the mother protested against it.

Arathi Bandi vs. Jagadrakshaka Rao and Ors.[7]

The key difference between this case and the previous one is that in this case a court in USA was already seized of the matter and had given clear directions. The wife disobeyed the orders of the USA court and brought the child to India. After she had come to India, the husband followed her and moved Andhra Pradesh High Court with a habeas corpus petition asking for custody of the child. The High Court issued orders in favor of the husband. Honourable Supreme Court confirmed the orders of the High Court. The following extract from the SC judgment explains the view of the SC.

> 21. In our opinion, these observations leave no manner of doubt that no relief could be granted to the Appellant in the present proceedings given her conduct in removing Anand from U.S.A. In defiance of the orders of the Court of competent jurisdiction. The Court has specifically approved the modern theory of Conflict of Laws, which prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. The Court also holds that Jurisdiction is not attracted "*by the operation or creation of fortuitous circumstances*". The Court adds a caution that to allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging *forum-shopping*. The aforesaid observations are fully applicable in the facts and circumstances of this case.

The lesson from the Arathi case is a very important one. If one accepts the jurisdiction of a foreign court, one loses the option of getting benefits from Indian courts. Often, whether in matter of custody of children or in divorce proceedings, a party (either husband or wife) initiates proceedings in a foreign court. The other party has the option of either accepting the jurisdiction of the foreign court or of refusing to submit to the foreign court and seek justice under Indian judicial system. The choice is a tacit one and is rarely presented on a platter by the concerned lawyer. Nevertheless, the choice is real and must be exercised with due care and thought. Once the choice is exercised and one presents oneself or some documents to the foreign court, the doors of Indian judicial system are largely shut.

This applies whether one is an Indian citizen resident abroad or is a citizen of a foreign country. We have seen in the Majoo case above that Indian courts exercised jurisdiction even though everyone concerned was a citizen of the USA.

[7] MANU/SC/0711/2013; 2014(1)ABR346 decided on 16th July 2013

Last but not the least – Indian judicial system has a reputation of being slow and inefficient. This is true in some cases. However, in many cases the Indian system can be fast as well as better than of many other countries. Especially in matters concerning women and children, Indian laws and judicial system are second to none in the world. Some may even argue that Indian women enjoy such rights that men are a disadvantaged and discriminated lot. Without commenting on that, we can only advise all the women who wish to take benefit of Indian laws and legal system to avoid facing up to any foreign judicial system.

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Notes:

Anil Chawla Law Associates LLP is registered with limited liability and bears LLPIN AAA-8450.