

INDIAN ASPECTS ON FOREIGN DIVORCE

Notes on Adv. ANZAR M.A.

"Marriages are settled in heaven and they are performed on earth."

Whether and where a marriage can be dissolved is a matter in the domain of the earthly law governing the spouses. But the matrimonial laws are not common everywhere in the world and they differ from country to country. The problem arises when the parties have their domicile in one country and one of them obtains matrimonial relief in a foreign country. In India, marriage can be solemnized through customary or statute laws of law. In other words, Indian people have different personal laws and are migrating to different countries either to make their permanent abode there or for temporary residence.

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.

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.

Generally foreign court judgment is not conclusive proof and binding of Indian court because every marriage of India are solemnized under personal/customary ritual or provision of civil statute so as question of divorce are determined concerned statute. Therefore, foreign court has no jurisdiction to entertain the petition according to the concerned Indian Act under which admittedly the parties were married.

However, the relevant provisions of Section 13 of the Code of Civil Procedure, 1908 (Code) are capable of being interpreted foreign court judgment with its own six pillars.

Under Section 13 of the Code, a foreign judgment is not conclusive as to any matter thereby "directly adjudicated upon" "between the parties" if:

(a) it has not been pronounced by a Court of competent jurisdiction; or

(b) it has not been given on the merits of the case; or

(c) it is founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable; or

(d) the proceedings are opposed to natural justice, or

(e) it is obtained by fraud, or

(f) it sustains a claim founded on a breach of any law in force in India.

It is thus clear that in order to make a foreign judgment conclusive in India; it must be shown that it complies with all the above mentioned six conditions. There is no compliance of any one of these conditions; then, foreign judgment will not be conclusive and consequently not legally effective and binding in India. A decree of a foreign Court is normally recognised by a Court in another jurisdiction as a matter of comity and public policy. But no country is bound to recognise and give effect to a decree of a foreign Court if it is repugnant to its own laws and public policy. So far as India is concerned, a judgment of a foreign Court creates estoppel or resjudicata between the same parties

provided such judgment is not subject to attack under any of the Clauses (a) to (f) of section 13 of the Code.

FOREIGN MUTUAL CONSENT DIVORCE

If parties obtained divorce by mutual consent and therefore the courts of India do not want to interfere with it. Since either party obtained divorce through mutual consent from any foreign country it implies that your ex spouse participated in the divorce proceedings. So he/she cannot now challenge the judgment of foreign court in an Indian court. The judgment of foreign court is final. There is no requirement of any validation of your divorce from an Indian court. As a corollary thereto, you are free to remarry.

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.**

THE DIVORCE IS NOT BY MUTUAL CONSENT THEN, THERE ARE TWO POSSIBILITIES.

1. The person who did not apply for divorce did not attend the divorce proceedings in the foreign court; and
2. The person who did not apply for divorce attended and actively participated in the divorce proceedings in the foreign court

DIVORCE - NOT ATTENDING PROCEEDINGS

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 And Ors vs Y. Venkata Lakshmi And Anr** is relevant clearly discussed 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 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."

Gist of the Supreme Court can be described as follows: If marriage solemnized of any Indian law, (a) the foreign court that grants divorce must be acceptable under provision of concerned personal or civil statute; and (b) the foreign court should grant divorce only on the grounds which are permissible under provision of concerned personal or civil statute. The two conditions make it almost impossible to get a legally valid divorce from a foreign court since no foreign court is an acceptable one provision of concerned personal or civil statute of India and also because no foreign court is likely to consider the provisions of concerned personal or civil statute of India before granting divorce.

EXCEPTION OF THE VERDICT

- A. Men and women must be domiciled and permanently resident of that foreign land and the foreign court should decide the case based on concerned personal or civil statute of India

- B. Both parties voluntarily and effectively attends the court proceedings and contests the claim on grounds of divorce as permitted under the provisions of concerned personal or civil statute of India.

C. Mutual consents to grant of divorce

DIVORCE - ATTENDING PROCEEDINGS

Both parties contesting the divorce actively attends the divorce proceedings in the foreign court, the chances of either parties 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-mocking.

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.**

CONSEQUENCES OF INVALID DECREE OF DIVORCE

If a man has obtained divorce decree from foreign court without proper ways:-

1. If he remarries, he may be prosecuted for bigamy.
2. Wife (divorced as per foreign law) may file for maintenance.
3. 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.

If a woman has obtained divorce decree from foreign court without proper ways:-

If she 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.

SUGGESTIVE SOLUTIONS

If marriage was solemnized under Indian custom or Indian statute, then must seek solution for divorce through Indian court alone.

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**

Foreign decree of divorce is valid in India as following two aspects

- 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 provisions of concerned personal or civil statute of India.

