

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 29th August, 2018.**

+ **C.R.P. 153/2018 & CMs No.30324/2018 (for stay) & 30325/2018**
(for condonation of 54 days delay in filing the appeal)

SWATANTRA ARORA

.... Petitioner

Through: Mr. Jitendra Nath Pathak, Adv.

Versus

RAJENDRA KUMAR BALI

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. On 31st July, 2018, when this petition came up first before this Court, the following order was passed:

“3. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 1st March, 2018 in CC No.23/2017 of the Court of Judge, Family Court, East District] of dismissal of the application under Order VII Rule 11 of the CPC filed by the petitioner wife for rejection of a Petition under Section 9 of the Hindu Marriage Act, 1955 filed by the respondent husband for restitution of conjugal rights.

4. Rejection of the petition for restitution of the conjugal rights was sought on the ground that the respondent husband who was living in USA had obtained a judgment from the US Court of dissolution of marriage with the petitioner wife. However only a photocopy of the said judgment was placed on record of the Family Court.

5. The application under Order VII Rule 11 of the CPC filed by the petitioner wife has been dismissed reasoning (i) that the petitioner wife had been unable to produce an authenticated/certified copy of the judgment and decree of the foreign court; (ii) that rejection under Order VII Rule 11 of the CPC is permissible only if on a reading of the averments in the

plaint/petition itself no cause of action is made out and there can be no rejection on a plea raised by the defendant/respondent; (iii) that the respondent/husband had denied any judgment and decree of the foreign court and also pleaded the same to be nullity and without jurisdiction and in the face thereof the petition under Section 9 could not be rejected outrightly; and, (iv) it was also the plea of the respondent husband in the petition under Section 9 that the parties, after the judgment and decree of the foreign court alleged, had also been residing together as husband and wife and had substantiated the same by considerable financial transactions between the parties.

5. The counsel for the petitioner wife states that he has since received the certified copy of the judgment and decree of the foreign court and has handed over in the Court a certified copy of the judgment dated 17th July, 1995 of the Matrimonial Court of New York State Supreme Court in a proceeding filed by the respondent husband against the petitioner wife and dissolving the marriage of the parties.

6. The said certified copies of judgment and decree are taken on record.

7. I have however asked the counsel for the petitioner wife the mode of proof of a foreign judgment, if denied.

8. The counsel for the petitioner wife is unable to appreciate the question put to him.

9. Section 14 of the CPC though requires the Court to, upon production of any document purporting to be a certified copy of a foreign judgment, presume that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record but further provides that such presumption may be displaced by proving want of jurisdiction.

10. Similarly, Section 13 of the CPC though provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties but further provides that it will not be conclusive inter alia where it has not been pronounced by a Court of competent jurisdiction or

where it has not been given on the merits or where it appears on the face of the proceedings to be founded on an incorrect view of international law or refuses to recognise the law of India in cases in which such law is applicable or where it sustains a claim founded on a breach of any law in force in India.

11. The foreign judgment of dissolution of marriage is a default judgment.

12. Though the counsel for the petitioner wife has argued that the respondent husband having himself sought dissolution of marriage in the foreign court, cannot challenge the same but it prima facie appears that it will still not be a case for rejection at threshold of the petition under Section 9 of the Hindu Marriage Act.

13. Though the counsel for the petitioner wife is clueless but it is still deemed appropriate to give an opportunity.

14. List on 20th August, 2018.

15. On request of the counsel for the petitioner wife that the proceedings before the Family Court are listed for evidence on 9th August, 2018 and certified copy of the foreign judgment will be required, the same has been returned to the counsel for the petitioner wife."

2. On 20th August, 2018, adjournment was sought by the counsel for the petitioner and the proceedings were adjourned to today.

3. The counsel for the petitioner today relies upon (i) ***Sharmishtha Vs. Sujoy Mitra*** MANU/DE/1501/2008; (ii) ***Pritam Ashok Sadaphule Vs. Hima Chugh*** MANU/DE/0946/2013; and, (iii) ***Harpreet Singh Sekhon Vs. Rajwant Kaur*** MANU/PH/4432/2013.

4. I have perused the aforesaid judgments and do not find the same to be supporting the case of the petitioner.

5. In *Sharmishtha* supra, the husband had filed the divorce petition in Delhi, after a decree of divorce from the Court of Pennsylvania, United States of America (USA). The wife applied for rejection of the divorce petition filed in Delhi, owing to the marriage of the parties having already been dissolved by the decree of divorce of the Court of Pennsylvania. The said application of the wife was dismissed. Impugning the said order, this Court was approached. It was the contention of the husband in that case, that divorce obtained from a foreign country was required to be confirmed by the Courts in India. After referring to Sections 13&14 of the Code of Civil Procedure, 1908, this Court allowed the petition and dismissed the divorce petition filed in Delhi, reasoning that since the wife was acknowledging the decree of divorce granted by the State of Pennsylvania and was further acknowledging the same to be a valid decree, there was no challenge to the foreign decree of divorce and there was thus no need for a second divorce petition in Courts at Delhi.

6. It would thus be seen that in *Sharmishtha* supra, there was no challenge to the foreign decree. The Court nowhere held that it is not open to either of the spouses to challenge the foreign decree. The said judgment can thus not be the basis for summary dismissal of the petition for restitution of conjugal rights filed by the respondent/husband, thereby depriving the respondent/husband of opportunity to contest the validity of foreign decree.

7. Similarly, in *Pritam Ashok Sadaphule* supra, this Court was approached against the order of dismissal of an application filed by the husband for summary dismissal of the proceedings filed by the wife under

Section 13(1)(ia) of the Hindu Marriage Act, 1955, on the ground that the marriage of the parties already stood dissolved by a decree of the Foreign Court. This Court upheld the order of the Matrimonial Court refusing to summarily dismiss the divorce proceedings filed by the wife. The reason which prevailed was that the foreign decree was not conclusive under Section 13 of the Act. The said judgment thus, rather than being in favour of the petitioner/wife, is against the petitioner/wife.

8. The counsel for the petitioner/wife states that ***Harpreet Singh Sekhon*** supra also is against the petitioner/wife.

9. Exceptions (a) to (f) incorporated under Section 13 of the CPC are enacted to safeguard the interest of a person against whom a foreign judgment is claimed as *res judicata*. The said exceptions do not make any distinction, whether the foreign judgment is in a proceeding initiated by the person so claiming *res judicata* or by the person against whom claim for *res judicata* is invoked. Thus, it matters not, whether the divorce proceedings in the foreign Court were initiated by the respondent/husband or by the petitioner/wife. Even if the divorce proceedings in the foreign Court were initiated by respondent/husband, the language of Section 13 suggests that it is still open to the respondent/husband to contend that the (a) foreign judgment has not been pronounced by Court of competent jurisdiction; or (b) that the foreign judgment has not been given on the merits of the case; or (c) that the foreign judgment, on the face of the proceedings, appears to be founded on an incorrect view of international law or a refusal to recognise the law of India; or (d) that the proceedings in which the foreign judgment was obtained was opposed to natural justice; or

(e) that the foreign judgment was obtained by fraud; or (f) the foreign judgment sustains a claim founded on a breach of any law in force in India.

10. Perhaps only the plea of estoppel can be invoked by the petitioner/wife i.e. of the respondent / husband being estopped from contending that the foreign judgment in a proceeding initiated by the respondent/husband himself is not res judicata. Reference in this regard may be made to *Y. Narasimha Rao Vs. Y. Venkata Lakshmi* (1991) 3 SCC 451 and *Deva Prasad Reddy Vs. Kamini Reddy* ILR 2002 KAR 2835 (DB). However, a plea of estoppel cannot lead to summary dismissal of the petition for restitution of conjugal rights filed by the respondent/husband. It will also have to be examined whether the plea of estoppel at all is available against the statute i.e. Section 13 CPC.

11. In addition to Section 14 of the CPC referred to in the order dated 31st July, 2018 reproduced above, mention may also be made of Section 74 of the Indian Evidence Act, 1872 defining public documents as including documents forming the acts or record of the acts of judicial officers of a foreign country and Section 78(6) of the Indian Evidence Act providing for proof of public document of any other class in a foreign country by production of original or a copy certified by a legal keeper thereof with a certificate under the seal of Notary Public or a diplomatic agent that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country. Though Section 76 of the Act obliges the public officer having custody of the public document to issue certified copy thereof and Section 77 of the Act provides for proof of public document by production

of certified copies but since Section 76 of the Act does not bind foreign Courts, proof of foreign judgments cannot under Section 77 of the Act by mere production of certified copy thereof and has to be in accordance with Section 78(6) as aforesaid. Mention in this regard may also be made of Section 86 of the Evidence Act which again entitles the Court to presume that any document purporting to be a certified copy of judicial record of any country not forming part of India is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in such country to be the manner commonly in use for certification of copies of judicial records. Thus a foreign judgment is to be proved, not by mere production of certified copies thereof, but such certified copies must be further certified by the diplomatic agent of India in that country in the manner provided in Sections 78(6) and 86 of the Indian Evidence Act.

12. This petition thus cannot be entertained and is dismissed.

13. It is however clarified that this order will not preclude the petitioner/wife from taking any pleas which may be available to her in law before the Family Court.

RAJIV SAHAI ENDLAW, J.

AUGUST 29, 2018

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