

IN THE HIGH COURT OF BOMBAY AT GOA**MISC. CIVIL APPLICATION (MAIN) NO. 185 OF 2018**

Mr. Jose Sousa,
Son of late Leao Constantino Sousa,
Major age, service,
Married, Portuguese National,
Resident of 42 A Flaxley Road,
Selby North Yorkshire,
Y08 4BG,
Presently residing at
C/o Mr. Joaquim Mariano Souza
H.No. 843/1 Mandopa,
Navelim, Salcete, Goa 403707.

.... Applicant

V e r s u s

1. Mrs. Ema Mata Fernandes,
Wife of Jose Sousa,
Major of age, business,
Indian National,
Resident of H. No.1015/2,
Nova Palma,
Cortalim-Goa.
2. State of Goa,
Represented by the
Ministrio Public (Public Ministry)
Through the Advocate General,
Panaji, Goa.

... Respondents

Shri J. Vaz, Advocate for the Applicant.

Ms. S. Linhares, Advocate for the Respondent.

Mr. Amogh Prabhudessai, Additional Government Advocate for the
Respondent no.2.

CORAM: C. V. BHADANG, J.
Reserved on: 15/4/2019.
Pronounced on: 22/04/2019.

Order:

By this application under Article 1102 of the Portuguese Civil Procedure Code 1939 (Code, for short), the applicant is seeking confirmation of the judgment and order dated 9/6/2017 (as amended on 10/10/2017) passed by the Family Court at Bradford, U.K, by which, the marriage between the applicant and the first respondent, has been dissolved, by a decree of divorce.

2. The brief facts are that, the applicant was a citizen of India of Goan origin, born at Margao. The first respondent is an Indian citizen of Goan origin. The applicant was married to the first respondent in a civil marriage on 1/6/1985 at Margao and their marriage is registered before the Sub Registrar of Salcete at Margao under Entry no.836/1985. It appears that disputes and differences arose between the parties in the initial period of the marriage and the parties separated and the applicant has been residing in London since the year 2005, when he went there for purpose of work. The applicant has since acquired Portuguese citizenship in the year 2009, while the first respondent continues to be an Indian citizen. The applicant and the first respondent resided together in Goa as husband and wife until the year

2005 and from the time the applicant left for U.K, they have been residing separately.

3. It appears that the applicant filed Matrimonial Petition no.14/2010 against the first respondent on the ground of “incompatibility and continuous fights and beakerings”, which came to be dismissed in default. The applicant made an unsuccessful attempt to get the petition restored. The applicant thereafter filed a second petition being Matrimonial Petition no.25/2013/A before the competent court for dissolution of marriage on the ground of the alleged harassment and ill -treatment meted out to the applicant by the first respondent. That petition was dismissed on 30/6/2015 and that has attained finality, when an appeal preferred there against, by the applicant, was dismissed on 22/12/2015.

4. The applicant thereafter filed a petition for dissolution of marriage before the Family Court at Bradford, U.K on 12/1/2017 on the ground of (i) there being an irretrievable breakdown of marriage and/or (ii) the parties to the marriage having lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. The applicant claimed that the Family Court at Bardford had jurisdiction to hear the case in accordance with Article 3 (1) of the Council Regulations (EC) No.2201/03 of

27/11/2003.

5. It appears that a notice of the petition was served on the first respondent, who sent a detailed reply thereto inter alia taking exception to the jurisdiction of the Family Court at Bradford to entertain the petition. It was contended that the parties were Indian nationals of Goan origin at the time of their marriage. Their marriage was solemnized at Margao, where it is registered and thus the Family Court at Bradford, U.K. would lack jurisdiction to entertain the petition only on the ground that the applicant has been residing in U.K. It was pointed out that the marriage was solemnized as per the Family Laws applicable in Goa and although the applicant has acquired Portuguese Citizenship in the year 2009, the first respondent continues to be an Indian National and therefore, the marriage between the parties cannot be dissolved in accordance with the provisions of the foreign law.

6. The first respondent claimed that since the applicant left for U.K. she has been maintaining herself and has brought up two children on her own. She is running a mini grocery shop at Cortalim and is deriving meager income and is some how making a living. She pointed out that she is financially unable to appear and contest the petition before the Bradford

Court. The first respondent also pointed out that there were two earlier petitions filed by the applicant before the competent court in Goa in which he has failed to obtain a decree of divorce.

6. The Family Court at Bradford by a judgment and order dated 9/6/2017 has granted a decree of divorce, which is amended on 10/6/2017. The present application is filed for confirmation of the same.

7. It appears that on 27/7/2018 after noticing that the first respondent has chosen not to appear although served, this Court allowed the application in terms of prayer clause (a) and (b). However, subsequently the first respondent appeared and as per order dated 31/7/2018 the earlier order dated 27/7/2018 was recalled and the petition was restored to file.

8. The first respondent has thereafter filed a reply to the present application resisting the same. It is contended that the judgment of the Family Court fails to satisfy the ingredients of section 13 of the Code of Civil Procedure (CPC) and therefore, the said judgment cannot be recognized. It is submitted that the said judgment is not passed on merits and is a non speaking judgment which does not set out the grounds for allowing the divorce petition. It is submitted that it is an ex parte judgment passed without

holding any inquiry and is merely based on the pleadings of the applicant, which cannot be recognized. It is also contended that the judgment is hit by the principles of res judicata, as twice the applicant has failed to obtain a divorce from the competent court at Margao-Goa. It is pointed out that the Family Court at Bardford (UK) had no jurisdiction to entertain the petition and to dissolve the marriage between the parties, which was solemnized under the regime of communion of assets, as per the Family Law applicable in Goa.

9. I have heard Mr. Vaz, the learned counsel for the applicant and Ms. Linhares, the learned counsel for the first respondent. I have also heard Mr. Prabhudessai, the learned Additional Government Advocate for the second respondent. Perused record.

10. The only question is whether the judgment of the Family Court at Bardford, U.K can be confirmed.

11. **Article 1102 of the Code reads thus:**

In order that a judgment may be confirmed, it is necessary:

Clause 1: That there must be no doubt as to the authenticity of the document containing the judgment nor over the understanding of the decision.

Clause 2: That the document has become final as per the law of the country where it was passed.

Clause 3: That the judgment is passed by competent court as per rules of conflict of law as per Portuguese Law.

Clause 4: That there is no case of *lis pendens* or *res judicata* in respect of any case connected with Portuguese Court except where the Foreign Court provided the jurisdiction.

Clause 5: That the defendant is duly summoned except where the Portuguese Law has dispensed with initial summons. If the decision was passed *ex-parte*, the summons has been duly served on the defendant.

Clause 6: That the decision passed is not contrary to the principles of Portuguese public order.

Clause 7 : When the decision against Portuguese subject is not contrary to the provisions under Portuguese Law when the matter ought to have been decided as per Portuguese Law according to Portuguese rules of conflict.

Sole Paragraph: The provision of the Article is applicable to decision of Arbitral Tribunal to the extent applicable.

12. This Court in the case of **Saturnino Barros Vs. Tina Barros (1997 (2) Goa L. T. 343)** has held that section 13 of the Code of Civil Procedure 1908 corresponds to Article 1102 and Article 1102 stood repealed with the coming into force Code of Civil Procedure 1908. This Court has held that section 13 lays down substantive law and not of mere procedure. Procedural law described under Article 1103 is saved by section 4.

13. Section 13 of the C.P.C provides as to when a foreign judgment is not conclusive. The said section reads as under:

-A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be 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;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in India

It can thus be seen that for a foreign judgment to be conclusive, inter alia, it has to be pronounced by a Court of competent jurisdiction and the judgment ought to have been pronounced on merits of the case.

14. Coming to the present case, the applicant had approached the competent court in Goa, seeking a decree of divorce twice. The first of such petition was dismissed in default and the applicant was unsuccessful in

getting it restored. The second petition was dismissed on merits and that has been confirmed in appeal. Mr. Vaz, the learned counsel for the applicant tried to get out of this situation by claiming that the petition filed before the domestic court was based on the ground of ill treatment, while the petition before the foreign court is on the twin grounds of marriage having broken down irretrievably and/or the parties to the marriage having lived apart for a continuous period of at least five years, immediately preceding the presentation of the petition. In this regard it is significant to note that the ground about irretrievable break down of marriage is not a ground available in law, as is applicable here. In so far as the second ground, about the parties having lived apart for a continuous period of five years is concerned, that ground was available to the petitioner even in the year 2013 when the matrimonial petition no.25/2013/A was filed and perhaps, also when the matrimonial petition no.14/2010/A was filed but was not pursued. Be that as it may, we will assume that the ground about the parties living apart for a continuous period for at least five years is available to the applicant, still the applicant has not shown as to how the Family Court at Bradford, U.K. would have jurisdiction to entertain the petition only on the basis of the residence of the applicant in U.K. Admittedly, the marriage was solemnized at Margao as per the Family Laws applicable in Goa, when both the parties were Indian nationals and were governed by the said law and their marriage is registered

in the office of the Sub Registrar at Margao. Subsequently the petitioner has acquired Portuguese citizenship in the year 2009 and is staying in U.K. The parties last resided together at Margao.

15. According to the appellant the Family Court at Bradford (U.K) had jurisdiction to hear the case under Article 3(1) of the Council Regulations EC 22/2003 of 27/11/2013 which are not produced in the present application. Thus, it is not shown on the basis of any such Council Regulations that the Family Court at Barfard had jurisdiction to entertain the petition, even assuming that the parties were governed by the said Council Regulations. The true copy of the judgment produced at pages 12 to 14 of the compilation also does not show as to on which grounds the decree of divorce has been granted. The decree dated 9./6/2017 refers to an earlier decree made in the cause on 22/4/2017, which is not produced in this application.

16. A perusal of the reply sent by the first respondent to the Family Court at Bradford, would show that a specific ground of the absence of jurisdiction was raised, however, the judgment as produced in this application does not show that the same has been dealt with in any manner. There is absolutely no reference to the said aspect. Thus on the basis of clauses (a) and (b) of section 13 of the C.P.C, I do not find that the judgment can said to be

conclusive. For these reasons it is not possible to confirm the said judgment.

In the result civil application is hereby dismissed, with no order as to costs.

C. V. BHADANG, J.

Ap/