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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3773 OF 2021

Milind Ashok Kalamkar

... Petitioner

Vs

Sheetal Milind Kalamkar Nee

Sheetal Premnath Kerkar

... Respondent

Mr. Atul Damle Sr. Advocate i/b Prasad Gajbhiye for the Petitioner

Mr. Himanshu Nagarkar a/w Anagha Nimbkar for the Respondent.

CORAM : M.S.KARNIK, J.

DATE : 23rd AUGUST, 2021

ORAL JUDGMENT :-

I start with a narration which may not be completely relevant in the context of deciding the present issue. I express this with a fond hope that the warring couple resolve their disputes amicably and at the earliest keeping in mind that apart from the hardships the parties are facing, it is their minor son 'Ridaan' who is worst affected by this unfortunate estrangement. 'Ridaan' is already a subject matter of a parenting agreement. Whether it be in the Foreign Court or the Indian Court, the parties must try to resolve the marital dispute amicably. I have no manner of doubt that the parties will put 'Ridaan's interest above everything else and find an early resolution to the dispute.

FACTS OF THE CASE

2. The husband prays for an anti suit injunction restraining the respondent – wife from instituting proceedings for divorce and other matrimonial disputes before the Foreign Court.

3. These proceedings are an outcome of an unfortunate marital discord between the couple. The couple married in Mumbai on 30/11/2004 as per the Hindu Rites and Customs. For a major part, as the pleadings record, the couple stayed abroad in different countries for job related assignments. From the earnings, investments are made and properties are purchased in India. The couple was blessed with a son ‘Ridaan’ in May, 2010.

4. The couple decided to shift to Australia in 2015. They are issued Permanent Residency visa (‘PR’ for short). The wife has applied for Australian Citizenship.

5. The husband was upset with the lifestyle of his wife since 2017. Serious allegations are made in the Petition against her. The wife left the matrimonial home on 4/11/2018 with ‘Ridaan’. All efforts of a possible reconciliation failed. The husband alleges the wife claimed 50% share in the property as a settlement. A marital asset division notice was sent by a lawyer in Australia on her behalf

on 2/9/2019. A marital asset division suit was filed by her before the Federal Circuit Court on 8/11/2019. Thereafter, on 4/10/2019 and 23/1/2020, both parties had joint session with the Counsellors from Family Relationship Centre, being an Australian Government Recognised 'Family Dispute Resolution Practice' and formulated a parenting plan for child access for betterment of 'Ridaan' while he is in Australia.

6. The husband filed divorce proceedings under Section 13(1), (i-a) of Hindu Marriage Act, 1955 before the Family Court, Mumbai, on 20/12/2019. An application Exhibit '6' is filed restraining the wife from filing divorce proceedings on any grounds and/or from pursuing her marital asset settlement case in Australia.

7. The application made by him for an anti suit injunction, restraining the wife from instituting matrimonial proceedings in the Court at Australia (Referred to as 'a Foreign Court') is rejected by the Family Court in Mumbai by the impugned order dated 6/4/2021. The issue for consideration in this Petition is whether the Family Court is justified in refusing the application of the husband to grant an anti suit injunction restraining the wife from instituting matrimonial suit or other related proceedings in a Foreign Court.

8. Learned Senior Advocate Shri Damle, on behalf of the husband urged that the Family Court committed an error in refusing the anti suit injunction on the following set of submissions :

(A) As the parties are Indian citizens, being Domiciled in India, married in Mumbai as per Hindu Rites and Customs, only the Court in Mumbai will have jurisdiction to deal with all disputes relating to matrimonial proceedings. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Sondur Gopal vs. Sondur Rajini**¹ to contend that in the above facts it is only the Family Court in Mumbai which will have jurisdiction and therefore the anti suit injunction must follow.

(B) The parties have properties, bank accounts, LIC policies in India. There is no intent of abandoning the domicile of Indian origin. Mere issuance of a PR which is valid till September 2022 does not manifest the intention of the parties to abandon domicile of Indian origin.

(C) The husband never submitted to the jurisdiction of the Foreign Court. The parenting plan the parties agreed to by way of 'Family Dispute Resolution Practice', is only an informal document and no sanctity can be attached to it, as the same cannot be said to have been signed before a Foreign Court.

1 (2013) 7 SCC 426

(D) The decision in case of **Y. Narasimha Rao vs. Y. Venkata Lakshmi & anr.**² is relied upon to contend that when parties are married in India and governed by the Hindu Marriage Act, a foreign judgment cannot be recognised in this Country.

9. Learned counsel for the respondent, on the other hand, in support of his submissions, invited my attention to the findings of the Family Court. He placed reliance on the decision of the Hon'ble Supreme Court in the cases of '**Modi Entertainment Network and ors. vs. W.S.G. Cricket PTE. Ltd.**³' and '**Dinesh Singh Thakur vs. Sonal Thakur**⁴'. He submits that the proceedings are initiated in India only to harass the wife and cause inconvenience to her. As parties reside in Australia, no prejudice will be caused to the husband by refusal of the injunction, as the Foreign Court has concurrent jurisdiction in relation to the matter under dispute. According to him, the parenting agreement is a document to indicate that the husband has subjected himself to the jurisdiction of the Foreign Court. He submits that all along, and even to the Immigration Specialist, the husband since 2015 has expressed his desire to settle in Australia. He has even purchased property in Australia.

2 (1991) 3 SCC 451

3 (2003) 4 SCC 341

4 (2018) 17 SCC 12

CONSIDERATION

10. The facts reveal that the parties are Indian Citizens, domiciled in India. They are governed by Hindu Laws as the marriage is solemnised in Mumbai. Son 'Ridaan' is born in India. The parties have properties in India. Since 2015, the couple and 'Ridaan' reside in Australia. They have been granted PR visa. The wife, her Counsel informs, has applied for an Australian citizenship. The husband expressed his desire to settle in Australia as the correspondence with the Immigration Specialist reveals. The husband has purchased property in Australia. The parties signed the parenting agreement while in Australia. The wife is pursuing her asset division settlement case in the Federal Circuit Court.

11. In this backdrop it is to be considered whether the husband is entitled to an anti suit injunction. The decision in **Sondur Gopal** (*supra*) in my humble opinion will have not help the Husband's case. In **Sondur Gopal's** case, the wife filed a petition for Divorce in the Family Court at Bandra. The husband questioned the maintainability of the proceedings as according to him, the couple "acquired Citizenship of Sweden domiciled in Australia". The Apex Court held that there is no material to endorse husband's claim of being a domicile of Australia. It was held that as husband

and wife are domiciled in India, hence, they are covered by Hindu Marriage Act. The dictum in **Sondur's** case will not apply in the present facts as the challenge is not to the maintainability of the Divorce petition instituted by the husband in Mumbai, but the wife is opposing grant of anti suit injunction to institute proceedings in the Foreign Court on the principle of comity and forum convenience as the parties are residing in Australia for considerable length of time.

12. As regards the decision in **Y. Narasimha Rao** (*supra*) , it relates to a foreign judgment being unenforceable as the same was obtained by playing fraud on a foreign Court by representing to it incorrect jurisdictional facts. The Apex Court held that the decree dissolving the marriage passed by the foreign Court is without jurisdiction according to the Hindu Marriage Act as neither the marriage was celebrated nor the parties last resided together nor the Respondent resided within the jurisdiction of that Court. It is further held that residence does not mean a temporary residence for the purpose of obtaining a divorce but habitual residence which is intended to be permanent for future as well. In support of grant of anti suit injunction, in the present facts, the decision of the Hon'ble Supreme Court in **Y. Narasimha Rao's** case can have no

application.

13. The Apex Court in **Dinesh Singh Thakur's case** (supra) considered the provisions Section 41 of the Specific Relief Act which provides for various instances and circumstances under which injunction cannot be granted. The Apex Court in para 23 held that Foreign Court cannot be presumed to be exercising its jurisdiction wrongly even after the appellant being able to prove that the parties continue to be governed by the law governing Hindus in India in the matter of dispute between them.

14. In the case of **Modi Entertainment Network and Ors. Vs. W.S.G. Cricket PTE. Ltd.**, Their Lordships in paragraph 10 held that the Courts in India like the Courts in England are courts of both law and equity. The principles governing grant of injunction - an equitable relief - by a court will also govern grant of anti-suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including a foreign court, it is called anti-suit injunction. It is a common ground that the Courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because

courts of equity exercise jurisdiction in personam. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court. In paragraph 28, Their Lordship culled out the following principles :-

- (1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects : -
 - (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;
 - (b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and
 - (c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind;
- (2) in a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens;
- (3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;
- (4) a court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties

have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like;

- (5) where parties have agreed, under a non- exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum;
- (6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non- exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens; and
- (7) the burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."

(emphasis supplied)

15. Reverting back to the facts of the present case, since 2015 the parties are residing in Australia. They are now on PR Visa. The matrimonial disputes between parties started in Australia. The wife left the matrimonial home some time in November 2018. The suit was filed by the respondent wife in Federal Circuit Court, Australia and interim consent order was obtained. The agreement between parties pertaining to the child security was arrived at Family Relationship Center, Australia. The husband has given an undertaking in the asset division case that he will not transfer any properties or assets situated outside Australia to the third parties.

16. It is pertinent to note that when the husband had visited India some time in 2019, he instituted the Petition for divorce in the Family Court at Mumbai. The petitioner has executed Special Power of Attorney in favour of Shri Sanjay Pathak to deal with the litigation at Mumbai and any other litigation. In the said power of attorney it is mentioned that the petitioner is out of India for few months, hence, it will be difficult for him to attend the Courts during that time. Even the present Petition is affirmed by the Power of Attorney, on behalf of the Husband.

17. At the cost of repetition, as held in **Dinesh Singh Thakur's** case, it is well settled that foreign courts cannot be presumed to exercise its jurisdiction wrongly even after one of the party is able to prove that the parties in the case continue to be governed by law governing Hindus in India. The couple is residing in Australia since 2015. The parties are governed by laws governing Hindus. The husband has to establish that he will suffer grave injustice if the injunction is not granted. The parties are permanent residents of Australia. In the correspondence with the Immigration Specialist in 2015, the husband has expressed his intention of settling in Australia. The circumstances when the Foreign Court will have concurrent jurisdiction in a given case will depend on facts and circumstances of each case. Their Lordships in **Y. Narasimha Rao' case** (supra) observed that definitive rules for recognition of foreign judgment in family matters and particularly matrimonial disputes prove to be inadequate or miss some aspects but a beginning has to be made as best as one can, the lacunae and the errors being left to be filled and corrected by future judgments. The following Rule is deduced for recognising a foreign matrimonial judgment in this country in paragraph 20 the relevant portion which reads thus :-

“20. The jurisdiction assumed by the foreign court as well as the grounds 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 or 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.”

18. For deciding the present issue, it is not at all necessary to proceed on the footing that the husband subjected himself to the jurisdiction of the Foreign Court. In the present case, it is not as if the husband will suffer grave injustice if the anti-suit injunction is refused. The husband has executed a Power of Attorney empowering another person to pursue the disputes on his behalf before the Family Court in Mumbai. Even the present Petition is affirmed by the Power of Attorney. There is nothing brought on record to show how the husband will suffer grave injustice if the anti suit injunction is refused. Even further, if the injunction is declined it cannot be said that ends of justice will be defeated and injustice will be perpetuated. The proceedings which are initiated by the wife before the Foreign Court is the Assets Division Suit which is now transferred to the Family Court in Sydney, Australia. Not only the husband has expressed his intention

to settle in Australia to the Immigration Specialist, but even has purchased property. The balance of convenience is clearly in favour of the wife. Their stay in Australia cannot be regarded as a short stay for a temporary period which otherwise could have been regarded as one of the factors for grant of anti suit injunction.

19. In the peculiar facts of this case and in view of the above discussion, it cannot be said that the view taken by the Family Court is unreasonable or perverse. There is no reason to interfere with the order passed by the Family Court, Mumbai. The Writ Petition is accordingly dismissed. No order as to costs.

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(**M. S. KARNIK, J.**)