

Madras High Court

S.Saravanan vs Deepa on 10 November, 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.11.2010

CORAM

THE HONOURABLE Mr. JUSTICE R.S.RAMANATHAN

C.R.P. No.413 of 2010

and

M.P.No.1 of 2010

S.Saravanan

.... Petitioner

Vs.

Deepa

... Respondent

Civil Revision Petition is filed under Article 227 of Constitution of India, against the Fair and

For Petitioner : : Mr.R.Thiyagarajan (Senior Counsel)
for Mr.M.Muthappan

For respondent : : Mr. V.Balu

O R D E R

The respondent in O.P.No.1417 of 2008 on the file of Principal Family Court, Chennai, is the revision petitioner.

2. The respondent herein filed O.P.No.1417 of 2008 before the Principal Family Court against the revision petitioner for restitution of conjugal rights and in that application, the revision petitioner filed I.A.No.2030 of 2009 to decide the maintainability of the O.P.No.1417 of 2008 as a preliminary issue, in view of the divorce decree granted earlier in favour of the revision petitioner herein and that application was dismissed by the Principal Family Court Judge and aggrieved by the same this revision is filed.

3. The case of the revision petitioner is that the respondent was his wife and he filed application for dissolution of marriage in Case No.1-05-FL-125461 before the Superior Court of California to dissolve the marriage between him and the respondent herein and as there was no appearance for

the respondent before the Superior Court of California despite service of summons that Court passed an order of dissolution of marriage on the ground of irreconcilable differences and therefore, the marriage between the petitioner and respondent was already dissolved by a Competent Court and hence the application filed by the respondent herein for restitution of conjugal rights is not maintainable and therefore that question must be taken as a preliminary issue.

4. The respondent herein, who was also the respondent in I.A.No.2030 of 2009 filed counter stating that the order passed by the Superior Court of California was an ex parte order and United States of America is not a reciprocating country to India and therefore, any Judgment passed by a foreign court cannot be construed as a valid Judgment as per Section 13 of the C.P.C. It is further stated that summons in that proceedings was not served on her. The learned Family Court Judge relying upon the Judgment in Hon'ble Supreme Court rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) held that the order passed by the Superior Court of California dissolving the marriage between the parties is without jurisdiction and unenforceable in India and is also not binding upon the respondent and dismissed the application. Aggrieved by the same, this Revision is filed by the petitioner husband.

5. Mr.R.Thiyagarajan, learned senior counsel appearing for the revision petitioner submitted that as per Section 13 of C.P.C. and as per the Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) a Foreign Judgment cannot be relied upon. Nevertheless, the learned senior counsel submitted that when the parties submitted to the jurisdiction of the Foreign Court then they are bound by the Judgment and in this case, the respondent herein went to America and participated in the proceedings and submitted to the jurisdiction of the Foreign Court by filing application to set aside the ex parte order of divorce, filed various applications for spousal support and for other reliefs and the petitioner's counsel at America also agreed for setting aside the ex parte decree of divorce but refused to grant spousal support and other reliefs prayed for the respondents and thereafter the respondent did not prosecute the case and those applications were dismissed and therefore, having regard to the fact that the respondent submitted to the jurisdiction of the Foreign Court, she is bound by the Judgment rendered by the Superior Court of California and hence the present petition filed by the respondent before the usual Family Court for restitution of conjugal right in O.P.No.1417 of 2008 is not maintainable.

6. On the other hand, Mr.V.Balu, learned counsel for the respondent submitted that the Foreign Court is not having jurisdiction to entertain the application as admittedly, the marriage took place at Chennai according to Hindu rites and the respondent was severely assaulted and she was forced to return to India and thereafter, the revision petitioner filed application for divorce before the Superior Court of the State of California and the ground on which dissolution of marriage was sought for namely irreconcilable differences is not a ground available in India for divorce and United States of America is not a reciprocating country for India and hence as per the Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another), the Judgment rendered in case No.1-05-FL-125461 by the Superior Court of California is not valid in India and the said decree is unenforceable and is not binding on the respondent. The learned counsel for the respondent further submitted that the respondent has not submitted to the jurisdiction of the Foreign Court and she filed only application, to set aside the ex parte decree and

she has not filed her statement contesting the said application filed by the revision petitioner herein and the filing of other applications such as application for spousal support cannot be considered as submitting to the jurisdiction of the Foreign Court.

7. The point for consideration in this revision is:-

1. Whether the respondent submitted to the jurisdiction of the Foreign Court by filing of an application to set aside the ex parte order or by filing various applications for spousal support and for other reliefs?

8. Admittedly, both parties are Indians and the marriage between them took place in Chennai. Both parties are governed by Hindu Marriage Act. It is also not in dispute that under the Hindu Marriage Act, as it stood today irreconcilable differences is not a ground for divorce. In these circumstances, we will have to see whether the respondent submitted to the jurisdiction of the Foreign Court.

9. As agreed by both the counsels, the law has been settled by the Hon'ble Supreme Court Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another). The Hon'ble Supreme Court while interpreting Section 13 of C.P.C. held as follows:-

"Clause (a) of Section 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. We are of the view that this clause should be interpreted to mean that only that court will be a court of competent jurisdiction which the Act or the law under which the parties are married recognises as a court of competent jurisdiction to entertain the matrimonial dispute. Any other court should be held to be a court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that court. The expression "competent court" in Section 41 of the Indian Evidence Act has also to be construed likewise.

Clause (b) of Section 13 states that if a foreign judgment has not been given on the merits of the case, the courts in this country will not recognise such judgment. This clause should be interpreted to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the court either in person or through a representative for objecting to the jurisdiction of the court, should not be considered as a decision on the merits of the case. In this respect the general rules of the acquiescence to the jurisdiction of the court which may be valid in other matters and areas should be ignored and deemed inappropriate.

The second part of clause (c) of Section 13 states that where the judgment is founded on a refusal to recognise the law of this country in cases in which such law is applicable, the judgment will not be recognised by the courts in this country. The marriages which take place in this country can only be

under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married and no other law. When, therefore, a foreign judgment is founded on a jurisdiction which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country. For the same reason, such a judgment will also be unenforceable under clause (f) of Section 13, since such a judgment would obviously be in breach of the matrimonial law in force in this country.

Clause (d) of Section 13 which makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained are opposed to natural justice, states no more than an elementary principle on which any civilised system of justice rests. However, in matters concerning the family law such as the matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. If the rule of *audi alteram partem* has any meaning with reference to the proceedings in a foreign court, for the purposes of the rule it should not be deemed sufficient that the respondent has been duly served with the process of the court. It is necessary to ascertain whether the respondent was in a position to present or represent himself/herself and contest effectively the said proceedings. This requirement should apply equally to the appellate proceedings if and when they are filed by either party.

If the foreign court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the costs of travel, residence and litigation where necessary, it should be held that the proceedings are in breach of the principles of natural justice. It is for this reason that we find that the rules of Private International Law of some countries insist, even in commercial matters, that the action should be filed in the forum where the defendant is either domiciled or is habitually resident. It is only in special cases which is called special jurisdiction where the claim has some real link with other forum that a judgment of such forum is recognised. This jurisdictional principle is also recognised by the Judgments Convention of the European Community. If, therefore, the courts in this country also insist as a matter of rule that foreign matrimonial judgment will be recognised only if it is of the forum where the respondent is domiciled or habitually and permanently resides, the provisions of Clause (d) may be held to have been satisfied.

The provision of clause (e) of Section 13 of which requires that the courts in this country will not recognise a foreign judgment. It it has been obtained by fraud, is self-evident. However, in view of the decision of this Court in *Smt.Satya vs Teja Singh* it must be understood that the fraud need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts.

From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. 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."

Therefore, it is seen from the above Judgment that unless the respondent voluntarily and effectively submitted to the jurisdiction of the Foreign Court and contesting the claim which is based on the ground available and the matrimonial law under which the parties are married the Judgment of the Foreign Court cannot be relied upon. As stated supra, the ground on which the revision petitioner applied for dissolution of marriage was irreconcilable differences. As per Section 13 of the Hindu Marriage Act, irreconcilable differences is not one of the grounds for divorce. Further, the Court which granted the decree must be a competent Court that has been considered by the Hon'ble Supreme Court in the very same Judgment that only that Court will be a Court of competent jurisdiction which the Act or the Law under which the parties are married recognises as a Court of competent jurisdiction to entertain the matrimonial dispute. Admittedly, the parties got married in Chennai under the Hindu Marriage Act and therefore, the Foreign Court did not have jurisdiction to entertain the matrimonial dispute in respect of marriage that took place in India as per the Hindu Marriage Act. Therefore, unless the respondent submitted to the jurisdiction of the Foreign Court, the Judgment rendered by the Foreign Court cannot be enforced in India against the respondent.

10. It is submitted by Mr.R.Thiyagarajan, learned senior counsel that by filing application to set aside the ex parte decree of divorce and by filing various applications for various relief, the respondent submitted to the jurisdiction of the Foreign Court and therefore, as per the Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another), the decree is binding on the respondent.

11. Mr.V.Balu, learned counsel for the respondent has submitted that by filing an application to set aside the ex parte decree, the respondent cannot be said to have submitted to the jurisdiction of the Foreign Court. Further, the application to set aside the ex parte decree without filing a written statement or counter cannot be construed as submitting to the jurisdiction of the Foreign Court for the reason that after setting aside the ex parte order, the respondent might have taken the plea that the Foreign Court has no jurisdiction to entertain such dispute and therefore, in the absence of filing any written statement, the mere filing of an application to set aside the ex parte decree will not amount to submitting to the jurisdiction of the Family Court. According to the learned counsel for the respondent that filing of an application to set aside the ex parte decree will not amount to submitting to the jurisdiction of the Court.

12. According to me, by way of analogy Section 34 of the Arbitration Act, 1940 can be relied upon to find out whether an application to set aside the ex parte decree will amount to submitting to the jurisdiction of the Court. As per Section 34 of the Arbitration Act, 1940 whether any party to an

arbitration agreement or any person claiming under him commences any legal proceedings against any other party to that agreement or any person claiming under him, any party to such legal proceedings made at any time before filing written statement or taking any other steps in the judicial proceedings applied to the judicial authority before which proceedings are pending to stay the proceedings. While interpreting the phrase taking any other steps in the proceeding, the Hon'ble Supreme Court held in the Judgment reported in AIR 1982 SCC 1302 in the matter of Food Corporation of India and another Vs. M/s.Yadav Engineer and Contractor held as follows:-

" Giving the expression "taking any other steps in the proceedings" such wide connotation as making an application for any purpose in the suit such as vacating stay, discharge of the receiver or even modifying the interim orders would work hardship and would be inequitable to the party who is willing to abide by the arbitration agreement and yet be forced to suffer the inequity of ex parte orders. Therefore, the expression "taking any other steps in the proceedings" must be given a narrow meaning in that the step must be taken in the main proceeding of the suit and it must be such step as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings. Each and every step taken in the proceedings cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of proceedings.

....Therefore, unless the step alleged to have been taken by the party seeking to enforce arbitration agreement is such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby indicate that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration any other step would not disentitle the party from seeking relief under S.34. Contesting the application for interim injunction or for appointment of a receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to an order under S.34."

13. Further in the Judgment rendered in AIR 1987 MP 164 (M/s.Sharda Talkies Vs. M/s.Dhadiwal Exhibitors) it has been held that application for setting aside the ex parte decree will not amount to taking other steps in the suit. In AIR 1952 Punjab 109 in the matter of M/s.Charan and Sons Vs. Harbajan Singh, the Punjab High Court held that application to set aside will not amount to taking a step in the proceedings. Therefore, by filing an application to set aside the ex parte decree it cannot be stated that the respondent has submitted to the jurisdiction of the Foreign Court. Further this Court, also held in the Judgment reported in 2005 (3) MLJ 1 in the matter of T.Sivaraman Vs. P.Renganayagi following the Supreme Court Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) that in the absence of any evidence to show that the husband and wife entered in to a matrimonial agreement in United States not to institute any legal action for divorce in India, the dissolution of marriage granted by the Foreign Court is not valid and the application filed by the wife for restitution of conjugal rights in India is maintainable. Considering all these aspects, I am of the view that the learned Principal Family Court Judge has elaborately discussed all these aspects and dismissed the application, relying upon the Judgement of the Hon'ble Supreme Court rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) and held the petition filed by the wife of restitution of conjugal

rights is maintainable and I do not find any reason to interfere with the order of the lower Court and the revision is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

10.11.2010

Index : Yes
Internet : Yes
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To
The Principal Family Court,
Chennai.

R. S. RAMANATHAN, J
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10.11.2010