

EXECUTABILITY & ENFORCEABILITY OF FOREIGN JUDGMENTS AND DECREES IN INDIA: AN ANALYSIS OF JUDICIAL TRENDS

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I. Introduction

The liberalization of Indian Economy and globalization of business activities, is paving a way in for free flow of foreign capital/ funds in India. Also, Indian Companies are investing in foreign companies/ countries. With this India is perched to be a major international and global player in the world economy. There is an advent of a large number of International Contracts being signed involving parties of different geographical origins and subjects of different jurisdictions. Substantial International Contracts, incorporate a provisions for settlement of disputes between the parties through Arbitration at international level or through the adjudication of disputes by the foreign courts.

Enforceability of judgments and awards passed by the Foreign Courts (courts located outside the politico geographical boundary of a country) is a twilight zone of International Law and involves complex issues of law. There are numerous impediments in the enforceability of foreign awards and judgments, Sovereignty of nations being the perilous and another may be absence of a strong enforcement mechanism/ authority/ body.

However, even after exercise of jurisdiction, the courts may be unable to help a party in getting relief. The biggest reason for such failure being local laws of the country concerned where the judgment is being enforced have certain restrictions for the execution/enforcement of foreign judgments or decrees or award in the Country.

Number of citizens of India with different personal laws have migrated and are migrating to different countries either to make their permanent abode there or for temporary residence. There is also immigration of the nationals of other countries. It is also not unusual to come across cases where citizens of India have been contracting marriages either in India or abroad with nationals of the other countries or among themselves, or having married here, either both or one of them migrate to other countries.

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There are cases where parties having married here have been either domiciled or residing separately in different foreign countries. This migration, temporary or permanent, has also been giving rise to various kinds of matrimonial disputes destroying in its turn the family and its peace².

Abandoned bride in distress due to runaway foreign country resident Indian spouse, desperate parent seeking child support and maintenance, non-resident spouse seeking enforcement of foreign divorce decree in India, foreign adoptive parents desperately trying to resolve Indian legal formalities for adopting a child in India, officials of a foreign High Commission trying to understand the customary practices of marriage and divorce exclusively saved by Indian legislation: these are some instances of problems arising every day from cross-border migration.

There are a large number of legal issues that concern a sizeable section of the Global Indian Community residing abroad. Though the non-resident Indians have increased multifold in foreign jurisdictions, family law disputes and situations are handicapped for want of proper professional information and advice on Indian laws. The problems created by such migration largely remain unresolved. There are a plethora of problems in matters concerning succession and transfer of property, conditions of validity of marriages solemnized in India, modes and means of divorce under Indian law, legal formalities to be complied with for adopting children from India, banking affairs, taxation issues, execution and implementation of wills and other commercial propositions for non-resident Indians. However, application of multiple laws, their judicial interpretation and other legalities often leave the problems unresolved even though remedies partially exist in Indian law and partly need new urgent legislation.

The number of non-resident Indians (NRI) has multiplied in every jurisdiction abroad. With his return the NRI seeks a remedy for his legal problem connected with his temporary or permanent return to India. This invariably makes the NRI import the foreign law of the overseas jurisdiction from where he has migrated. Such a situation is created because either Indian law provides him no remedy or because he finds it easier and quicker to import a foreign court judgment to India on the basis of alien law which has no parallel in the Indian jurisdiction. This clash of jurisdictional law is commonly called Conflict of Laws in the realm of Private International Law which is not yet a developed jurisprudence in the Indian territory.

² Y. Narasimha Rao vs. Y. Venkata Lakshmi, JT 1991 (3) SC 33

II. Difficulties Faced Under Indian Law

Areas of family law in which the problems of jurisdiction are seen occurring very frequently relate to dissolution of marriage, inter-parental child abduction, inter country child adoption and succession of property of non-resident Indians. In matters of divorce, since irretrievable breakdown of marriage is not a ground for dissolving the marriage under Indian law, Indian Courts in principle do not recognize foreign matrimonial judgments dissolving marriage by such breakdown. Surprisingly, even very little help is available in areas of matrimonial offences, leaving a helpless deserted Indian spouse on Indian shores confronted with a matrimonial litigation of a foreign court which he or she neither has the means or ability to invoke often results in despair, frustration and disgust. Likewise, enforcement of a foreign court order in whose violation a child of the family has been removed and brought to Indian soil brings a parent to India seeking a legal remedy.

Unfortunately, no special Indian legislation exists to combat such problems and provide certain remedies. The numbers of Indians on foreign shores have increased multifold but the multiple problems which bring them back to India are still left to be resolved by the conventional Indian legislation. Times have changed but laws have not. However, the dynamic, progressive and open minded judicial system in the Indian Jurisprudence often comes to the rescue of such problems by interpreting the existing laws with a practical application to the new generation problems of immigrant Indians. Fortunately, judicial legislation is the only option/ crutch available.

Vide this research paper/ article, let us aim to study the binding nature of the foreign judgments in consistency with the nature, scope and object of section 13 of The Code of Civil Procedure, 1908 (as amended from time to time) ("CPC"). Also let us analyze the conditions under which the judgments given by any foreign court creates the rule of estoppel or res-judicata.

The "recognition" of a foreign judgment occurs when the court of one country or jurisdiction accepts a judicial decision made by the courts of another "foreign" country or jurisdiction, and issues a judgment in substantially identical terms without rehearing the substance of the original lawsuit. Recognition will be generally denied if the judgment is substantively incompatible with basic legal principles in the recognizing country.

For the purpose of brevity let us first glance through the bare provisions under the CPC governing the execution of Foreign Judgments in India.

"Foreign Court"³ is "a Court situated outside India and not established or constituted by the authority of the Central Government".

"Foreign Judgment"⁴ is a judgment of a Foreign Court.

When Foreign Judgment not Conclusive⁵:

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 litigation 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.

Presumption as to foreign judgments⁶:

The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

Court in which suits to be instituted⁷:

Every suit shall be instituted in the Court of the lowest grade competent to try it.

³ Section 2(5) of The Code of Civil Procedure, 1908

⁴ Section 2(6) of The Code of Civil Procedure, 1908

⁵ Section 13 of The Code of Civil Procedure, 1908

⁶ Section 14 of The Code of Civil Procedure, 1908

⁷ Section 15 of The Code of Civil Procedure, 1908

Execution of decrees passed by Courts in reciprocating territory⁸:

- (1) Where a certified copy of decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.
- (2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.
- (3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1: "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2: "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect to a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

III. Enforcing Foreign Judgments in India

A foreign judgment can be enforced in India in one of two ways:

1. ***Judgments from Courts in "reciprocating territories"***: By filing an execution petition under Section 44A of the CPC- Judgments from Courts in 'reciprocating territories' can be enforced directly by filing before the Indian Court an execution decree.

A ***reciprocating territory***⁹ is defined as "any country or territory outside India which the Central Government may, by notification in the

⁸ Section 44A of The Code of Civil Procedure, 1908

⁹ Explanation 1, Section 44A of The Code of Civil Procedure, 1908

Official Gazette, declare to be a reciprocating territory and "**Superior Courts**", with reference to any such territory, means such Courts as may be specified in the said notification.. Till date only eleven countries have been notified¹⁰ as Reciprocating Territories under the provisions of Section 44A of the CPC.

In *N.P.A.K. Muthiah Chettiar and Ors. Vs. K.S. Rm. Firm Shwebo, Burma and Ors*¹¹, The Hon'ble High Court of Madras observed that with respect to decrees of a reciprocating territory contemplated in the explanation to Section 44-A no fresh suit is necessary but the same can be executed by the application of the provisions of Section 47, of CPC. The distinction that has to be borne in mind is that reciprocating territories enjoy greater privilege regarding execution of decrees of their superior Courts in our country than are enjoyed by the non-reciprocating territories.

In *Kevin George Vaz Vs. Cotton Textiles Exports Promotion Council*¹², the Hon'ble High Court of Bombay clarified the above discussed position of the Indian Legal System vis-à-vis Foreign Awards from Reciprocating and Non-Reciprocating territories of India. The Hon'ble Court observed and propounded that it is pertinent to highlight that reciprocity is a bilateral arrangement. All the reciprocating territories of

¹⁰ Following have been notified as Reciprocating Territory and Superior Court

- i. On 3.1.56, Federation of Malaya (now Malaysia) and the High Court and the Courts of Appeal as the Superior Court
- ii. On 18.1.56, Colony of Aden and Supreme Court of Aden as the superior Court
- iii. On 15.10.1957, New Zealand and Cook Islands, Trust Territory of Western Samoa and the Supreme Court of New Zealand as the Superior Court
- iv. On 21.1.1961, Sikkim and the High court of Sikkim or any other court whose jurisdiction is not limited to a pecuniary jurisdiction.
- v. On 15.7.1961, Burma all civil and revenue courts as Superior Courts.
- vi. On 1.3.53, United Kingdom of Great Britain and Northern Ireland and the House of Lords, Court of Appeals, High Court of England, the Court of Sessions in Scotland, the High court in Northern Ireland, the Court of Chancery of the County Palatine or Lancaster and the Court of Chancery of the County Palatine or Durham as the Superior Courts.
- vii. On 22.3.54, Colony of Fiji and the Supreme Court of Fiji as the Superior Court
- viii. On 23.11.68, Hong Kong and republic of Singapore
- ix. On 1.9.66, Trinidad and Tobago
- x. On 26.9.70, Papua New Guinea and Supreme Court as the superior court
- xi. On 6.3.76, Bangladesh and Supreme Court and Courts of District and subordinate judges as the Superior Court.
- xii. Canada and the Supreme Court of Ontario, please see the decision in the case of Gurdas Mann Vs. Mohinder Singh, AIR 1993 P&H 92.

¹¹ AIR1957Mad. 25

¹² 2006 (5) BOMCR 555

India mutually agree to enforce court orders passed by the Indian Courts in their country as well.

2. **Judgments from "non-reciprocating territories:** By Filing a suit upon foreign judgment or decree- Judgments from the non-reciprocating territories, can be enforced only by filing a law suit in an Indian Court for a judgment based on the foreign judgment. The foreign Judgment is considered evidentiary. The time limit to file such a law suit is within 3 years from date of pronouncement of foreign judgment.

However, in both cases the judgment has to pass the test of section 13 of CPC which specifies certain exceptions under which the foreign judgment becomes inconclusive and therefore not executable or enforceable in India.

IV. The Proving Ground/ Substantiation - Section 13 of the Code of Civil Procedure, 1908

A foreign judgment operates as res judicata except for the exceptions as specified in the Section 13 of CPC and subject to the other conditions mentioned in Sec. 11 of CPC. The rules laid down in this section are rules of substantive law recognizing conclusiveness of a foreign judgment and not merely rules of procedure¹³. The judgment of a foreign court is enforced on the principle that where a court of competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy that claim. Such recognition is accorded not as an act of courtesy but on considerations of justice, equity and good conscience¹⁴. Awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining our notions of justice and public policy. We are sovereign within our territory but “it is no derogation of sovereignty to take account of foreign law¹⁵”.

The present paper sets sight on to discuss decisions of various courts in India including the Hon’ble Supreme Court of India, various High Courts and other Courts in order to analyze the law on the point and to highlight an inclusive view of the courts.

1. **Where it has not been pronounced by a Court of competent jurisdiction:**

A fundamental principle of law, that a judgment or order passed by a court, which lacks/ has no jurisdiction, is null and void. Thus, a judgment

¹³ Dr. Padmini Mishra Vs. Dr. Ramesh Chandra Mishra, 1990 70 Cut. LT 673

¹⁴ Satya Vs. Teja Singh, (1975) 1 SCC 120.

¹⁵ Badat & Co. Vs. East India Trading Co., AIR 1964 SC 552

of a foreign court to be conclusive and enforceable in India must be a judgment pronounced by a court of competent jurisdiction¹⁶.

For the purpose of brevity we shall analyze both sides of the coin i.e where the judgment pronounced was held to be by a court of competent jurisdiction and where it was held to be inconclusive as was pronounced by a court lacking jurisdiction.

In the case of *Moloji Nar Singh Rao vs. Shankar Saran*¹⁷, decided by a Constitutional Bench of Hon'ble Supreme Court of India comprising of 5 judges, where a suit was filed by the plaintiff in a foreign Court for recovery of some money against the defendants. The Defendants did not appear despite service of the writ of summons. The suit thereafter was proceeded ex parte against the defendants. The claim was decreed. The decree was brought to the local court for execution. The matter came up before the Supreme Court of India to discuss the major issue which "what conditions are necessary for giving jurisdiction to a foreign court before a foreign judgment is regarded as having extra-territorial validity." The Supreme Court in order to answer this issue relied upon the Halsbury's Laws of England Vol. III p. 144 para 257 (3rd Edition) and held that none of those conditions were satisfied in the present case. The Court while applying those conditions observed that:

- (a) The respondents (defendants) were not the subjects of Gwalior (foreign country¹⁸).
- (b) They did not owe any allegiance to the Ruler of Gwalior and therefore they were under no obligation to accept the judgments of the Courts of that state.
- (c) They were not residents in that state when the suit was instituted.
- (d) They were not temporarily present in that State when the process was served on them.
- (e) They did not in their character as plaintiffs in the foreign action themselves select the forum where the judgment was given against them
- (f) They did not voluntarily appear in that court.

¹⁶ Vishwanathan Vs Abdul Wajid, AIR 1963 SC 1. (1450).

¹⁷ AIR 1962 SC 1737.

¹⁸ It is necessary to deal with the various Statutes, Orders and agreements as a result of which the erstwhile Indian State of Gwalior became a part of the territories of the Union of India governed by one Civil Procedural law. So Gwalior is termed to be Foreign Country.

- (g) They had not contracted to submit to the jurisdiction of the foreign court.

Therefore the Supreme Court held that the foreign decree was null and void and could not be executed in the local courts.

In the case of *Sirdar Gurdial Singh Vs. Maharaja of Faridkot*¹⁹, it was held by the Privy Council that:

“A decree pronounced in absentem by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity, by the Courts or every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.”²⁰

In the case of *R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar*²¹, it was alleged by the respondent that since he was not a subject of the foreign country, and that he had not submitted to the jurisdiction of the Foreign Court (Singapore Court), the decree could not be executed in India. The Appellant, in defense of this argument, stated that the Respondent was a partner of a firm which was doing business in Singapore and had instituted various suits in the Singapore Courts. Therefore, the Appellant argued, that the Respondent had accepted the Singapore Courts jurisdiction. The Court held that it was the firm which had accepted the jurisdiction of the foreign Court and the Respondent, in an individual capacity, had not accepted the jurisdiction. This was one of the reasons for which the High Court held that the decree against the Respondent was not executable.

In the case of *Narappa Naicken Vs. Govindaraju Naicken*²², it was held that failing in an action to set aside a foreign decree in the foreign Courts does not amount to submission to jurisdiction, however, in case the decree is set aside and the party is allowed to plead and a new decree is passed then the defendant would be deemed to have submitted to the jurisdiction of the foreign court.

It was held in the case of *Thirunavakkaru Pandaram Vs Parasurama Ayyar*²³, that if a party has once appeared before a foreign court in the character of the plaintiff, it does not mean that he is forever afterwards to be regarded as having submitted to the jurisdiction of the foreign court in

¹⁹ (1895) 22 Cal 222 (PC): 21 IA 171.

²⁰ Ibid.

²¹ AIR 1973 Mad. 141.

²² AIR 1934 Mad. 434.

²³ AIR 1937 Mad. 97 at p. 99.

any subsequent action, by any person or upon any cause of action, which may be brought against him.

The Supreme Court in the case of *Shalig Ram Vs. Firm Daulatram Kundanmal*²⁴, held that filing of an application for leave to defend a summary suit in a foreign court amounted to voluntary submission to the jurisdiction of the foreign Court.

In the case of *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries Ltd.*²⁵ the Supreme Court held that even though the defendant had taken the plea of lack of jurisdiction before the trial Court but did not take the plea before the Appeal Court or in the Special Leave Petition before the Supreme Court, it amounted to submission to jurisdiction.

In the case of *Satya v. Teja*²⁶, while dealing with a matrimonial dispute, the Supreme Court held that the challenge under S. 13 was not limited to civil disputes alone but could also be taken in criminal proceedings. In this case a foreign decree of divorce obtained by the husband from the Nevada State Court in USA in absentum of the wife without her submitting to its jurisdiction was held to be not binding and valid upon a criminal court in proceedings for maintenance.²⁷

Reasoned scrutiny of the decisions mentioned above leads us to a conclusion that in actions-in-personam, judgment passed by a Foreign Court an Indian defendant, be enforceable against such a defendant in India, only if the judgment satisfies the conditions laid down by the Hon'ble Supreme Court in *Moloji Nar Singh Rao Vs. Shankar Saran*²⁸ (mentioned above)

2. Where it has not been given on the merits of the case:

A judgment is said to have been given on merits when, after taking evidence and after applying his mind regarding the truth or falsity of the plaintiff's case, the Judge decides the case one way or the other. The mere fact of a decree being ex parte will not necessarily justify a finding that it was not on merits²⁹.

In order to operate as res-judicata, a foreign judgment must have been given on merits of the case.

²⁴ AIR 1967 SC 739. This view was followed by the Supreme Court in the case of *Lalji Ram and Sons Vs. Firm Hansraj Nathuram*, AIR 1971 SC 974.

²⁵ (1990)3 SCC 481 at p. 495.

²⁶ AIR 1975 SC 105.

²⁷ *Ibid.* at p. 117 para 49.

²⁸ AIR 1962 SC 1737.

²⁹ *Lalji Vs. Hansraj*, (1971) 1 SCC 721 (726)

When a suit is dismissed for default of appearance of the plaintiff; or for non-production of the document by the plaintiff even before the written statement was filed by the defendant, or where the decree was passed in consequence of default of defendant in furnishing security, or after refusing leave to defend, such judgments are not on merits³⁰.

D.T. Keymer Vs. P. Viswanatham.³¹ A decision pronounced by Privy Council where, a suit for money was brought in the English Courts against the defendant as partner of a certain firm, wherein the latter denied that he was a partner and also that any money was due. Thereupon the defendant was served with certain interrogatories to be answered. On his omission to answer them his defence was struck off and judgment entered in the favour of the plaintiff. When the judgment was sought to be enforced in India, the defendant raised the objection that the judgment had not been rendered on the merits of the case and hence was not conclusive under the meaning of S. 13(b) of CPC. The matter reached the Privy Council, where the Court held that since the defendant's defence was struck down and it was treated as if the defendant had not defended the claim and the claim of the plaintiff was not investigated into, the decision was not conclusive in the meaning of S. 13(b) and therefore, could not be enforced in India.

*Mahomed Kassim & Co. Vs. Seeni Pakir-bin Ahmed*³² a decision by a full bench of the Madras High Court wherein the Bench relied upon the decision of Privy Council in the aforesaid case and held that a decree obtained on default of appearance of the defendant without any trial on evidence is a case where the judgment must be held not to have been on the merits of the case.³³ In the obiter dictum the Court observed that in a case where there was default in appearance, but however the claim of the plaintiff was tried in full on evidence and the plaintiff proved his case, the decision may be treated as a judgment on the merits of the case

In the case of *Gurdas Mann Vs. Mohinder Singh Brar*³⁴, the Punjab & Haryana High Court held that an ex parte judgment and decree which did not show that the plaintiff had led evidence to prove his claim before the Court, was not executable under S. 13(b) of the CPC since it was not passed on the merits of the claim.

³⁰ Keymer vs Vishwanathan Reddy, AIR 1916 PC 121.

³¹ AIR 1916 PC 121.

³² AIR 1927 Mad. 265(FB). See *Mallappa Yellappa Bennur vs Raghavendra Shamrao Deshpande*, AIR 1938 Bom. 173 at 177, the Court held that although under normal circumstances the court does not go into the merits of the case decided in the foreign court, however, due to S. 13(b) of CPC, the Courts in India have a right to examine the judgment to see whether it has been given on the merits.

³³ *Ibid.* at p. 270.

³⁴ AIR 1993 P&H 92.

In the case of *R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar*³⁵, the Madras High Court held that that the burden of proof for showing that the execution/enforceability of the judgment or decree was excepted due to the operation of S. 13 is upon the person resisting the execution.

In the case of *Y. Narsimha Rao Vs. Y. Venkata Lakshmi*³⁶, the Supreme Court while interpreting S. 13(b) of CPC held 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. The Court further held that 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.³⁷

It was held in *M/s International Woollen Mills Vs. M/s Standard Wool (U.K.) Ltd*³⁸. Exparte decree of the foreign Court cannot be presumed to be on merit by the aid of Section 114(e) of Evidence Act. Where ex parte judgment passed granting decree for money but nothing indicated whether any documents were looked into or whether merits of the case considered. Such judgments will not be enforceable in India.

In *Trilochan Choudhury Vs. Dayanidhi Patra*³⁹, the defendant entered appearance in the foreign Court and filed his written Statement. However, on the appointed day for hearing the defendant's advocate withdrew from the suit for want of instructions and also the defendant did not appear. The defendant was placed exparte. The Court heard the plaintiff on merits and passed the decree in his favour. The Orissa High court Court held that the foreign decree and the judgment was passed on the merits of the claim and was not excepted under S. 13(b) of the CPC.

In *Mohammad Abdulla Vs. P.M. Abdul Rahim*⁴⁰, the defendant had passed on a letter of consent to the plaintiff that the decree may be passed against him for the suit claim. The Court held that since the defendant agreed to the passing of the decree against him, the judgment could not be said to be not on the merits of the claim.

³⁵ AIR 1973 Mad. 141.

³⁶ (1991) 3 SCC 451.

³⁷ *Ibid.* at p. 461.

³⁸ AIR 2001 SC 2134

³⁹ AIR 1961 Ori. 158.

⁴⁰ AIR 1985 Mad. 379 at pp. 382 and 383.

In *Gajanan Sheshadri Pandharpurkar Vs. Shantabat*⁴¹, the Bombay High Court held that the true test for determining whether a decree is passed on the merits of the claim or not is whether the judgment has been given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. Since in the present case, although the defendant was considered to be ex-parte, the claim of the plaintiff was investigated into, the objection under S. 13(b) was held to be unsustainable.

Bearing in mind the decisions of the Hon'ble Supreme Court of India and various High Courts a robust opinion can be drawn that a judgment or decree passed by a Foreign Court, may not be enforceable in India, until and unless it can be established that the said judgment was passed after investigation of, and leading of evidence on the plaintiff's claim even if the judgment is passed ex parte.

3. *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:*

A judgment based upon an incorrect view of international law or a refusal to recognize the law of India where such law is applicable is not conclusive⁴². But the mistake must be apparent on the face of the proceedings.

In *Gurdayal Singh Vs. Rajah of Faridkot*⁴³, it was held by the Privy Council that where in a suit instituted in England on the basis of a contract made in India, the English court erroneously applied English law, the judgment of the court is covered by this clause in as much as it is a general principle of Private International Law that the rights and liabilities of the parties to a contract are governed by the place where the contract is made (*lex loci contractus*).

In *Panchapakesa Iyer Vs. K.N. Hussain Muhammad Rowther*⁴⁴, where the foreign court granted the probate of a will in the favour of the executors. The property was mostly under the jurisdiction of the foreign Court, but some of it was in India. the Madras High Court held that the foreign Court had adopted an incorrect view of International Law, since a foreign Court does not have jurisdiction over the immovable property situated in the other Country's Court's jurisdiction. Therefore the judgment was declared to be inconclusive and unenforceable in India

⁴¹ AIR 1939 Bom. 374.

⁴² Vishwanathan VS. Abdul Wajid, AIR 1963 SC 1 (21, 23).

⁴³ (1895) 22 Cal 222 (PC)

⁴⁴ AIR 1934 Mad. 145.

In *Narsimha Rao Vs. Venkata Lakshmi*⁴⁵, where a foreign judgment founded on a jurisdiction or on a ground not recognized by Indian law or International Law, it was held that it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matter adjudicated therein and, therefore, unenforceable in this country.

In *I&G Investment Trust Vs. Raja of Khalikote*⁴⁶, a suit was filed in the English Jurisdiction to avoid the consequences of the Orissa Money Lenders Act. The Court held that the judgment was passed on an incorrect view of the International law. The Court further observed that, although the judgment was based on the averment in the plaint that the Indian law did not apply, however there was no “refusal” to recognize the local laws by the Court.⁴⁷

In *Anoop Beniwal Vs. Jagbir Singh Beniwal*,⁴⁸ where the plaintiff had filed a suit for divorce in England on the basis of the English Act, that is the Matrimonial Causes Act, 1973. The particular ground under which the suit was filed was “that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.” This ground is covered by S. 1(1)(2)(b) of the Matrimonial Causes Act, 1973. The decree was obtained in England and came to India for enforcement. The respondent claimed that since the decree was based on the English Act, there was refusal by the English Court to recognize the Indian Law. The Court held that under the Indian Hindu Marriage Act under S. 13(1)(ia), there is a similar ground which is “cruelty” on which the divorce may be granted. Therefore the English Act, only used a milder expression for the same ground and therefore there was no refusal to recognize the law of India. Thus the decree was enforceable in India.

A meticulous analysis of the above mentioned judicial decisions alleviate for us to conclude that A judgment or decree passed by a foreign Court upon a claim for immovable property which is situate in the Indian territory may not be enforceable since it offends International Law and establishes the principle that a foreign judgment may not be enforceable in India, *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*

⁴⁵ Ibid footnote no. 32

⁴⁶ AIR 1952 Cal. 508.

⁴⁷ *Ibid.* at p. 525 para 43 and 44.

⁴⁸ AIR 1990 Del. 305 at 311.

4. Where the proceedings in which the judgment was obtained are opposed to natural justice:

It is a settled principle of law that the judicial and quasi judicial adjudication should always adhere to the Principles of Natural Justice and judgments delivered by a Court should be obtained after due observance of the due process of Law. A few of the several principles of natural justice being reasonable notice to the parties to the dispute, opportunity of being heard to the parties to the dispute.

A judgment, which is the result of bias or want of impartiality on the part of a the judicial authority, will be regarded as a nullity and the “*trial coram non iudice*”⁴⁹. The Hon’ble Supreme Court while interpreting the scope of S. 13(d) and the expression “principles of natural justice” in the context of foreign judgments held that since the natural guardians who were served with the notices did not evince any interest in joining the proceedings, the appointment of an officer of the court to be guardian ad litem of the minors in the proceedings was substantial compliance of the rule of Natural justice. The Court further observed that, the expression “natural justice” in clause (d) of Section 13 relates to the irregularities in procedure rather than to the merits of the case.

In the case of *Lalji Raja & Sons v. Firm Hansraj Nathuram*⁵⁰, the Supreme Court held that just because the suit was decreed ex-parte, although the defendants were served with the summons, does not mean that the judgment was opposed to natural justice.

In the case of *I&G Investment Trust v. Raja of Khalikote*⁵¹, the Court held that although the summons were issued but were never served and the decree was passed ex-parte, the proceedings were opposed to principles of natural justice and thus inconclusive.

Thorough scrutiny and analysis of the principles and judicial pronouncements lead us to an understanding that a judgment given without notice of the suit to the defendant or without affording a reasonable opportunity of representing his case is contrary to the principles of natural justice and, therefore, does not operate as *res judicata*. Court pronouncing a judgment or decree must be composed of impartial persons, must act fairly, without bias in good faith. A judgment or decree, in order to be competent and conclusive for enforcement in India must pass the test of gratifying the principles of natural justice in case the judgment or decree comes to the Indian court for enforcement

⁴⁹ Sankaran Vs. Lakshmi (1975) 3 SCC 351 (356): AIR 1974 SC 1764.

⁵⁰ AIR 1971 SC 974 at p. 977

⁵¹ AIR 1952 Cal. 508 at p. 524.

5. *Where it has been obtained by fraud:*

Section 13 (e) of the CPC embarks that a foreign judgement to be enforceable in India should not be obtained by fraud. Also, it is a settled principle of Private International Law that a judgement obtained by fraud is inconclusive and shall not serve as *res judicata*. Such fraud should not merely be constructive, but must be actual fraud consisting of representations designed and intended to mislead; a mere concealment of fact is not sufficient to avoid a foreign judgment.

Concurrently if we analyse, on the same subject, the position of law in England the conclusions are essentially the same. Cheshire⁵² states: "It is firmly established that a foreign judgment is impeachable for fraud in the sense that upon proof of fraud it cannot be enforced by action in England." All judgments whether pronounced by domestic or foreign courts are void if obtained by fraud, for fraud vitiates the most solemn proceeding of a court of justice.

In the case of *Satya v. Teja Singh*⁵³ the Supreme Court held that since the plaintiff had misled the foreign court as to its having jurisdiction over the matter, although it could not have had the jurisdiction, the judgment and decree was obtained by fraud and hence inconclusive.

*Lazarus Estates Ltd. v. Beasley*⁵⁴, it was observed by Lord Denning that, "No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."

In the case of *Sankaran v. Lakshmi*⁵⁵ the Supreme Court held as follows:

"In other words, though it is not permissible to show that the court was mistaken, it might be shown that it was misled. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely that on the merits, the decision was one which should not have been rendered but that it can be set aside if the Court was imposed upon or tricked into giving the judgment."

The Hon'ble Court further observed that The fraud may be either fraud on the part of the party invalidating a foreign judgment in

⁵² Private International Law, 8th Edn., p. 368.

⁵³ AIR 1975 SC 105 at p. 117 para 50.

⁵⁴ (1956) 1 All ER 341 (345)

⁵⁵ AIR 1974 SC 1764 at p. 1770.

whose favor the judgment is given or fraud on the court pronouncing the judgment.

In the case of *Maganbhai Chhotubhai Patel v. Maniben*⁵⁶, the court held that since the plaintiff had misled the court regarding his residence (domicile), the decree having been obtained by making false representation as to the jurisdictional facts, the decree was obtained by fraud and hence was inconclusive.

Finally to conclude the analysis, it is pertinent to study, *Chengalvaraya Naidu v. Jagannath*⁵⁷, wherein the Hon'ble Supreme Court observed: "It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of the law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

Therefore it is judicious to observe that a judgment or a decree which is void ab initio cannot be enforced anywhere in the world.

6. *Where it sustains a claim founded on a breach of any law in force in India:*

A foreign judgment founded on a breach of any law for the time being in force in India, it would not be enforced in India. Section 13 (f) of the CPC confirms and lays down the above mentioned principle/ law.

In the case of *T. Sundaram Pillai v. Kandaswami Pillai*⁵⁸, the plea of the defendant was that the judgment was obtained in breach of the Contract Act since the defendants at the relevant time were minors when the contract was entered into and since under the Contract Act they were not competent to enter into a contract, the claim was founded on the breach of the Indian Law. The Court held that, when a decree sustains a claim which was not wholly founded upon a breach of the Contract Act, the appellant cannot be prevented by clause (f) of S. 13 from executing his decree.

In *Satya v. Teja Singh*⁵⁹, it was observed by the Hon'ble Supreme Court that every case, which comes before an Indian Court, must be decided in accordance with Indian law. It is implicit that the foreign law must not offend the public policy.

Thus, a judgment or a decree, passed by a foreign court, on a claim founded on a breach of any law in force in India would not be enforceable in India.

⁵⁶ AIR 1985 Guj. 187.

⁵⁷ (1994) 1 SCC 1: AIR 1994 SC 853.

⁵⁸ AIR 1941 Mad. 387

⁵⁹ AIR 1975 SC 105 at p. 117 para 50.

V. A Wrap Up:

The conditions for seeking execution of a foreign decree in India have been very aptly summed up by the Indian Supreme Court in *M.V. AL. Quamar Vs. Tsaviliris Salvage (International) Limited*⁶⁰, it has been observed:

“A mere glance at that provision, read with relevant explanations shows that before it is invoked by any decree-holder, he must satisfy the following conditions.

- 1. A decree-holder who seeks execution must be armed with a money decree passed by any of the superior Court of any reciprocating territory, being any foreign country or territory which the Central Government may, by notification in official gazette, has declared to be a reciprocating territory for the purpose of the Section.*
- 2. Such an execution petition can be entertained by the executing Court in India being the District Court that will be clothed with the legal fiction as if the said foreign decree was passed by itself and whose aid and assistance are required for executing such a decree.*
- 3. Such a decree can be put up for execution before a District Court in India being the principal Civil Court of original jurisdiction and which will include the local limits of the original civil jurisdiction of a High Court.*
- 4. Once such execution petition is filed before the appropriate District Court the entire machinery of Section 47 for execution of Indian decrees would automatically get attracted.*
- 5. In such execution proceedings, the judgment-debtor of a foreign Court decree will be entitled to satisfy the executing Court in India that the foreign decree cannot be executed against him as it is hit by any of the exceptions specified in Clauses (a) to (f) of Section 13 of the C.P.C.”*

Practical experience in seeking actual implementation of the provisions of the CPC for execution of foreign decrees in Indian Courts has shown that they provide an effective and composite remedy under Indian law to foreign decree holders who are otherwise alien to the Indian legal system. A judgement debtor will surely avoid the enforcement by setting up legal objections available to him under Section 13 of the CPC which makes enforceability of foreign judgements a daunting task. Execution of a decree

⁶⁰ AIR, 2000 SC 2826 at p. 2832, para 6.

even in the Indian scenario is sometimes a start of a new round of litigation. Section 44A read with Section 13 of the CPC are composite, concise and inbuilt provisions of law which are exclusively applicable for execution of foreign decrees only.

And finally, Section 14 of the CPC lays down the “*Presumption as to Foreign Judgments*” and states that “*The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction*”.

A reading in totality of the matters in the overseas family law jurisdictions gives an indication that in such affairs, it is the judicial precedents which provide the much available guidance and judicial legislation on the subject. With the large number of non-resident Indians now permanently living in overseas jurisdictions, it has now become important that some composite legislation is enacted to deal with the problems of non-resident Indians to avoid them from importing judgments from foreign courts to India for implementation of their rights. The answer, therefore, lies in giving them law applicable to them as Indians rather than letting them invade the Indian system with judgments of foreign jurisdictions which do not find applicability in the Indian system. Hence, it is the Indian legislature which now seriously needs to review this issue and come out with a composite legislation for non-resident Indians in family law matters. Till this is done, foreign court judgments in domestic matters will keep cropping up and courts in India will continue with their salutary efforts in interpreting them in harmony with the Indian laws and doing substantial justice to parties in the most fair and equitable way⁶¹.

Analyzing the trends and judicial decisions it can be evidently concluded that, the Indian judiciary has made it clear that, the Indian Courts would not simply mechanically enforce judgments and decrees of foreign courts in family matters. The Indian courts have now started looking into the merits of the matters and deciding them on the considerations of Indian law in the best interest of the parties rather than simply implementing the orders without examining them. Fortunately, we can hail the Indian Judiciary for these laudable efforts and till such time when the Indian legislature comes to rescue with appropriate legislation, we seek solace with our unimpeachable and unstinted faith in the Indian Judiciary.

⁶¹ LAW COMMISSION OF INDIA (REPORT NO. 219) Need for Family Law Legislations for Non-resident Indians, 30th March, 2009, p. 21