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## Enforceability Of Foreign Judgments - Understanding the Domestication Of Legal Contours Under Indian Law

### Abstract:

The advancement of the world has brought globalization, liberalization of trade and commerce, economies, and various arenas. A new wing of law viz. ‘Transnational Law’ has emerged. This article deals with the enforcement of foreign judgments and the ways of consideration of trans-judicial communication. The concept of foreign judgment has evolved from the occasions where one nation is referring to the judgment of the courts of other nation. Thus the judgments from the foreign courts are said to be the foreign judgments.

This research paper discusses the enforceability of foreign judgments of the foreign courts. The judges of Indian courts occasionally refer to these foreign judgments for better adjudication of cases related to protection of human rights, gender justice, family dispute, cross-border business transactions, environment protection, etc. There are judgments and concepts of law that are being inspired from other countries like that was observed in abolition of Triple Talaq<sup>1</sup> practice by the Supreme Court in India.

This paper also talks about regarding the concept of recognition of foreign judgments, enforcement of the same and decrees passed by foreign courts and the nature, scope of sections 13, 14, 44A of the Code of Civil Procedure<sup>2</sup>. Every nation has its own conditions while referring to the foreign judgments or implementing in their domestic courts. Similarly,

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<sup>1</sup> Shayara Bano v. Union of India (2017) 9 SCC 1

<sup>2</sup> Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002) Acts of Parliament, 2002 (India)

in Indian context few circumstances are enumerated in section 13 of the Code of Civil Procedure, 1908 which entails when foreign judgments will not be binding.

**Keywords:** Foreign Judgments, Foreign courts, Enforceability, Indian Courts, Orders.

### **Introduction:**

The Constitution of India is considered as the ‘Mother of all Laws’ which demarcates the framework about the administration works of the country, encourages the unity and convergence of idealism. It is the main framework of political duties, fundamental duties, fundamental rights of citizens, etc. The foreign legislations of various countries have a strong impact on Indian legislation. The very basis of the Indian Constitution has been adopted from the constitutional concepts of the other countries. The features like Parliamentary Government, Rule of law, Legislative procedure, Single citizenship, Prerogative Writs were adopted from the Britain Legislation<sup>3</sup>. Other than this Impeachment of the President, functions of President and Vice President, Removal of Supreme Court and High Court Judges, Independence of Judiciary from USA<sup>4</sup>. The concepts like ‘Freedom of trade and commerce,’ ‘Concurrent List’ were adopted from Australia.

The Indian Higher Judiciary refers to the precedents of the foreign courts after consideration of the effectiveness and parameters of the Indian statutes. The courts are required to review the foreign decisions and interpretations of international instruments like treaties, conventions, declarations, etc. The foreign judgments are cogent and credible but not authoritative related to the cases like protection of Human Rights, right to privacy, gender justice, child custody, environment pertaining to cross-border business dealings.

The former Chief Justice of India **K.G. Balakrishnan** has observed that “Reliance on foreign precedents is necessary in certain categories of appellate litigation and adjudication.” He further added that “in recent years, the decisions of Constitutional Courts in law jurisdictions

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<sup>3</sup> Constitution of India: features taken from other countries, <https://www.jagranjosh.com/general-knowledge/constitution-of-india-features-taken-from-other-countries-1409660545-1>, (last visited Mar 4, 2024, 04:50 P.M.)

<sup>4</sup> Constitution of India: features taken from other countries, <https://www.jagranjosh.com/general-knowledge/constitution-of-india-features-taken-from-other-countries-1409660545-1>, (last visited Mar 4, 2024, 4:50 P.M.)

such as South Africa, Canada, New Zealand and India have become the primary catalyst behind the growing importance of comparative constitutional law.”

The Supreme Court of India abolished the Triple Talaq practice in the case of **Shayara Bano v. Union of India**<sup>5</sup> and this concept was inspired from the laws of the south-east Asian countries. The Apex court stated the laws from 19 countries including Egypt, Pakistan, Algeria, Jordan, Indonesia, Malaysia, etc.

### **Meaning and explanation of the term foreign courts and foreign judgment:**

Foreign judgments are often relied upon in the courts of India in their decisions by the judges in respect to certain parameters as applied by the statute. The two expressions “Foreign Judgment” and “Foreign Court” are enumerated in The Indian Code of Civil Procedure (CPC), 1908<sup>6</sup>. The Code also enumerates the procedure for enforcement of foreign judgments and decrees in India. The CPC, 1908 had defined the following as-

- Section 2(5) “Foreign Court” means a Court situate outside India and not established or continued by the authority of the Central Government<sup>7</sup>.

Therefore, the courts in England, Scotland, Ceylon, Burma, etc. are the foreign courts and the two conditions must be gratified to bring a court within the definition of a foreign court:

- a) The court should be situated outside India;
  - b) It must not be established by the Central Government of India or have any direct relation.
- Section 2(6) “Foreign Judgment” means the judgment of a foreign Court<sup>8</sup>.

To determine the crucial date as to whether a judgment has been passed from a foreign court or not, is the date of the judgment and not the date when it is sought to be enforced or executed.<sup>9</sup> Therefore, a judgment of a foreign court at the time of its pronouncement would not cease to be a foreign judgment just because of the fact, that the foreign territory has become a part of the Union of India. Now, an order which was moral and from a competent court of jurisdiction when it was made and which was passed by a tribunal which was

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<sup>5</sup>Shayara Bano v. Union of India (2017) 9 SCC 1

<sup>6</sup> Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002) Acts of Parliament, 2002 (India)

<sup>7</sup> Id. at 6

<sup>8</sup> Supra at 6

<sup>9</sup> Raj Rajendra Sardar Moloji Nar Singh v. Shankar Saran, AIR 1962 SC 1737

domestic at the date of its making and which could on that date has been enforced by a Indian court, will not lose its efficacy by reason of partition.<sup>10</sup>

### **Illustrations:**

- A sues B in a foreign court and the suit is decreed. A therefore sues B on that judgment in India. B will be precluded from putting in issue the matters which were directly and substantially in issue before the foreign court and adjudicated before the court.
- M sues N in a foreign court and subsequently the suit is dismissed by the court. The judgment will thus operate as a bar to a fresh suit by A against B in India on the same cause of action.

### **Concept of Trans-Judicial Communication vis-à-vis foreign judgments:**

Trans-judicial communication is increasing interaction and internationalism of legal education. The expression ‘trans-judicial communication’<sup>11</sup> which has been defined and described in three different forms which are as follows:

- a) **Vertical communication** – Vertical communication indicates when the domestic courts refer to the judgments of International adjudicatory institutions, irrespective of whether the countries are parties to the International instrument under which the adjudicatory body works. The judgments of the European Court of Human Rights and European Court of Justice refer to the decisions of the by the courts of other countries as well.
- b) **Horizontal communication** – The domestic courts refer to precedents from other national jurisdictions to interpret its own laws in horizontal Communication. The doctrine of ‘Stare decisis’ is followed when the comparative analysis is considered especially suitable to the emerging constitutional systems. For instance, the constitutional courts in Canada and South Africa frequently refer to the judgments of the foreign precedents to interpret the bill of rights in their respective legal system.

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<sup>10</sup> Kishori Lal v. Shanti Devi, AIR 1953 SC 441

<sup>11</sup> Anne-Marie Slaughter, A Typology of Transjudicial Communication, Vol. 29, U. Rich. L.Rev. 99 (1994), <http://scholarship.richmond.edu/lawreview/vol29/iss1/6> (last visited Mar 4, 2024, 4:50 P.M.)

- c) **Mixed vertical-horizontal communication** – In Mixed vertical-horizontal communication the domestic courts may refer to the decision of a foreign court on the interpretation of obligations applicable to both jurisdictions under an international instrument. For instance, courts in European countries freely refer to the decisions that deal with the interpretation of the emerging body of the European Community law.

### **Jurisdiction of foreign court:**

Jurisdiction of foreign courts is very fundamental aspect otherwise a judgment delivered by it would not be recognized in India which is a settled proposition in private international law<sup>12</sup>. The jurisdiction matters when there is only the competence of the court, i.e. territorial competence on the subject matter and over the defendant. The competence of the court or its jurisdiction is not regarded as material by our courts. The material date to decide the jurisdiction of the court is the time when the suit is instituted<sup>13</sup>.

There is distinction between want of jurisdiction and irregular exercise of the same. In the first situation, a decree passed by the court is nullity and non-est. In the latter situation, the decree is merely irregular or wrong but not without jurisdiction and thus it cannot be ignored. The landmark judgment in **Anisminic Ltd. v. Foreign Compensation Commission**<sup>14</sup> the legal position is considerably changed. It essentially assimilated the distinction between the lack of jurisdiction and erroneous exercise thereof.

### **Res judicata and foreign judgment:**

A foreign judgment is conclusive as to any matter adjudicated upon by a competent foreign court. Section 13 of the Code in quintessence enacts a rule of res judicata in relation to foreign judgments. Hence, if a foreign judgment is delivered by a court of having jurisdiction in the matter, it would operate as res judicata.<sup>15</sup> The submissions to jurisdiction of a foreign court may be express or implied. A defendant whether has submitted or not to the jurisdiction

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<sup>12</sup> Sankaran Govindan v. Lakshmi Bharathi (1975) 3 SCC 35

<sup>13</sup> Andhra Bank Ltd. v. R. Srinivasan, AIR 1962 SC 232

<sup>14</sup> Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147

<sup>15</sup> R. Viswanathan v. Rukn-ul-Mulk Syed Abdul, AIR 1963 SC 1

of a foreign court in a question of a fact which must be adjudicated in the light of the facts and circumstances of each case.<sup>16</sup>

### **The legislative provisions that administer the recognition and enforcement of foreign judgments in India:**

In India there are no states with various administrative regimes for recognition and enforcement of foreign judgments. The code of civil procedure is the only is uniformly applicable across the country. There are three sources of law in relation to implementation of foreign judgments in India:

- i. **Enacted Legislation by Parliament:** Section 44A of the Code of Civil Procedure enumerates execution of decrees from reciprocating territory. Where a judgment of a reciprocating territory is rendered by a superior court is enforced in India by the Indian domestic courts but that of a non-reciprocating country cannot be enforced directly and thus a new suit must be filed for its enforcement where the judgment holds an evidentiary value.
- ii. **Bilateral treaties:** The bilateral treaties with the reciprocating countries to recognition and enforcement of foreign judgments to which India is party, and
- iii. **Judicial Precedents:** The landmark case of Moloji Nar Singh Rao v. Shankar Saran<sup>17</sup> held that a foreign judgment not emanating from a superior court of a reciprocating territory cannot be executed in India without the filing of a new suit in which the said judgment has only evidentiary value/ on the basis of the foreign judgment.

India is not a party of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971. But, India has executed bilateral treaties with various countries in relation to the reciprocity for enforcing judgments and decrees.

### **Recognition of Foreign Judgment in Indian legal system:**

The Code of Civil Procedure, 1908 discusses that judgment shall be conclusive as to any matter thereby directly decided upon between the same parties or between the parties under

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<sup>16</sup> Sahlig Ram v. Firm Daulat Ram Kundanmal, AIR 1967 SC 739

<sup>17</sup> Moloji Nar Singh Rao v. Shankar Saran AIR 1962 1737

whom they claim contesting under the same title. The judgments shall be not conclusive under the following situations:

- a) where it is not passed by a court of competent jurisdiction;
- b) where the it has not been given on merits of the case;
- c) where it appears to be on the face of the proceedings;
- d) where it was obtained from the proceeding which was opposed to the natural justice;
- e) where it is obtained by fraud;
- f) where it sustains a claim founded based on breach of Indian law.

The Code presumes in favour of the competency of jurisdiction of the foreign court unless proved to the contrary. The landmark judgment of Ramanathan Chettyar and Another v Kalimuthu Pillay and Another<sup>18</sup> elucidates the following circumstances in which the foreign court is said to have competent jurisdiction where the defendant:

- is a subject of the country in which the judgment was passed;
- is a resident of the country in which the action was commenced;
- has in a previous case filed a suit in the same forum;
- has voluntarily appeared; or
- has contracted to submit itself to the jurisdiction of the foreign court.

Therefore, recognition of a foreign judgment depends upon the conditions of reciprocity, which are the basis of international treaties governing the recognition and enforcement of foreign judgments in India.

### **Enforcement Of Foreign Judgment in Indian Legal System:**

Foreign judgment which is enumerated in section 13 of the Code of Civil Procedure, 1907 can be enforced in India only in the following ways:

1. **Suit on foreign judgment:** A foreign judgment may be enforced by instituting a suit on such judgment. The general principle of law is that any decision by a foreign court, tribunal or quasi-judicial authority is not enforceable in a country unless such decision

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<sup>18</sup> Ramanathan Chettyar and Another v Kalimuthu Pillay and Another, 24 MLJ 619

is embodied in a decree of a court of that country.<sup>19</sup> The court cannot go into the merits of the original claim and it shall be conclusive as to matter thereby directly adjudicated upon between the same parties. Thus, such a suit must be filed within a period of three years from the date of the judgment<sup>20</sup>.

2. **Execution proceedings:** A foreign court can be enforced in proceedings in execution in certain specified cases mentioned in section 44-A of the Code<sup>21</sup>. The section provides that where a certified 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. When a foreign judgment is sought to be executed under section 44A, it will be open to the judgment debtor to take all objections which might be available under section 13 if a suit has been filed on such a judgment.<sup>22</sup> There has been due compliance out of six exceptions with some of the conditions and there has been no violation of some of the exceptions is of no avail. The decree can be executed under section 44A only if all conditions of section 13(a) to (f) are satisfied<sup>23</sup>.

### **Circumstances where foreign judgments are not binding vis-à-vis Section 13:**

Section 13 of the Code of Civil Procedure, 1908 entails that a foreign judgment is conclusive and will operate as res judicata between the parties and thereto except the cases which are mentioned in the section itself. In the following cases, a foreign judgment is not conclusive.

- i. **A foreign judgment is not pronounced by the competent court:** Any decree or judgment passed by a court of incompetent jurisdiction is null and void. The foreign judgment is of no exception and as a result any judgment from a foreign court of incompetent jurisdiction will thus be null and void. Thus, a judgment of foreign court will be conclusive when it will be passed from a court of competent

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<sup>19</sup> Roshanlal v. R.B. Mohan Singh (1975) 4 SCC 628

<sup>20</sup> Limitation Act, 1963, Article 101, (36 of 1963)

<sup>21</sup> Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002) Acts of Parliament, 2002 (India)

<sup>22</sup> R.M.V. Vellachi Achi v. R.M.A. Ramanathan Chettiar, AIR 1973 Mad 141

<sup>23</sup> Narhari Shivram v. Pannaal Umediram (176) 3 SCC 203



jurisdiction.<sup>24</sup> Thus, the final adjudication vis-à-vis the judgment must be conclusive from any foreign court of competent jurisdiction.<sup>25</sup>

When A sues B in a foreign court and if the suit is dismissed, the decision will act a bar to a fresh suit in India based on the same cause of action. Now, if a decree is passed in favour of A by a foreign court against B and he sues B on the judgment in India, B will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit and adjudicated by the foreign court.

- ii. **The foreign judgment is not adjudicated on merits:** A foreign judgment from any foreign court must be adjudicating a case on merits. In the instances where a suit is dismissed for default of appearance of the plaintiff; or for non-production of document by the plaintiff even before the written was filed by the defendant or where decree was passed in consequence of default of defendant in furnishing security, etc. such judgments are not on merits.<sup>26</sup> So, the mere fact of a decree being ex-parte will not necessarily justify a finding that it was not on merits.<sup>27</sup>
  
- iii. **Against International or Indian law:** A judgment based on an incorrect view of international law or a refusal to recognize the law of India where such law is applicable is not conclusive.<sup>28</sup> But the mistake must be ostensible on the face of the proceedings. Thus, where a suit is instituted in England on the basis of contract made in India, the English court erroneously applied English Law, the judgment of the court is enclosed 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.**<sup>29</sup>
  
- iv. **Opposed to natural justice:** It is a settled principle of Law that the foreign judgment or order passed by a court of competent jurisdiction must be through due observance of judicial process, that should satisfy the basic requirements of natural justice - which should be in fair, without bias, and in good faith. A judgment which is a result of biasness or has tinge of impartiality on it while adjudicating by a

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<sup>24</sup> Sankaram Govindan v. Lakshmi Bharathi (1975) 3 SCC 351

<sup>25</sup> Viswanathan v. Abdul Wajid, AIR 1961 SC1

<sup>26</sup> Narasimha Rao v. Ventaka Lakshmi, (1991) 3 SCC 451

<sup>27</sup> Isidore Fernando v. Thommai Antoni AIR 1933 Mad. 544

<sup>28</sup> Lalji Raja & Sons v. Firm Hansraj Nathuram (1971) 1 SCC 721

<sup>29</sup> Gurdoyal Singh v. Rajah of Faridkote, (1893-94) 21 IA 171

judge will be regarded as a nullity and the trial 'coram non iudice'<sup>30</sup>. The expression "natural justice" in clause (d) of section 13 relates to the irregularities in procedure rather than the merits of the case.<sup>31</sup>

- v. **Foreign judgment obtained by fraud:** When a foreign judgment is obtained by fraud then it will not operate res judicata which is a well settled principle of Private International Law and thus will not operate as res judicata. The legal maxim '**fraus et jus nunquam cohabitant**' refers that "fraud and justice never dwell together."<sup>32</sup> Cheshire<sup>33</sup> states that "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."<sup>34</sup> As per Lord Denning<sup>35</sup> "no judgment of a court, no order of any minister, can be allowed to stand, if it has been obtained by fraud." The Supreme Court in S.P. Chengalvaraya Naidu v. Jagannath<sup>36</sup> stated that it is a well settled proposition of law that a judgment of a decree obtained by fraud in a court of law is a nullity and non est in the eye of the law.
- vi. **Foreign judgment founded on a breach of Indian law:** When any foreign judgment is passed on a breach of law in force in India, it would not be enforced in India. The rules of Private International Law cannot be adopted mechanically and blindly.<sup>37</sup> The cases needs to be adjudicated must be in accordance with India law. It is implicit neither foreign law nor foreign judgment must not offend any domestic policy.

### **Presumption as to foreign judgment:**

Section 14 of the Code of Civil Procedure, 1907 declares that the court shall presume upon production of any document purporting to be a certified copy of a foreign judgment was pronounced by a court of competent jurisdiction, unless the contrary seems on the record or is

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<sup>30</sup> Sankaram Govindan v. Lakshmi Bharathi (1975) 3 SCC 351

<sup>31</sup> Sankaram Govindan v. Lakshmi Bharathi (1975) 3 SCC 351

<sup>32</sup> A.V. Papayya Sastry v. Govt. of A.P. (2007) 4 SCC 221

<sup>33</sup> G.C. Cheshire and P.M. North, Private International Law, (8<sup>th</sup> Ed.) 368

<sup>34</sup> Satya v. Teja Singh, (1975) I SCC 120

<sup>35</sup> Lazarus Estates Ltd. v. Beasley, (1956) 1 QB 702

<sup>36</sup> S.P. Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1

<sup>37</sup> Narasimha Rao v. Ventaka Lakshmi, (1991) 3 SCC 451

proved. However if for admissibility of such copy any further condition is required to be fulfilled it can be admitted in evidence only if that condition is satisfied.<sup>38</sup> The Supreme Court in *Narasimha Rao v. Ventaka Lakshmi*<sup>39</sup> held that mere production of a Photostat copy of a foreign judgment is not sufficient. It is obligatory to be certified by a representative of the Central Government in America.

### **Foreign judgments and its Conclusiveness in Indian legal system:**

A foreign judgment is conclusive and will be operating as *res judicata* between the parties and privies though not strangers. Any foreign judgment can be examined in perspective of competence of satisfying conditions as per the domestic laws of respective nations. A judgment evolving from a foreign court whether is conclusive or not is determined where the court in India will not require whether conclusions recorded by a foreign court are correct or findings otherwise tenable. The courts cannot go into merits of the original claim and shall be conclusive as to any matter thereby directly decided upon between the same parties subject to exceptions enumerated in clauses (a) to (f) of section 13.<sup>40</sup>

A foreign judgment is conclusive under section 13 of the Code, but it does not embrace any reasons in support of the judgment passed by a foreign court. Thus, it cannot be held that a foreign judgment would mean reasons recorded by a foreign judge in support of the order passed by him. The Supreme Court has observed that section 13 speaks not only of “judgment” but “any matter thereby directly adjudicated upon”. The word ‘any’ signifies that all the adjudicative parts of the judgment are equally conclusive. The Doctrine of merger does not apply to foreign judgments. It is applicable only for the plaintiff despite of foreign judgment in his favour to sue the defendant on the original cause of action and to obtain a decree in his favour.

### **Foreign Award:**

On evaluation of provided facts and evidence or merits while adjudication of a suit is done, then award is passed by a court in favour of one of the parties to the suit by the another one.

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<sup>38</sup> *International Wollen Mills v. Standard Wools Ltd.*, (2001) 5 SCC 265

<sup>39</sup> *Narasimha Rao v. Ventaka Lakshmi* (1991) 3 SCC 451

<sup>40</sup> *Badat and Co. v. East India Trading Co.*, AIR 1964 SC 538

A foreign award is passed by a foreign arbitrator and which will be enforceable in a country where it was made and therefore can be enforced in India.

**Conclusion:**

Judiciary is an important organ of any nation that maintains law and order of the society thus ensuring peace and security. Judiciary is a system comprising of Statutes, legal provisions, amended laws, judgments of court, Jurisdiction, etc. Sometimes the judges of courts of various nations occasionally do refer to these foreign judgments for better adjudication of cases related to protection of human rights, gender justice, family dispute, cross-border business transactions, environment protection, etc. Thus, there should be efficacy to the laws regarding the enforcement of foreign judgments arising from foreign courts must be duly amended from time to time for the betterment of the growth of judiciary and legal aspects in any nation thus promoting peace law and order in the world.

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