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CONFLICT OF LAWS

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I INTRODUCTION

GLOBALISATION AND increased movement of people from one country to another is the environment has created for speedy and frequent interaction. Greener pastures have attracted many a people to look for opportunities to establish new abodes. These changes envisage frictions and disputes to which there are no ready answers. Problems that arise are varied; they include impropriety in travel documents, contractual deals concerning international trade and commerce or service contracts as well as issues pertaining to marriages abroad. In all these matters presence of foreign element make the courts and tribunals apply rules of conflicts of laws / private international law that would lead them to identify appropriate law so as to avoid injustice to interacting parties. It is these situations that have given rise to principles of conflicts of laws. Hence the main and major resource for conflicts of laws is the decisions of courts and tribunals which most of the time are domestic. These decisions and judgments constitute the state practice. A systematized survey that records such state practice evolved from court's decisions indicates development of private international law periodically. The state practice in some countries is on the basis of legislations incorporating principles of conflicts of laws. These legislations will need new sections and amendments to be added as and when new areas of dispute are developed. Such progressive development of this law is evidenced through new judgments from courts. In India however conflicts principles are found incorporated in various statutes in a piecemeal manner in addition to the stream of decisions from courts. India's active interaction in trade and commerce globally has resulted in active practice of conflicts principles, indeed; in particular, matters relating to international commercial arbitration are a sure example. In personal matters, India has a unique system of inter-personal conflicts as a result of prevalent 'composite system of personal laws' having allegiance to various religions. Thus Indian state practice in this field of conflicts of laws generally follows the state practices such as UK (for good reasons), USA and others. However, inter-personal conflicts are surely India's own contribution. Further, India also includes in its state practice its international commitments under international conventions.

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This survey clearly indicates with large number of reported judicial decisions increased global interactions. Accordingly case law has also witnessed greater awareness of the subject private international law. It is no denying that there have been an increased number of judicial pronouncements year after year in this field which manifests progressive development of the subject in India. The topics covered in the present survey are domicile, international contracts, intellectual property rights (IPR), international commercial arbitration, family law and foreign judgments.

II DOMICILE

Domicile, notionally, a legal link that connects a person to a territory through a system of laws. All the commonwealth jurisdictions accept and practice domicile as a concept. However, its interpretation and application differs from state to state. Factors like, changes in the society, national interests, developing trends in patterns of life styles of people and many more can be attributed to the transformation of the concept from its traditional and conventional approach to adapt itself to the modern needs of states. This is very clear from the recent high court decisions. Further these decisions have explained the concept of domicile in the Indian context and have clarified the existing misconception rampant amongst the administrative authorities.

This is well illustrated in the Indian state practice, as is envisaged in *Sondur Gopal* v. *Sondur Rajini.*[1] The parties were married in India at Bangalore in 1989 according to Hindu rites and the marriage was registered under the Hindu Marriage Act, 1955 (HMA). After the marriage the parties left for Sweden and in 1997 became Swedish citizens. A child was also born in 1993. From 1997 to 1999 the couple stayed in India for a short period. In 1999 the husband accepted a job offer in Sydney, Australia. From 2001 to 2004 the parties were moving back and forth between Sweden and Sydney until 2004 when wife refused to return to Sydney, and filed a petition for judicial separation and custody of her minor children in Bombay Family Court. The husband questioned the maintainability of this petition as they have acquired Swedish citizenship and are domiciled currently in Australia although they were originally citizens of India. According to him they do not have domicile in India and hence not governed by HMA, 1955. On these averments the family court gave a verdict in favour of the husband. On appeal the High Court of Bombay reversed the decision, on the ground that his Indian domicile of origin revived when he abandoned Swedish domicile to acquire Australian domicile of choice. It is against this order of the Bombay High Court that the litigation reached the apex court.

In this context the apex court examined in depth the scope and extent of the applicability of the HMA, 1955. The court began with the analysis of section 1 of

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1 AIR 2013 S C 2678. See also "Conflict of Laws" XLII *ASIL* 61 (2006) for a comment at the high court level.

the Act.[2] From a plain reading of section 1(2) of the Act, it is evident that it has extra territorial operation. The general principle underlying the sovereignty of states is that laws made by one state cannot have operation in another state. A law which has extra territorial operation cannot directly be enforced in another state but such a law is not invalid and saved by article 245(2) of the Constitution of India. Article 245(2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation. But this does not mean that law having extra territorial operation can be enacted which has no nexus at all with India. In our opinion, unless such contingency exists, the Parliament shall be incompetent to make a law having extra territorial operation. Reference in this connection can be made to a decision of this court in *Electronics Corporation of India Ltd.* v. *Commissioner of Income Tax*[3] in which it has been held as follows:[4]

> But the question is whether a nexus with something in India is necessary. It seems to us that unless such nexus exists Parliament will have no competence to make the law. It will be noted that Article 245(1) empowers Parliament to enact law for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra territorial operation in order to subserve the object, and that object must be related to something in India. It is inconceivable that a law should be made by Parliament in India which has no relationship with anything in India.

Bearing in mind the principle aforesaid, when we consider from section 1(2) of the Act, it is evident that the Act extends to the Hindus of whole of India except the State of Jammu and Kashmir and also applies to Hindus domiciled in India who are outside the said territory. In short, the Act, in our opinion, will apply to Hindus domiciled in India even if they reside outside India. If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra-territorial operation has no nexus with India. In our opinion, this extra territorial operation of law is saved not because of nexus with Hindus but Hindus domiciled in India.[5]

The analysis of the apex court continued to include the observation made in this context by Bombay High Court in the impugned order thus: "It is thus clear

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2 Provides for extent of the Act. S. 1(2) "1. Short title and extent:

(1) xxx xxx xxx

(2) it extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which the Act extends who are outside the said territories."

3 AIR 1989 SC 1707.

4 *Id*. at 1710.

5 *Supra* 1 at 2683.

that a condition of a domicile in India, as contemplated in Section 1(2) of H.M.Act, is necessary ingredient to maintain a petition seeking reliefs under the H.M.Act".[6]

Turning to case law on the subject the court referred to the Calcutta High Court decision in *Prem Singh* v. *Dulari Bai.*[7] In this case a Nepali Hindu married to a Hindu in India according to Hindu rites in India, and had filed a petition for restitution of conjugal rights under HMA in the Calcutta High Court, when his wife failed to return to the matrimonial home. The Calcutta High Court while interpreting sections 1(1) and 2(1) of the Act ruled that "as regards the intra-territorial operation of the Act, it is clear that it applies to Hindus, Buddhists, Jains and Sikhs irrespective of the question as to whether they are domiciled in India or not".[8] The Supreme Court did not endorse this view of the Calcutta High Court and observed: [9]

> If this view is accepted, a Hindu living anywhere in the world, can invoke the jurisdiction of the courts in India in regard to the matters covered under the Act. To say that it applies to Hindus irrespective of their domicile extends the extra – territorial operation of the Act all over the world without any nexus which interpretation if approved would make such provision invalid. Further, this will render the words "domiciled" in section 1(2) of the Act redundant.

The court next considered section 2 of HMA and " We are of the opinion that Sec 2 will apply to Hindus when the Act extends to that area in terms of Section 1 of the Act…the Act will apply to Hindus outside the territory of India only if such a Hindu is domiciled in the territory of India".[10]

The husband's claim of Australian domicile and Sweden's citizenship was considered by the apex court, against the following background: [11]

> Domicile are of three kinds, viz. domicile of origin, the domicile by operation of law and the domicile of choice. In the present case, we are concerned only with the domicile of origin and domicile of choice. Domicile of origin is not necessarily the place of birth. The birth of a child at a place during temporary absence of the parents from their domicile will not make the place of birth as the domicile of the child. In domicile of choice one is abandoned and another domicile is acquired but for that,

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6 *Ibid.*

7 AIR 1973 Cal 425.

8 AIR 2013 SC 2678 at 2684.

9 *Supra* note 426.

10 *Supra* note 1 at 2685.

11 *Supra* note 1 at 2686.

> the acquisition of another domicile is not sufficient. Domicile of origin prevails until not only another domicile is acquired but it must manifest intention of abandoning the domicile of origin. In order to establish that Australia is their domicile of choice, the husband has relied on their residential tenancy agreement dated 25.01.2003 for period of 18 months; enrolment of Natasha in Warrawee Public School in April, 2003; commencement of proceedings for grant of permanent resident status in Australia during October-November, 2003; and submission of application by the husband and wife on 11.11.2003 for getting their permanent resident status in Australia.

The right to change the domicile of birth is available to any person not legally dependent and such a person can acquire domicile of choice. It is done by residing in the country of choice with intention of continuing to reside there indefinitely. Unless proved, there is presumption against the change of domicile. Therefore, the person who alleges it has to prove that. Intention is always lodged in the mind, which can be inferred from any act, event or circumstance in the life of such a person. Residence, for a long period, is an evidence of such an intention so also the change of nationality.

The Supreme Court found husband's visa upon his own admission was nothing but a 'long term permit' and 'not a domicile document'. In the light of foregone analysis of the facts and circumstances, the court found difficulty in accepting the husband's claim and concluded that "he shall continue to be the domicile of origin i.e. India". In view of the court's finding that the husband is a domicile of India, the question that the wife shall follow the domicile of husband has become academic. For all these reasons, the court is of the opinion that both the husband and the wife are domicile of India and hence shall be covered by the provisions of the HMA, 1955.

In the result the husband's appeal was dismissed and the petition filed by the wife for judicial separation and custody of the children became maintainable.

It is submitted that the apex court's analysis of provisions of HMA calls for a few comments. *Firstly*, the court's observation that section 1(2) of HMA, 1955 applies to Hindus domiciled in India who are outside the said territory. In other words, the Act is applicable to those Hindus domiciled in India, even if they reside outside India. This raises two questions, *viz.,*

i. 'Domicile' as constituting 'nexus' between the propositus and the state territory., if made to prove in a court of law – what will be the substantial proofs to establish domicile of Hindu 'the animus – intention' and the physical fact of 'residence' ? The answer could include a 'make believe intention' and an address to show the physical fact of 'residence'. This perhaps would suffice for purposes of courts since the Hindu who has his/her domicile in India actually resides outside India for his day to day life.

ii. In continuation of what has been said above – what if the 'Hindu domiciled' in India is a foreign passport holder – a citizen of a country other than India, who professes Hindu faith, as are the couple in the present case, though Hindus by faith, have also India as their domicile of origin – but Swedish citizens having renounced Indian citizenship. Maybe we can confine such extension of HMA to Indian citizens living abroad to earn for their living.

Secondly, on the issue of parties' 'Indian domicile of origin' provided a 'strong' link / nexus for the court to rely on for extension of (extra-territorial) application of HMA 1, 1955 provisions to them. Throughout the judgment the terminology used in the context of domicile of origin is "abandonment". The domicile of origin as it has been created and practiced is in fact 'immortal' and devoid of abandonment. It is permanent and as such it is always kept in 'abeyance' (never destroyed) only to be 'revived' whenever there is a gap while changing over from one domicile of choice to another.

Finally an alternative procedure for women to move courts for matrimonial causes in India in their own right in the absence of their husband's was introduced in 2003 by way of amendment to matrimonial statutes , could have been referred to in this case.

India is a uni domiciliary state as opposed to countries like USA which are multi domiciliary. Two decisions from Uttarakhand clearly established this position, though, in different perspectives – on the one hand there is one single domicile in India which is the Domicile of India as opposed to the concept of regional or provincial domicile. 'Domicile of India' which is prevalent as a single concept is practiced by different classes of persons all over the country, and not by regions, on the other.

In *Madhu Arya* v. *State of Uttarakhand*[12] the petitioner was born into a family of Other Backward Class (OBC) in the State of Uttarakhand and is a permanent resident of the state. She was married to a person, a permanent resident of the state. She was married to a person, a permanent resident of Bulandshahr (in UP). She applied for a caste certificate in Uttarakhand to get an appointment in government service, from authorities in Uttarakhand. Her request was turned down on the basis that, since her marriage to a person in UP her current domicile is in UP. The denial was based upon sections 15 and 16 of the Indian Succession Act of 1925. As per these provisions the petitioner's domicile will be that of her husband's who belonged to UP and hence authorities of UP alone can grant her the caste certificate. The court ruled the order of Sub Divisional Magistrate, Roorkee denying the grant of caste certificate as absolutely illegal and that the provisions of the Indian Succession Act, 1925 relied upon being not applicable to the petitioner who is admittedly a Hindu. The court explained that sections 15 and 16 which are part of part II of the said Act specifically state that part II is not applicable to a "Hindu, Mohammedan, Buddhist, Sikh or Jaina".

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12 AIR 2011 Utt 50.

The court explaining the context traced the historical background of the Indian Succession Act, 1925 beginning from its enactment during the British rule India, including its contemporary relevance. Discussing the issue of caste certificate with the help of the apex court judgment in *Valsamma Paul* v. *Cochin University* [13] the court pointed out that the girl marries into the family and not into a community and her caste will not change, nor would she get benefits of the community into which she has been married. Pointing out the rampant misconception amongst the administrative authorities in the state as to the concept of domicile the court clarified many a pointers relying on earlier judgment of this court in *Neha Saini* v. *State of Uttarakhand* [14] based on similar factual situation as well as the Supreme Courts views in *Pradeep Jain* v. *Union of India.*[15]

The *Neha Saini* case has created a new approach, a new connotation to the concept of domicile as practiced in the Indian context. The discussion of 'Domicile of India' along with the 'regional domicile' has been projected in this case from the point of positive contribution to serve the needs of the country as a whole. Both the concepts have not been pitted against each other rather a parallel approach has been found by which their roles in the developmental schemes of the country have been emphasized. The entire discussions of the concepts of 'Domicile of India' and 'regional domicile' have been traced through historical development.

The petitioner is a member of an OBC community notified as such in the State of Uttarakhand. The petitioner was married to a person outside her caste, a resident of State of Bihar. Currently they reside in Delhi. The petitioner had applied for a UPSC job where some of the posts are reserved for OBC. The husband is not an OBC. The petitioner applied for OBC certificate from her home state, State of Uttarakhand, where she was born, brought up and had most of her education. Her community 'Saini' has been notified as OBC only in the State of Uttarakhand to which she belongs and not so notified in Bihar to which her husband belongs , a state in which she resides since her marriage. The Uttarakhand authorities denied the caste certificate on the ground; Domicile is the main issue in the present controversy and since the petitioner has acquired the domicile of her husband by law the present domicile of the petitioner is not in the State of Uttarakhand, but in the State of Bihar and therefore, the only state which can grant OBC certificate to the petitioner, is the State of Bihar. In the course of the judgment the court observed as regards the dispute: [16]

> What goes to the root of the present dispute is the concept of "domicile" and the misconception prevalent in the State and

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13 AIR 1996 SC 1011.

14 AIR 2010 Utt 36.

15 AIR 1984 SC 1420.

16 *Supra* note 14 at 37. The state authorities relied upon the decision of this court in *Jyotibala* v. *The State of Uttarakhand*, 2009 (1) UD 1 with similar facts. In this case the eligibility issue arose after the candidate had cleared the written test and reached the stage of *viva – voce* and the issue was linked to domicile.

> particularly with those, who are authorized to deal with the issues related to domicile. Therefore, first and foremost this concept has to be defined and its legal position clearly stated. However, before we come to the core issue, which is 'domicile', it must be clearly understood first that merely because the petitioner is married into the higher caste, she will not cease to be a member of an OBC. She has married into a "family" and not into a 'community' and therefore she will not loose her claim on 'reservations, which are available to a member of an OBC community.
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> The benefits which are legally admissible to a SC or an OBC are not washed out merely because such an OBC or SC (or the case might be) has now married into a higher caste, Since the determining factor is the birth in a socially disadvantageous community, a person born into a socially disadvantageous community, such as the petitioner, must carry with her the benefit of reservation. It also goes without saying that this caste certificate can only be claimed by her in the State of Uttarakhand, where she originally resides and where her parents still reside and where the status of her caste is that of an OBC. The Caste Certificate has to be given by the authorities in the State where the person claiming such certificate is born.

Putting the core issue in perspective the court pointed out: "Now to the core issue of Domicile. What is domicile? Domicile as a concept is of immense importance, both in municipal law as well as in Private International Law or the conflicts of laws, as it is called. The concept denotes "the place of living", or more precisely a permanent residence. Domicile "is the legal relationship between an individual and a territory with a distinctive legal system which invokes that system as his personal law."[17] Although the notion which lies behind the concept of domicile is of "permanent residence" or a "permanent home", yet domicile is primarily a legal concept for the purposes of determining what is the "personal law" applicable to an individual and therefore, even if an individual has no permanent residence or permanent home, even then he is invested with a "domicile" albeit by law or implication of law. There are three main categories or classes of domicile. a) Domicile of Origin b) Domicile of Choice and c) Domicile by law. Domicile of origin is the domicile which each person has at birth *i.e.,* the domicile of his father or his mother. Domicile of choice is the domicile which a person of full age is free to acquire in substitution for that which he presently possesses. In other words, the "domicile of origin" is what is attached to person by birth whereas the domicile of choice is what is acquired by residence in a territory subject to a distinctive legal system with the intention to reside there permanently or indefinitely. What should

17 Halsbury's Laws of England 8 (4th edn.), para 421.

be always remembered is that a domicile denotes an area with a separate and distinctive legal system and not just a particular place in a country. Even person who has, or whom the law deems to have, his permanent home within the territorial limit of a single system of law is domiciled in the country over, which is the whole of that country even though his home may be fixed at a particular spot within it.

In Federal States some branches of law are within the competence of the federal authorities and for these purposes the whole federation will be subject to a single system of law and an individual may be spoken of as domiciled in the federation as a whole: other branches of law are within the competence of the State or provinces of the federation and the individual will be domiciled in one State or province only. [18]

The third category of domicile would be "Domicile by operation of law". All the same, the concept of domicile, as discussed above, acquires importance only when within a country there are different laws or more precisely, different systems of laws are operating. Right from Kashmir to Kanyakumari and from Ran of Kutch in the west, to the east in Arunachal Pradesh, there is one system of law, which is being followed. Therefore, there has to be only one "domicile" in India. Each citizen of this country carries with him or her, one single domicile which is the "Domicile of India". The concept of regional or provincial domicile is alien to Indian legal system the difference in personal laws in India is not regional based but religion or community based.

Next, the court relying heavily on the Supreme Court decision in *Pradeep Jain*[19] quoted the following:[20]

> Now it is clear on a reading of the Constitution that it recognizes only one domicile, namely domicile in India. Article 5 of the Constitution is clear and explicit on this point and it refers only to one domicile, namely, "domicile in the territory of India." Moreover, it must be remembered that India is not a Federal State in the traditional sense of that term. It is not a compact of sovereign States which have come together to form a federation by ceding a part of their sovereignty to the Federal State. It has undoubtedly certain federal features but it is still not a Federal State and it has only one citizenship, namely, the citizenship of India. It has also one single unified legal system which extends throughout the country…. "The concept of 'domicile' has no relevance to the applicability of municipal laws, whether made by the Union of India or by the States. It would not therefore, in our opinion be right to say that a citizen of India is domiciled in

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18 *Ibid.*

19 *Supra* note 15.

20 *Id*. at 1427.

> one State or another forming part of the Union of India. The domicile which he has is only one domicile, namely, domicile in the territory of India. When a person who is permanently resident in one State goes to another State with intention to reside there permanently or indefinitely, his domicile does not undergo any change: he does not acquire a new domicile of choice. His domicile remains the same, namely, Indian domicile. We think it highly detrimental to the concept of unity or integrity of India to think in terms of State domicile…

The apex court took note of the common misconception of the various state governments with the term domicile and observed that it is not uncommon for the state governments to use the term when what they actually intend to state is 'permanent residence' the apex court also cautioned the state governments to desist from using the term domicile in any other manner except what the word actually conveys or means.[21]

In yet another excerpt from the Supreme Court decision it has been stated, as regards the repercussions of usage of the term domicile.[22] It is dangerous to use a legal concept for conveying a sense different from that which is ordinarily associated with it as result of legal usage over the years. The concept of domicile if used for a purpose other than its legitimate purpose may give rise to lethal radiations which may in the long run tend to break up the unity and integrity of the country. Therefore, strongly urge upon the state government to exercise this wrong use of the expression 'domicile' from the rules regulating admissions to their educational institutions and to desist from introducing and maintaining domiciliary requirement as a condition of eligibility for such admissions.

In this context, the court also referred to a full bench judgment on the concept of domicile, delivered by M.C Chagla CJ. The full bench of the Bombay High Court stated: [23]

> Now in our opinion, it is a total misapprehension of the position in law in our country to talk of a person being domiciled in a province or in a State. A person can only be domiciled in India as a whole. That is the only country that can be considered in the context of the expression "domicile" and the only system of law by which a person is governed in India is the system of law which prevails in the whole country and not any system of law which prevails in any province or State. It is hardly necessary to emphasize that unlike the United States of America, India has a single citizenship. It has a single system of Courts of law and a

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21 *Supra* note 14 at 40.

22 *Ibid*.

23 *The State* v. *Narayandas* AIR 1958 Bom 68 (F.B).

> single judiciary and we do not have in India the problem of duality that often arises in the American Law, the problem which arises because of a federal citizenship and a State citizenship. Therefore, in India we have one citizenship, the citizenship of India. We have one domicile - the domicile in India and we have one legal system - the system that prevails in the whole country. The most that one can say about a person in a State is that he is permanently resident in a particular State.

Explaining the term 'regional domicile' the court again was relying on *Pradeep Jain's* case where the judges observed:[24]

> ...It is true and there we agree with the argument advanced on behalf of the State Governments that the word 'domicile' in the rules of some of the State Governments prescribing domiciliary requirement for admission to medical colleges situate within their territories, is used not ill its technical legal sense but in a popular sense as meaning residence and is intended to convey the idea of intention to reside permanently or indefinitely. That is, in fact, the sense in which the word 'domicile' was understood by a five Judge Bench of this court in D.P.Joshi case while construing a rule prescribing capitation fee for admission to a medical college in the State of Madhya Bharat and it was in the same sense that word domicile' was understood in Rule 3 of the Selection Rules made by the State of Mysore in *N. Vasundara* v. *State of Mysore*. It would also, therefore, interpret the word 'domicile' used in the rules regulating admissions to medical colleges framed by some of the states in the same loose sense of permanent residence and not in the technical sense in which it is used in private international law.

Next the court turned to sections 15 and 16 of the Indian Succession Act of 1925, relied on by the respondents. Explaining clearly the non - applicability of these provisions to the petitioner, the court recounted the historical background as well as the current situation of the legislation as the two sections *i.e.*, section 15 and section16 form a part of the Indian Succession Act. Part II of the Act which consists of section 4 to section 19 and the title of this part is "Domicile". The first section of this part *i.e*., section 4 excludes Hindus, Mohammedans, Buddhist, Sikh and Jain from the operation of this part. The very fact that Hindus, Muslims, *etc.* have been put outside the purview of the (chapter which is on 'domicile' and of which sections 15 and 16 are a part, shows that *inter alia* in the case of Hindus and Muslims, it is not the "domicile" of a person, which would be determining factor

24 *Supra* noted 15 at 1427. In *D.P.Joshi* case, referred to in this case supported 'regional domicile' on certain justifiable grounds. In the same case Jagannathadas J dissented by saying : 'there is no place for regional domicile in existing Indian law".

in a matter relating to succession of property of the deceased, but the determining factor would be the personal laws applicable to Hindus and Muslims, therefore, the reliance of the state counsel on section 15 and 16 of the Act is not well placed. Both the present petitioner as well as the petitioner in writ petition in the case of *Jyotibala*[25] case, a decision of the division bench of this court relied upon by the state are 'Hindus'.

Apart from this, the Indian Succession Act was enacted in the year 1925. This was the time when India was under a colonial rule. The country as we understand it today did not exist as such in the year 1925. In 1925 India had 'different legal systems' in different parts of the country. It was only one part of India which was under one political and legal system which was called 'British India', and the remaining was further fragmented into several princely states having their own distinctive legal systems. Furthermore, there were pockets in India, which were either under Portuguese or French rule. In short, one legal system did not prevail in India in the year, 1925 and therefore, the concept of domicile had relevance in the Indian Succession Act. Today in the present context this has no relevance.[26] The court took into consideration the division bench decision of this court in *Jyotibala* case in its analysis. In conclusion the court ruled: [27]

> Consequently, the denial of caste certificate to the petitioner by the authorities in Uttarakhand is based on a misconception of the term domicile'. Petitioner was never a domicile of Uttarakhand, U. P. or Bihar, or for that matter of any one province. She was, and continues to be a domicile of India] as there is nothing like a "domicile of Uttarakhand" or a "domicile of Bihar" or of any other state. It is emphasised, even at the cost of repetition, that in India each citizen has only one domicile, which is the domicile of India.

Thus, the denial of caste certificate to the petitioner by the state authorities in Uttarakhand on the ground that she is presently a domicile of the State of Bihar and not of Uttarakhand is clearly wrong, in fact misconceived. The petitioner always had and presently possesses a domicile, which is called the 'domicile of India.[28]

The issue relating to non existence of 'provincial domicile' and that there is one domicile, that is domicile in India in the entire length and breadth of the country has again repeated in District Magistrate, *Udham Singh Nagar Singh Nagar* v. *Amit Dixit*.[29] The respondent sought admission to MBBS course on the basis of

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25 See *supra* note 16.

26 *Id*. at 43-44.

27 *Ibid*

28 *Supra* note 16_at 43.

29 AIR 2012 Utt 50.

residence/domicile certificate. In the context of compliance to the requirement of this certificate that the court relied on the apex court judgment in *Pradeep Jain's*[30] case where it held that, in India there is no concept of domicile of a state and that a citizen of India has one domicile, namely, domicile in the territory of India. The word "domicile", used in rules regulating admissions to medical colleges framed by some of the states, was to denote, in loose sense, permanent residence and not in the technical sense in which it is used in private international law.[31]

On facts and circumstances of the case the court held that respondent has failed to establish his residence in the State of Uttarakhand and allowed the appeal. In *Kirandeep Kaur* v. *Regional Passport Office*[32] parents of the petitioner were Afghan nationals who came to India in 1979 and stayed on uninterruptedly since then. They were issued a certificate of naturalization in 1991 by the Government of India. The petitioner claiming Indian citizenship on the basis of section 3 of the Citizenship Act, 1955 which prescribes that every person born in India on or after 26-1-1950 but before 1-7-1987 shall be a citizen of India by birth. But the respondent insists on the basis of article 5 of the Constitution which requires domicile at the time of the commencement of the Constitution. The court after perusing the factual details came to the conclusion that since the parents of the petitioner have already been naturalized and the petitioner had admittedly born in India between 26-1-1950 and 1-17-1987 and has been uninterruptedly residing in India her undisputable domicile in India should be taken into consideration for claiming citizenship.

III FAMILY LAW

Marriage

Vinisha Jitesh Tolani v. *Jitesh Kishore Tolan*i,[33] this case concerned with matrimonial jurisdiction of HMA where parties are governed by different laws. Wife's petition for transfer of the matrimonial petition. The petitioner who is a Sikh by religion was born in Afghanistan she shifted to India in 1998. Her parents shifted to London, U.K. where they were granted Afghan refugee asylum. In 2001 the petitioner also went to UK where her parents had been given British Nationality. She got married in 2007, in Goa with respondent before the civil registrar, she went to London upon the insistence of the respondent and was shuttling between UK and India, and finally she took up residence in India, In Delhi. While she was in Delhi, the petitioner was served with a copy of the petition filed by the respondent in Goa for declaring her marriage to be a nullity which was proceeding *ex-parte*. It was argued on behalf of the respondent that the petitioner stays in UK and holds the status of Afghan refugee. The parties in the present case are governed by the

30 *Supra* note 15.

31 *Supra* note 29 at 53.

32 AIR 2006 Delhi 2.

33 AIR 2010 SC 1915.

Civil Code of 1867 which was in force in Goa. Accordingly it was argued that the petition for annulment could only be tried in Goa and not in other states. It was further argued that in terms rules of Private International Law and bearing in mind that various personal laws in the country, it would be the civil court exercising jurisdiction in the divorce matters in the state of Goa that could hear and decide the petition. The court disagreeing with the respondents position observed that by the decree of 22.01.46 the validity of both Catholic and Hindu marriages was restored and hence two Hindus can contract a marriage according to Hindus religious rites or by way of civil marriage. The court also pointed out that section 2 of HMA, 1955 extends the operation of the Act to the whole of India except Jammu and Kashmir and also applies to Hindus domiciled in the territories to which the Act extends who are outside the said territories. On facts and circumstances of the case the court ruled that the petitioner's case can be heard by any court having jurisdiction within the territories to which HMA applies.

Madhulika Sameer Azad v. *Sameer Mohan Azad.* [34] This case deals with matters of procedure in Indian courts where a foreign party is involved.The marriage between the parties was solemnized and registered at Mumbai in 2006. Due to marital discord the couple started living separately, wife in India and the husband, who had a job in U.S.A, in U.S. The husband had initiated divorce proceedings in India. The family court in which the case has been filed generally does not permit engagement of a lawyer in a routine matter. This case concerns with the husband's application for engaging a lawyer since he is working and living in U.S.A attending proceedings personally on every date not practically possible for him. The court after perusing the rule of procedure followed in the family court proceedings held that a plain reading of the rules framed under the Family Court's Act, 1984 indicates that it does not place an absolute bar upon the engagement of a lawyer and that the family court at its discretion can always seek assistance of a lawyer. In other words engagement of a lawyer in family court is not permissible as of right that nonetheless in certain contingencies a party can be allowed to be represented by a legal practitioner. This case is a clear illustration that rules of procedure (followed in court proceedings involving a party from outside India) are from the law of the forum when the matter is being litigated. In cases where parties from different jurisdictions and locked in litigation, the proceedings are conducted in accordance with the procedural law of the forum where the matter is being heard.

Foreign Marriage Act (33 of 1969)

Foreign Marriage Act, 1969 (FMA) incorporates principles of Conflict of Laws as practiced in India. It is the secular personal law applicable to marriages solemnized outside India where at least one of the parties is an Indian. In *Minoti Anand* v. *Subhash Anand* [35] the parties are Hindus. They have been married in Japan, before the Consul General of India in 1972 and were registered under section

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34 AIR 2013 All 78.

35 AIR 2011 Bom 61.

17 of the FMA, 1969. The certificate of marriage showed certification by Consul General of India after compliance of all necessary formalities by the parties to the marriage ceremony. It is the case of the husband that they have been married under HMA initially before they underwent marriage as per the Japanese custom and hence his petition for dissolution of marriage under HMA, 1955 in the family court. Parties are at dispute with regard to the matrimonial reliefs. While the husband's claim is under the provisions of HMA, the wife's plea is for Special Marriage Act, 1954 as their marriage was registered under FMA. It is a fact that the parties' marriage has not been registered under HMA but their marriage under FMA has been registered. Hence the court concluded that their marriage was solemnized under the FMA and not HMA. The court also pointed out that in this case there is finality with regard to the registration and solemnization of the marriage of the parties under FMA. It was observed further:[36]

> It must be appreciated that under Section 17(1), the certificate of registration is issued upon the satisfaction of the Marriage Officer (in this case Consul General) that the marriage was duly solemnized in the foreign country in accordance with the law of that foreign country, in this case Japan, and the Marriage Registrar as per the Marriage Certificate, would be deemed to be solemnized under the FMA.

In the result the husband's petition for matrimonial relief under HMA, 1955 was rejected.

Registration of marriages

In *Deepu Dev* v. *State of Kerala*[37] a writ petition involving a question of legal importance as to whether a marriage solemnized between two persons belonging to different religions can be registered under the provisions of the Kerala Registration of Marriages (Common) Rules, 2008.

The petitioners are husband and wife, the marriage being solemnized at the Infant Jesus Church on 16.2.12, as per Christian religious rites. The first petitioners, a Hindu while the second petitioner, a Christian. On the same day (on 16.2.12) petitioners performed religious rites and ceremonies of a Hindu marriage. Certificates of marriage of both styles of marriages (Hindu and Christian) were issued by Sree Sankara Auditorium and the Church respectively. Petitioner's

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36 *Id*. at 64. See also *Gracy* v. *P.A.Mathiri*, AIR 2005 Ker 314, where the Kerala High Court was concerned with the validity of a marriage solemn ized in England between parties, one of whom is an Indian citizen. The court perused the whole of the Foreign Marriage Act, 1969 and held, on facts, that copy of entry of marriage attested only by notary cannot be accepted as proof of valid marriage between parties, and that party has to produce a certified copy of solemnization of marriage duly certified by marriage officer appointed by Government of India in that particular country.

37 AIR 2013 Ker 51.

application for registration under the common rules was rejected by the registrar in view of the government circular to the effect that "marriages between persons belonging to different religions has to be registered under the Special Marriage Act,1954 and in such cases registration under the Common Rules cannot be permitted." The petitioners are challenging the rejection in this writ petition. The petitioners challenge is as regards the sustainability of the government circular which is repugnant to provisions of the common rules and is also against the legal principles and directions contained in the decision of the apex court in *Seema* v. *Ashwani Kumar.*[38] The court observed in this context that it is in view of the directions of the Supreme Court that the state government has framed the common rules, making all the marriages compulsorily registered irrespective of the religion of the parties.[39]

On the facts and circumstances of the case and also the interpretation and application of the Common Rules it was ruled:[40]

> I am of the view that the instructions issued that the marriages solemnized between persons belonging to different religion are not registrable under the Common Rules is repugnant and contrary to the provisions contained in the Common Rules

The court accordingly allowed the writ petition and quashed the executive order.

Inter religious marriages though constitute inter- personal conflict issues the procedural matters follow the regular conflict of law principle that *lex fori* governs in all matters of procedure. The court made it very clear in this case by stating that "for the purpose of deciding the issue involved, I need not adjudicate the validity of the marriage". Obviously the court was treating the issue of registration of inter-religious marriages which carry certificates of marriage from religious authorities as one of procedure.

The relevance and importance of rules of procedure in matters of interaction from country to country has been well explained in *Upasna Bali* v. *The State of Jharkhand.*[41] The procedures are significant as they provide legitimacy for activities involving people of Indian origin settled in foreign jurisdictions. The Jharkhand High Court has clearly brought out one such situation in this case. The petitioner couples were residents of London faced difficulty in getting their registration of their marriage which took place in Jharkhand, India. The husband a Swedish passport holder and wife a citizen of Australia presently residing in UK got married in India and a child was born in UK. They do not possess a marriage certificate

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38 AIR 2006 S.C. 1158.

39 *Supra* note 37 at 53.

40 *Ibid.*

41 AIR 2013 Jhar 34.

from India and without which they cannot get their child's passport issued and cannot also visit native India leaving behind their eight month old son. The court after a thorough perusal of development of technology leading apex court rulings in following the procedures observed:[42]

> …[A]dvance in science and technology have now shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place.

Further the Supreme Court, pointed out: Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of justice. It is therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.[43]Allowing the petition, the court observed:[44]

> …[W]e are of the considered view that the requirement of presentation of application for registration of the marriage under the Jharkhand Hindu Marriage Registration Rules, 2002 can be met fully , when such application is presented by duly authorized power of attorney of the parties , authorized jointly or separately, coupled with satisfaction of the registering authority through video conferencing from the persons who are seeking registration of their marriage and for that reason the registering authority may permit appearance through video conferencing whenever any need arise for opting for such procedure.

In *Najma, Sirajudeen Musliyar* v. *Registrar General of Marriage*,[45] the petitioner is aggrieved because of non acceptance of an application submitted for registration of marriage under the provisions of Kerala Registration of Marriage (Common) Rules, 2008. The petitioner has married an UAE citizen who is a PIO. The marriage was solemnized in Kerala as per religious rites and customs and is registered at 'Kottal Mahhalu Juma Masjid', and a marriage certificate was issued. It is the complaint of the petitioner that the Registrar - General of Marriages has not received the application for reasons that both the spouses should appear in person in cases where a foreign national is one of the parties. The court pointed out after a clear analysis of the situation that with respect to the objection that both the parties should appear in person at the time of submitting the application, has been settled with this court's ruling in its earlier decision, in *Sarala Baby* v. *State of Kerala*[46] which dispensed with such personal appearance of the parties for presenting the application. The court then referred to the Kerala Registration of

42 *Id.* at 39.

43 AIR 2013 Jhar 34 at 41.

44 *Id.* at 42.

45 AIR 2012 Ker 115.

46 AIR 2010 Ker 143.

Marriage (Common) Rules, 2008 and relying on Supreme Court's ruling in *Seema* v. *Aswani Kumar*[47] and observed: [48]

> Rule 6 indicates that all marriage solemnized within the State should compulsorily be registered, irrespective of religion of the parties. Nowhere in the Rules it can be noticed any insistence about nationality of the parties contracting the marriage. On consideration of the relevant personal law (Mohammedan Law) no prohibition can be pointed out with respect to a foreign national marrying an Indian lady, if both of them are professing the religion of Islam. Hence I am of the view that objection raised by the 2nd respondent for registration of marriage are unsustainable. The court allowed the petition following the above reasoning.

Inter personal conflict of laws

India's religion based personal laws that govern personal matters have been described as constituting a 'composite system of personal laws'. When persons governed by religion based personal laws interact, establish transactions and relations inter personal conflicts issues are generated. These issues are governed by rules pertaining to inter personal conflict of laws.

Inter religious marriages

In *Margaret Palai* v. *Savitri Palai*[49] parties are governed by different religion based personal laws, *viz.* Hindu law and Christian law. Marriage between a Hindu male and a Christian female became an issue before the court. The plaintiff - appellant, Christian by religion married one Debendra Polai, a Hindu in 1973 according to Hindu customs. After the birth of two daughters, Debendra died in the year 1987. Having left no choice, the plaintiff appellant filed a case demanding partition of her husband's share, in the joint family property. All the defendant – respondents filed a common plea against the plaintiff's demand contending that the plaintiff is neither a Hindu nor the married wife. The core issue in this case being that the suit filed by the petitioner can be maintained if the plaintiff's marriage is valid and she is the widow of her dead husband who has a share in the family's joint family property. Instead of testing the validity of marriage in terms of formal and essential conditions the court ruled that "since plaintiff has failed to prove that she is the legally married wife of Debendra, she is not entitled to a share in the ancestral property."

Thus if the plaintiff appellant has capacity to marry according to Christian law and her husband had the capacity to marry according to Hindu Law and if they

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47 AIR 2006 SC 1158.

48 *Supra* note 45 at 116.

49 AIR 2010 Orissa 45.

have followed the ceremonial formalities as per Hindu customs – as has been carried out in the instant case – the marriage is a valid marriage according principles of interpersonal conflict of laws. Indeed lack of technical application of conflict of laws rules in matters of inter – personal conflicts situations appears to have resulted in injustice and cost the affected party a share in the family property.

Child custody

Sunaina Chowdhary v. *Vikas Choudhary*[50] is a case involving an issue concerning child custody. Marriage between the parties was solemnized at Gurgaon, in India, in 2004 according to Hindu rites. Two children were born out of the said wedlock. The family shifted to Auckland (New Zealand). When the disputes arose the wife was driven to join her parents after she lost the case against her husband in a New Zealand Court. The appellant filed a petition for custody of the minor children. In the present case the appellant-petitioner is seeking to establish the jurisdiction of the Indian Courts, in respect of the minors. The respondent had argued that the Gurgaon Court has no jurisdiction to entertain the wife's petition, in view of the fact that the parties have shifted to Auckland (New Zealand) and taken permanent abode there. The respondent relied heavily on the proceedings before the New Zealand Court regarding the custody of the children.

Appellant-petitioner contended that both were born in India and are Indian citizens and are staying in New Zealand with respondent in Auckland and since the children are minors, they require care and consideration of the mother. She also put forward the argument that the stay of the children with their father's sisters in New Zealand is a temporary arrangement and cannot be said to oust the jurisdiction of the Indian courts. The court said that the only question to be examined is as regards the territorial jurisdiction of the Gurgaon Court and held that the Indian courts, Gurgaon has the jurisdiction in respect of the minors, relying on the leading case law, Indian and foreign, namely *V.Ravichandran* (Dr.) v. *Union of India*,[51] *Dhanwanti Joshi* v. *Madhav Unde.*[52] In *Ravi Chandran* v. *Union of India*[53] the Supreme Court was concerned with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home. The child in question was an American citizen. The custody of the child was given to the father in a matrimonial dispute before an American Court. In this case the father filed a *habeas corpus* petition for the custody of his son from the mother who was in India. The apex court observed in this case: [54]

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50 AIR 2013 P&H 147.

51 AIR 2010 SC (Supp) 257.

52 (1998) I SCC 112. See also *Elizabeth Dinshaw* v. *Arvind M.Dinshaw*; *Mckee* v. *Mckee*; L (Minors): In re; Court of Appeal in H.(Infants) : In Re.

53 AIR 2010 SC (Supp) 257.

54 *Supra* note 50 at 150.

> while dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

Ruchi Majoo v. *Sanjeev Majoo* [55] concerns with jurisdiction of Indian court to entertain petition for custody of minor. The court noted the duty of a court in exercising its '*parens patriae'* jurisdiction in cases involving custody of minor children, whose main plank being best interest and welfare. Initially the court rightly pointed out that, Conflict of Laws and jurisdictions in the realm of private international law is a phenomenon that has assumed greater dimensions with the spread of Indian diasporas across the globe. The litigation between the spouses became a bitter battle for custody of their only child aged about 11yrs, born in US-hence a citizen of US by birth. The NRI parents of the child decided to educate their only child in India. Accordingly, they came to India with the child. The alleged misdemeanor of the respondent father the appellant mother parted company and stayed back in India with son instead of returning to US. The husband returned to America and filed a case for divorce from wife and also for custody of minor child. The wife filed a petition in India under Guardians and Wards Act, 1890 which granted an interim custody of the minor to her. A writ filed by the husband in the high court set aside the earlier district court order, giving the custody to the wife. As against the high court decision, the wife has filed this appeal in the Supreme Court. The main issues *inter alia* before this court are of jurisdiction of Delhi forum, principle of comity of courts, besides the substantive issues relating to facts and circumstances of the case.

In the opinion of the court, the court at Delhi was in facts and circumstances of the case competent to entertain the application filed by the complainant. The

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55 (2011) 6 SCC 479.

issue is to determine the jurisdiction and the test that the court followed is based on the 'ordinary residence' of the minor, and the expression used is the 'where the minor ordinarily resides'. The child was ordinarily residing with the appellant, his mother. He has been admitted to a school where he has been studying for the past nearly three years. This is so as the decision for the minor being ordinarily resident in Delhi was voluntarily taken jointly by the parents.

Referring to principle of comity of courts and recognition of foreign custody orders from the point of welfare principles and including the duty of a court exercising its *parens patriae* jurisdiction in such matters the apex court observed:[56]

> Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of section 13 of the Code of Civil Procedure, 1908 as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising it *parens patriae* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision.

Discussing the question, as to the effect of bringing away of a child to India by his mother contrary to foreign court order on the Indian courts seized with cases concerning custody and welfare of the child, the court quoted with approval the view expressed by the Apex Court thus in *Dhanwati Joshi* v. *Madhv Unde*[57] and relying upon *McKee* v. *McKee*[58] and *J* v. *C,*[59] this court held that it was the duty of the courts in the country to which a child is removed to consider the question of custody, having regard to the welfare of the child. In doing so, the order passed by the foreign court would yield to the welfare of the child and that comity of courts simply demanded consideration of any such order issued by foreign courts

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56 *Id.* at 498.

57 (1998) I SCC 112.

58 1951 AC 352.

59 1970 AC 668.

and not necessarily their enforcement. Emphasizing further on the issue of competence of court at Delhi to entertain the application filed by the appellant the Supreme Court opined:[60]

> What needs to be examined is whether the High Court was right in relying upon the principle of comity of courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that "comity of courts" principles ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. The decisions of this court in *Dhanwanti Joshi*[61] and *Sarita Sharma*[62] cases clearly support the proposition.

In conclusion the apex court held that repatriation of minor to USA, on principle of "comity of courts" does not appear to be an acceptable option worthy of being exercised.

In the course of deciding the case the apex court carved out the role of conflict of laws/private international law perspectives in child custody cases involving more than one country. The issues involved related to jurisdiction based on 'ordinary residence', repatriation of child on the principle of 'comity of courts' recognition and enforcement of foreign judgments, conflicts of jurisdiction of Indian courts with jurisdiction of foreign courts, removal of children from foreign country to India and exercise of *parens patriae* jurisdiction- all in the context of paramount of welfare of minor.

Similar approach as in *Ruchi Majoo's* case is seen in *Shilpa Aggarwal* v. *Aviral Mittal*[63] which arose out of a *habeas corpus* petition before the Delhi High Court filed by the father of the child. The proceedings in UK were also initiated by the father of the child, in the beginning. The Delhi High Court had directed the return of the child to England to join the proceedings before the courts of England failing which the child had to be handed over to the petitioner father to be taken to England as a measure of interim custody leaving it for the court in that country to determine as to which parent would be best suited for custody of the child. The Supreme Court decided not to interfere with the high court's directive upheld by it since the question as to what is in the best interest of the minor had to be considered

60 *Supra* note 55 at 503.

61 *Supra* note 57.

62 *Sarita Sharma* v. *Sushil Sharma*, (2000) 3 SCC 14.

63 (2010) 1 SCC 591.

by the court in UK in terms of the order passed by the high court. Parties presented proposal for the purpose of implementing the order passed by the apex court earlier on 09.12.09. As a result, the appellant wife was ready to accept the arrangement and willing to stay with the respondent husband in the matrimonial home in UK while the husband was willing to undergo psychiatric evaluation and treatment. Further, the respondent husband was ready to allow the wife's father to accompany her to UK and stay during the period of her stay in UK. The father also agreed to bear the entire consequential expenses. Upon agreed proposals the points of disagreement had been narrowed down for a peaceful settlement through the pending custody and guardianship case at London. The apex court's role in this case has been that of providing directions to the parties.

In *Lalit Raju Plathotham* v. *Anju Sara Varkey* [64] is a case concerning custody dispute of their minor child. The respondent, mother of the child is the former wife of the appellant. The custody dispute was finally settled by the order the Supreme Court in 2009. The appellant's former wife is employed abroad. The respondent (former) wife moved a petition to get the custody of the child during her period of stay in India in summer from 20.04.2012 to 13.05.2012. The present appeal is against the order of the family court which went in favor of the respondent wife. After hearing the contentions of both the appellant and the respondent the court said "the only question rises for consideration is whether the mother is entitled to claim custody of the child during the period that she is available in India in view of order passed by the Supreme Court".[65]

The high court studied the situation thoroughly and found the formula evolved by the apex court being more balanced so as to include also the maternal grandparents for custody even when the respondent is away from India in addition included also important festival occasions for visitation rights. In conclusion in view of the above mentioned reasons allowed the appeal, setting aside the family court order of 19.4.2012.

Padi Trigunsen Reddy v. *Jyothi Reddy* [66] is a decision that strikes a balance between the concept of comity and welfare of the child in matters of dealing with foreign custody orders. The court was handling an issue as to "whether the decree passed by the competent court in the USA regarding the custody of the children is to prevail or an Indian mother can claim the custody of the children having a foreign nationality by birth".[67] The parties were married 19 years ago and were living in USA. The two children were born in the years 1998 and 2003. There has been frequent moving between India (Hyderabad) and US. Thereafter due to differences of opinion between spouses, they obtained a divorce decree from a

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64 AIR 2012 Ker 104.

65 *Id.* at 105.

66 AIR 2010 AP 119.

67 *Id* at 122.

competent court in US. After the divorce both the children and the mother have been staying in India with maternal grandparents. The present writ petition has been filed seeking a writ of *habeas corpus* by the husband. It is to be noted that in this dispute, the father and both the children are citizens of the USA and the mother is an Indian but with domicile of USA. The US court passed an order for joint custody of the children.

The court in considering the issues in this case relied on *Ravi Chandran's* [68] case decided by the apex court. In fact in this case also the apex court had dealt with elaborately various judgments of the Supreme Court pronounced earlier and also a catena of judgments from various courts in USA, UK and Canada. The court made a thorough analysis of the facts and circumstances including the bulk of case laws in the context and observed: The decree passed by the competent court in the USA is a relevant factor; still, the welfare of the minor child cannot be ignored. In other words, these two aspects *ie.,* the order passed by the competent court in the USA and the welfare of the children are to be reconciled carefully, basing on the various facts and circumstances of each case. If slightly put in a different way, it is something like - USA Law versus Indian Law? or the Law versus the welfare of the children. [69]

If the above aspect is to be considered the ultimate consideration should be - the welfare of the child only, notwithstanding the kind of judgment or order or decree passed by the competent court in the USA. When the children are living in the association of either of the parent in a particular country, other than the country to which they are the nationals, the courts of such country of their residence have the jurisdiction to pass appropriate orders keeping in view the best interest of the child and while giving such preference to the welfare of the child, the aspect of enforceability of a judgment passed by a competent court in a foreign country also gets faded or becomes secondary. Nevertheless, the concept of comity cannot be overlooked *in toto*, for the simple reason that a judgment passed by a competent court of a nation with the law of that land, cannot be slighted in any manner and due regard to such judgments have to be accorded by another country, but certainly not at the cost of the welfare of the child. For the sake of enforcement of the judgment passed by a competent court in a foreign country, the welfare of the child or the children, as the case may be, cannot be subjected to sacrifice. The reason is very simple *ie.,* the children are not parties to the differences of their parents. It is not the children, who ignited such differences, which ultimately led to the estrangement of their parents nor are they parties to the lis before any court of law. The children, in our considered view, are a distinct class by itself, who have all rights without any obligations. The obligations are on the parents. Unfortunately, often in matrimonial disputes it is only the children who are

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68 (2009) 9 SCC 111.

69 *Id*. at para 19.

unnecessarily being roped into the legal controversies. Therefore, undoubtedly, as between the law and the welfare of the child, the ultimate successor would always be the welfare of the child, inasmuch as the society in its entirety owes an obligation to the child but not the other way round.[70]

On the basis of the foregone reasoning and facts and circumstances the court ruled that the custody of the children be remained with the mother.

Inter - country adoption

The Supreme Court in *Stephanie Joan Becker* v. *The State*[71] took note of principles of law governing inter-country adoption in India as it has developed and has succinctly restated in a short resume. The law as to inter-country adoptions was indeed rudderless till the apex court laid down principles governing giving of Indian children in adoption to foreign parents including the procedure that should be followed thereof to ensure absence of any abuse, maltreatment or trafficking of children. In *Lakshmikant Pandey* v. *Union of India.*[72] The court was in fact studying the objections raised as they pertained to the legality of the practice of inter-country adoption itself. After an elaborate consideration of various dimensions of the questions the apex court supporting inter-country adoption, offered elaborate suggestions to ensure the process of such adoption is carried out in accordance with strict norms and well laid down procedures to eliminate the possible abuse or misuse in offering Indian children for adoption by foreign parents. Further this court also laid down approach to be adopted by the courts for inter-country adoption through the applications under the Guardians and Wards Act, 1890.

LakshmiKant Pandey decision of the Supreme Court established a central body *ie*., Central Adoption Resource Agency which acts as a clearing house of information as regards children available for inter-country adoption. The judgment also laid down principles governing adoption known as Guidelines for Adoption from India, 2006. These guidelines are elaborate provisions which regulate pre - adoption procedure including separate steps in the process of adoption. The court next referred to the two significant developments in the law governing adoptions. Firstly, the Juvenile Justice Act (Care and Protection of Children) Act, 2000 was amended to give powers to Court to give a child in adoption upon satisfaction of the various guidelines issued from time to time and second significant development being the enactment of the Juvenile Justice (Care and Protection of Children) Rules, 2007 by repealing the earlier 2001 Rules, again the Guidelines of 2006 were replaced by a fresh set of guidelines by notification dated 24-6-2011.

The appellant's case for adoption was sponsored by an agency (Journeys of the Heart, USA) rendering service in USA which is recognized by CARA. The home study report of the family of the appellant indicated all the necessary details.

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70 *Id*. at 124-125.

71 AIR 2013 S.C 3495.

72 AIR 1984 SC 469.

The child study report provided by the recognized agency in India has been read and considered by the appellant and thereafter she indicated her willingness to adopt. This civil appeal was necessitated as her applications filed under Guardians and Wards Act, for an order of the court appointing her as the guardian of one female orphan child, Tina, aged about 10 yrs whereas by the second application the appellant had sought permission of the court to take the child Tina out of the country for the purpose of adoption, were rejected both by the trial court and the high court (which affirmed the trial court order).

In the light of the facts and circumstances the Supreme Court observed "The Guidelines of 2011 were in operation on the date of the high court order *ie.*, 9.7.2012. The notification dated 24.06.2011 promulgating the Guidelines of 2011 would apply to all situations except such things done or actions completed before the date of the notification in question *ie.,* 24.06.2011. The said significant fact apparently escaped the notice of the high court. Hence the claim of the appellant along with consequential relief, if any, will have to be necessarily considered on the basis of the law as in force today".[73] The court further observed that: [74]

> It is our considered view that having regard to the totality of the facts of the case the proposed adoption would be beneficial to the child apart from being consistent with the legal entitlement of the foreign adoptive parent. If the above is the net result of the discussions that have preceded, the court must lean in favour of the proposed adoption. We, therefore, set aside the orders dated 17.09.2010 in Guardianship Case No.2 of 2010 passed by the learned Trial Court and the order dated 09.07.2012 in FAO No.425 of 2010 passed by the High Court of Delhi and appoint the appellant as the legal guardian of the minor female child Tina and grant permission to the appellant to take the child to USA. In conclusion the Apex Court ruled, "[W]e deem it appropriate to pass necessary orders giving the child Tina in adoption to the appellant. The CARA will now issue the necessary conformity certificate as contemplated under Clause 34(4) of the Guidelines of 2011.

It is to be noted that as a concept inter-country adoption has come to be accepted by many countries including India by their accession to the 1993 Hague Convention on inter-country adoption. However the process is still to take deep roots internally. Indeed, the present case is a direct illustration of inter-country adoption, wherein the concerned parties have satisfied all the technical requirements of the guidelines and rules of procedure. Even so, the net result is (a) the prospective adoptive parent is only a "legal guardian" and (b) a permission to take the child out of the country for the purpose of adoption in accordance with foreign law.

73 AIR 2013 SC 3495 at 3499

74 *Id.* at 3501.

Consequently, until such time when the child undergoes the process of adoption to be assimilated in the adoptive family, there is uncertainty in the status of the child. It is imperative to remedy this uncertainty to make life easier and smoother to the adoptive child in the new environment. Besides there are other related issues concerning citizenship rights, rights of inheritance and in general protection of rights of child without being discriminated as an adopted child from (outside the adopted country) a biological child.

IV INTERNATIONAL CONTRACTS

Proper law of contract

Pantaloon Retail India Pvt. Ltd. v. *Amer Sports Malaysia Sdn. Bhd,*[75] concerns with international commercial contract and its maintainability in India. Amer Sports Malaysia Sdn. Bhd the respondent entered into a contract with the Indian firm Pantaloon Retail India Pvt. Ltd. It was agreed by the parties that their agreement, dated April 01.04.10, shall be governed by the laws of Malaysia and only courts at Malaysia at Kuala Lumpur would have the jurisdiction to decide the issues arising from the contract. According to the principles of Private International Law pertaining to proper law of contracts, disputes require to be resolved at the forum of choice. The parties' contract is the "Distributor Agreement" dated 01.01.2010 with plaintiff Pantaloon Retail India being exclusive licensee to market and distribute the products of defendant (no.2) in India bearing the trade mark 'WILSON' or 'W'. Later consequent to differences arising between the parties the respondent Malaysian party rescinded the contract unilaterally. The plaintiff-applicant therefore moved the courts in India for relief. The court of first instance passed a decree for declaration against the defendants. On appeal the single judge held that the suit was not maintainable in India.

The division bench on facts and circumstances of the case found that one of the clauses of the said agreement offends sections 27 of the Indian Contract Act and that another clause in the contract (clause 18) which spelt out the 'severability' in the operation of the contract was not noted by the single judge, The court in its ruling stated: [76]

> Clause 22, vesting non-exclusive jurisdiction in courts of Malaysia, has to be read in the light of Clause 18 of the Agreement and highlighting the fact that the proper law of the contract would be the Indian Law, since the principal relief claimed by the appellant is to declare void the offending clause 10.1 (d) alleging the same to be violative of Section 27 of the Indian Contract Act, we hold that the suit is maintainable in India…

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75 2012 (50) PTC 583 (Del).

76 *Id.*at 15.

The said facts do bring out courts in India having jurisdiction as per the CPC, 1908 in as much as admittedly, a part of cause of action has arisen in India. Other facts which supported the stand pursued by the court are: [77]

> the said 'Distributor Agreement' was signed in India (Gurgaon) and that the licensee (plaintiff applicant) to market and distribute the products in the territory of India. The court on facts and circumstances of the case ruled that the suit was maintainable in India. On law the court expressed the view that "where by consent, even with respect to a non-exclusive jurisdiction clause, parties by consent vest jurisdiction in a foreign court, the principles of private international law would require parties to litigate only at the forum of their choice.

M/s Sumitomo Heavy Industries Ltd v. *Oil and Natural Gas Company.*[78] This case relates to an international commercial contract. The appellant contractor entered into contract with respondent for installing and commissioning of Wel-cum Production platform Deck for extraction of oil. The contract clearly provided for tax protection (net of all taxes). The indemnity clause in the contract provided for compensation for extra cost caused due to change of law. The dispute arose when the respondent declined to reimburse the extra cost incurred to the appellant because of the change in the tax amount. The matter went before an arbitration held in London which resulted in an award that directed the respondent to pay the appellant, the Japanese concern, the sum of Japanese Yen 129,764,463/=.

Aggrieved by the award finding the respondent sought setting aside of the award. The present special leave petition is against the previous and division bench judgment of the Bombay High Court. After a due consideration of the terms of the contract between the parties and also the arbitration award rendered in the matter the apex court upheld the award and set aside the judgment of the single judge as well as that of the division bench. The Supreme Court observed that in international commercial contracts intention of the parties is to be looked for in the words used in the contract giving due weight age to all the terms of the contract.

Choice - of – forum jurisdiction

Sustainable EMS LLC v. *Lee Harris Pomeroy Architects PC (LHPA).*[79] The plaintiff, Lee Harris Poemroy Architects PC (LHPA), an American company entered into a contract with the defendant company, Sustainable EMS LLC, also an American company. Both the companies have their lead offices in USA. This is an application by the defendant for the dismissal of the suit filed by the plaintiff, on the ground of lack of jurisdiction on account of the choice-of-forum clause in their

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77 *Id*. at 22.

78 AIR 2010 S.C. 3400.

79 AIR 2012 Cal 88.

agreement. It is the case of the defendant that the suit ought to have been filed in USA. The current dispute has arisen out of a sub-contract between the parties. The main contract was between the first and second defendants (Kolkata Metro Rail Corporation Ltd) which *inter alia* included the following forum selection clause:[80]

Article 9 Law Applicable

> This Agreement has been entered into in the United States and shall in all respects be construed and interpreted in accordance with laws of the state of New York in the United States. The parties hereto submit to the exclusive jurisdiction of the Federal and State courts located in the City of New York with respect to any disputes arising out of or sub-contract for services Kolkata East West Metro Project- Sustainable EMS LLC related this sub-contract.

According to this clause only the federal and state courts located in the city of New York in USA have the jurisdiction to adjudicate the dispute. To substantiate, the first defendant provided the following points: that both the parties are American, the sub-contract was executed in the US, bills were raised by the plaintiff in New York in the US, and payments were also made in New York in the United States in the proceedings initiated by the defendant against the plaintiff in USA the plaintiff has participated on the basis of these uncontroverted facts. The court followed the reasoning to begin with the law laid down by the apex court in *A.B.C Laminar Pvt. Ltd* v. *A.P. Agencies*[81] and opined: [82]

> that when parties had agreed to confer exclusive jurisdiction on a court the jurisdiction of any other court was necessarily ousted. Following the same principle to the present case that if the agreement is between two foreign parties where a substantial part of the cause of action is shown to have arisen in the U.S.A, and the plaintiff has participated in an action initiated by the first defendant against them in U.S.A, the parties must abide by their contracts. The court further pointed out that contract should be enforced and the parties should be kept to their bargain and that the discretion of the court is guided by the considerations of justice balance of convenience the nature of the claim and of the defense, the history of the case, the proper law which governs the contract the connection of the dispute with the several countries and the facilities for obtaining even-handed justice from the foreign tribunal are all material and relevant consideration.

80 *Id*. at 89.

81 AIR1989 SC 1239.

82 *Supra* note 79 at 89.

The court was ruling on its own appeal court in *Messers Lakhi Narayan Ramnivas* v. *Lloyd Triestino Societa Per Aziuni Di Navigazine Sede in Triesta* [83] for these views.

This case was also concerned as regards procedural issues while foreign parties utilize Indian court's jurisdiction. This is as regards filing_of a suit by foreign party without obtaining the leave of the court, a procedural requirement under clause 12 of the Letters patent 1865. This lapse on the part of parties, resulted in the proceedings being defective which should dismissed on that ground by lex *fori* in conflict of laws and non-compliance will result in dismissals.

Carriage of Goods by Sea Act, 1925 – Bills of lading

Carriage of Goods by Sea Act, 1925 in India has embodied the Hague Rules formulated by the International Convention for the Unification for Certain Rules of Law relating to Bills of Lading in 1924. In a contract of carriage (as illustrated by the cases here below) the terms of the contract undertake the transport of goods from the port of origin to port of destination. A contract of carriage has also an inbuilt duty to take care of the goods under its terms which would result in civil liability of negligence (tortious liability)

Shaw Wallace & Co. Ltd (Now United Sprits Ltd) v. *Nepal Food Corporation* [84] concerns with the liability of the carrier. The shipper, Nepal food Corporation (hereinafter NFC) entered into a contract with Ngoh Hong Hang, Pvt. Ltd, Singapore (hereinafter NHH) for sale of parboiled rice. The payment was to be made by the buyer by opening an irrevocable letter of credit in Rashtriya Banijya Bank, Kathmandu in US dollars whose validity period was up to 15.01.79. The vessel was chartered by NHH (buyer of rice from NFC) for carrying rice (5000 MT) shipped by NFC to NHH from Calcutta to Penang in Malaysia. Shaw Wallace & Co Ltd (now United Spirits Ltd), the appellants herein were appointed as charterer's agent. The dispute in this case was over payment of demurrage. Factually the seller NFC could not negotiate Letter of Credit before the Letter of Credit expired due to delay in issuance of Bill of Lading. Notices were issued mutually from the parties by NHH to NFC alleging that NFC was liable for several breaches and by NFC to NHH claiming value for rice supplied. NFC filed suits against NHH both in Calcutta and in Singapore for recovery of the value for goods supplied. The suit filed in Singapore was decreed. The contract of carriage was governed by the terms of the charter party agreement. As per the charter party agreement in this case, if the ship was delayed, the charterer (NHH) was responsible to pay the demurrage and that the same should be settled at Singapore, 20 days after discharge of the cargo at Penang. The contract of carriage was to deliver the cargo from the port in Calcutta (India) to Penang in Malaysia. The shipper, NFC did not have any obligation towards the owner of the vessel to pay either the freight or any demurrage

83 AIR 1960 Cal 155.

84 AIR 2012 SC 73.

charges. As per the sale contract between a NFC (as seller) shipper and NHH (as the buyer), the NFC to payment of the entire invoice value at the seller's bank on presentation of the Bills of Lading. In other words the shipper (NFC) was certain of obtaining payment from the bank under the buyer's Letter of Credit, by merely producing before the bank the Bills of Lading and the invoice.

On facts and circumstances, the Supreme Court found NFC losing the value of goods on account of the appellant not releasing the Bills of Lading before the expiry period of the Letter of Credit. The apex court found that the appellant acted negligently in performance of its legal duty in common law to issue the Bills of Lading as the agent of the ship owner and thus became liable to pay the damages to make good the loss. The Supreme Court ruled: [85]

> ….[I]f the issue of bill of lading is denied or delayed as a consequence of which the shipper suffers loss, the owner of the vessel and its agent will jointly and severally be liable to make good the loss by way of damages.

In another situation the original contract sale of rice involved a charter arrangement. The NHH had a charter party agreement with the shipping for carrying rice supplied by NFC from Calcutta to Penang, Malaysia. On facts and circumstances, the apex court held the agent of carrier not liable since the seller of goods NFC had not demanded the Bill of Lading (as per the provision of the statute – Carriage of Goods by Sea Act of 1925) or even the blank forms of the same before the Letter of Credit was expired.

This is a case concerning liability resulting from a contract of carriage in which Bills of Lading rules were not followed and resulted in loss to the parties. The act of breach of statutory duty[86] and negligence[87] took place in the Indian port.

M.V.X Press Annapurna v *Gitanjali Wollens Pvt Ltd*.[88] involves a contract of carriage. The cargo was to be carried from a port in India to Assab Port in Ethiopia. The plaintiff case is that despite the fact that the freight for the consignment was paid to the defendant the bills of lading were not handed out to him. With the result the goods were lost and the plaintiff suffered loss as he could not realize export proceeds from their buyers in Ethiopia. This is again a case where the Bills of Lading were not provided due the fact that the plaintiff's had not demanded for the same as mandated under the Carriage of Goods by Sea Act.

The plaintiff's suit was decreed by the High Court of Bombay for a payment of sum of US $ 57860.00 together with interest.

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85 *Id*. at 81.

86 With holding the bills of Lading by Charters agent.

87 Breach of legal duty amounting to a wrongful act and negligence.

88 AIR 2011 Bom105.

Intellectual property rights

The IPRs have a tendency to deal with issues that spill beyond the national boundaries and have to be answered by applying principles of private international law. The two cases discussed here demonstrate this point of view. In *Reckitt Benkiser India Ltd*. v. *Wyeth Ltd (FB)*[89] a reference was made to the full bench by a Division Bench of Delhi High Court on an issue pertaining to cancellation of design registered in India on the ground of existence of a design registered abroad in a convention country. The full bench in this context made extensive thorough analysis of the apex count's decision in *Bharat Glass Tube Ltd.* v. *Gopal Glass Works Ltd.*[90]on the issue of cancellation of a design, applied and registered, was sought on the basis of only a letter by German company and a website of Patent Office in UK. The full bench further relied on the work on the subject of industrial designs and made the following concluding observation:[91]

> (i) Existence of a design registered abroad in a convention country is not a ground under Section 19 (1) (a) for cancellation of a design registered in India.
>
> (ii) The provision of Section 44 does not have the effect of changing the literal interpretation of Section 19(I) (a) inasmuch as under Section 44, the foreign registered design becomes an Indian registered design although, the date of registration of the foreign registered design which is registered in India will relate back and have retrospective effect from the date of application first made in the convention country abroad. Once, the foreign registered design becomes registered in India, the very fact that it is an Indian registered design it will be a previously registered design in India, and by virtue of the priority rule the same will be a ground for cancellation of a design subsequently registered in India on an application made after the date of the priority date given of the application made abroad for registration of the design in a convention country.
>
> (iii) The benefit of foreign registered design after its registration in India for seeking cancellation of an Indian registered design under Section 19 (1) (a) will only be available if the application for registration in India is made within six months of the date of the application made in the convention country abroad, notwithstanding there may be prior publication in this interregnum six month period.

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89 AIR 2013 Delhi 101.

90 AIR 2008 SC 2520.

91 Russell-Clarke and Howe on *Industrial Designs* (Sweet & Maxwell 8th edn. , 2010).

(iv) In case, the application for registration in India is not made within the statutory permissible period of six months of having made the application abroad, then, the design registered in India in the meanwhile in six months period cannot be cancelled under Section 19 (1) (a), though, the foreign registered design owner on proving of prior publication can have an effective defence to the infringement action filed by the Indian registered design owner and which defense against an infringement action is available vide Section 22 relying on the round of prior publication under Section 19 (1) (b) read with Section 4 (b) of the Act.[92]

Adobe Systems Inc v. *Sachin Naik* [93] concerns with the infringement of copyright. The plaintiff is one of the world's leading software development company based in USA and having its subsidiary office in New Delhi. The present suit has been filed for permanent injunction restraining infringement of copyright. The prayer sought restraining of the defendant firm its employees, agents, servants *etc*. from using the plaintiff's unlicensed software as it was found that thirty three computer software's were installed with pirated software of plaintiff by the defendants.

This is an *ex-parte* case where the defendant did not participate in the proceedings. The court relied on the ex-parte evidence as well as documents placed on record. The court observed: [94]

> ….The plaintiffs work are also protected in India under Section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999 as the rights of authors of member countries of the Berne and Universal Copyright Conventions are protected under Indian copyright law. India and the USA are signatories to both the Universal Copyright convention as well as the Berne Convention. Consequently, this Court is of the view that plaintiffs are entitled to a decree of permanent injunction.

V INTERNATIONAL COMMERCIAL ARBITRATION– CONFLICTS AND PERSPECTIVES

International commercial arbitration encompasses within its ambit matters relating to arbitration agreements the applicable law to these agreements including substantive and procedural law, enforcement of foreign awards as well as side setting annulment and many more. There are many significant judicial pronouncements both from apex courts and various high courts. Few of them are

92 AIR 2013 Delhi 128.

93 AIR 2013 Delhi 80

94 *Id.* at 82-83.

path breaking and restate Indian state practice. These decisions have a telling effect on many important issues in the ever growing international trade and commerce and foreign investment.

The jurisdiction of the Indian courts to annul a foreign award

A Constitution Bench of the Supreme Court on 6th of September 2012 observed 'The Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law, in *Bharat Aluminium Co*. v. *Kaiser Aluminium Technical Service, Inc.*[95] In this case an agreement dated 22.04.93 was executed between appellant and respondent. According to the agreement the respondent was to supply and install a computer based system. The prevailing law of India was accepted as governing law and dispute settlement to be by arbitration in London. By this agreement the English Arbitration Law made applicable to proceedings. When the disputes arose between the parties they were referred to arbitration in England, resulting in two awards. The appellant filed application under section 34 of the Arbitration & Conciliation Act, 1996 (A&C Act, 1996) for setting aside the awards. When the case reached the Constitution Bench of the Supreme Court specifically constituted examined and defined the scope of A&C Act, 1996 and clarified the concept of seat of arbitration under the Indian Law. The bench was also examining the jurisprudence of *Bhatia International* [96] The Supreme Court in this case had ruled that part I of the Arbitration Act 1996 would have application to international commercial arbitration held outside India[97] This ruling was prevailing in India for nearly ten years and its scope was further broadened by the Apex Court *in Satyam Computer case.*[98]

The decision of the *'BALCO'*[99] case establishes the difference between the foreign and domestic awards under the A&C Act, 1996. The court's interpretation of the relevant provisions of the New York Convention is very vital as enforcement of foreign arbitral awards falls within the preview of conflict of laws/private international law/ the New York Convention harmonises the law relating to recognition and enforcement of foreign arbitral awards. In the opinion of the court the underlying motivation of the New York Convention was to reduce the hurdles and produce a uniform, simple and speedy system for enforcement of foreign arbitral award.

The bench observed, that the convention embodies a consensus evolved to encourage consensual resolution of complicated intricate and in many cases very sensitive international commercial disputes. Therefore, according to the court's view, the interpretation which hinders such a process ought not to be accepted.

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95 2012 (8) SCALE 333.

96 (2002) 4 SCC 105.

97 In *Bhatia International* v. *Bulk Trading S.A*, the arbitration took place in London.

98 *Venture Global Engineering* v. *Satyam Computer Services Ltd*. AIR 2008 SC 1061.

99 (2012) 9 SCC 552.

The Constitution Bench in this case has brought in conceptual clarity setting at rest most of the controversial issues relating to Indian's obligations arising out of international conventions in the international commercial arbitration as envisaged in the A&C Act, 1996.

After a detailed and in depth analysis of the New York convention and the Indian enactment A&C Act, 1996 also taking into consideration of various leading commentators on international commercial arbitration, the Constitution Bench observed: [100]

> the underlying motivation of New York Convention was to reduce hurdles and produce a uniform, simple and speedy system for enforcement of foreign arbitral awards

Consequent upon this judgment, the earlier cases, *Bhatia International* and *Venture Global Engineering* stand overruled.

In *Coal India Ltd* v. *Canadian Commercial Corporation.*[101] Parties entered into an agreement in 1989 for the respondent to set up a coal extracting facility. It was agreed by the contract that the agreement was to be governed b the laws in force in India, the dispute resolution to be arbitration that would take place in accordance with ICC Rules and the place of arbitration to be Geneva (Switzerland). Upon the arising of disputed the parties proceeded for arbitration. The arbitration was held in UK although the recognized seat of arbitration was Switzerland. The petitioner wants to challenge and set aside the award notwithstanding, the place of arbitration is outside India. The petitioner's challenge is under the provisions of the A&C Act, 1996 as well as provisions of Civil Procedure Code (1908). The respondent in turn has challenged the maintainability of the proceedings for annulment of a New York convention award in this country. The petitioner has invoked section 48 (in part II) and section 34 (in part I) of A&C Act, 1996. It clear that section 48 does not recognise a right to apply for setting aside of a foreign award; it only lays down conditions for enforcement of a foreign award passed under the New York Convention. The respondent on the other argued that in an international commercial arbitration if the parties agree to a seat of the reference the law of the seat of the reference would govern a challenge in the nature of setting aside the award. Further the respondent argued in terms of rudiments of the law of arbitration referring to four sets of rules that have bearing on the matter before the court. They are: the law governing the main or the matrix contract; the law governing the arbitration agreement in its interpretation, enforcement, effect and extent; the law governing the supervision of the arbitration and covering matters connected with there and finally the procedural rules (relating to the conduct of the reference). In the course of the proceedings and arguments of the issue before the count the fundamental rules pertaining to law of international commercial

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100 *BALCO* at 393

101 AIR 2012 Cal 92.

arbitration based on principles of conflicts of laws starting from proper law of contracts were analyzed.[102]

The court was relying on the leading authors and commentators to ascertain the choice of law perspective in international arbitration. Referring to Dicey, Morris and Collins, the court looked into various possibilities on the Conflict of Laws that could apply to different aspects pertaining to arbitration. The court further held: [103]

> It is the part of the very alphabet of arbitration law that an arbitration agreement, even if it is contained in an arbitration clause within the body of larger contract, forms a separate and distinct agreement. This principle is also recognized in India under which the validity, scope and interpretation of an arbitration clause contained in the body of the matrix contact falls to be considered separately from that of the main contract and is not necessarily affected by the invalidity or avoidance of the main contract. it follows from the concept of the autonomy of the arbitration agreement, that the law applicable to it must be determined separately from that applicable to the main contract…The law applicable to the main contract will have a strong influence on the law applicable to the arbitration agreement…If there is an express choice of law to govern the contract as a whole the arbitration agreement will also normally be governed by that law: whether or not the seat of the arbitration is stipulated and irrespective of the place of the seat… If there is no express choice of the law to govern either the contract as a whole or the arbitration agreement, but the parties have chosen the seat of the arbitration, the contract will frequently (but not necessarily) be governed by the law of that country on the basis that the choice of the seat is to be regarded as an implied choice of the law governing the contract. In each of these cases, the main contract and the arbitration agreement will be governed by the same law.

Turning to the primary question raised in this case, namely, respondent's challenge to the maintainability of the proceedings for annulment of the New York Convention award in India the court referred to the leading judicial pronouncement

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102 Extensive reference has been under taken both from case law on the subject on as well as the leading commentators such as Russel on *Arbitration* (South Asian Edition 23rd edn. 2009) Dicey, Morris and Collins on the *Conflict of Laws* (14th edn. 2006) Mustill and Boyd on *Commercial Arbitration* (2nd edn. 2001 Companion volume) and Red term and Hunter on *International Arbitration* (5th edn., 2009).

103 *Supra* note 101 at 100-101.

on the subject. *White Industries Australia Limited* v. *Coal India Ltd.*[104] involving a similar contract as the present one. The other judicial authorities relied on and referred to were *Sumitomo Heavy Industries Ltd*. v. *ONGC Ltd.*[105] which held that the applicability of the curial law would cease when the arbitral proceedings are conducted. *Bhatia International* v. *Bulk Trading S.A*[106] which upheld the applicability of part I of the 1996 Act, to arbitrations conducted outside India and *Nirma Ltd* v. *Lurgi Energie* and *Und Endsorgung GmbH, Germany*[107] which recognized that an award made in another country could be subjected to challenge under section 34 of the 1996 Act.

In the present case the agreement was concluded, executed and signed by the parties in India. The place of performance of the agreement was India. Further payments were made and received in India. Thus according to the petitioner the matrix contract is intricately connected with India that in the absence of the governing law clause the logical inference would lead to India Law as proper law of contract. The court next considered the choice of the parties as regards the law governing the arbitration agreement. The parties have chosen Switzerland as the venue of the arbitral reference or as seat of the arbitration although neither party to the contract had any connection with Switzerland. The court while considering the relevant authorities both judicial as well as the commentators on the subject pointed out that the applicable grounds for resisting the enforcement of foreign award have to be seen as distinct from substantive right to challenge an award for setting it aside. The setting aside of an awarded amounts to its annulment, the court added. In the course of the analysis of the issue raised in this case the court examined the contention of the respondent that a conjoint operation of the two disparate provisions namely, Section 34 and section 48 of the 1996 Act as accepted in the division bench judgment in *White Industries* case and also in the light of the apex court pronouncement in *Fuerst Day Lawson* v. *Jindal Export Ltd*.[108] In the *White Industries* case the opinion was rendered on the first chapter of Part II of the 1996 Act which covers the New York Convention awards. More significantly, the judgment considers the scheme of the 1996 Act and the treatment of matters pertaining to foreign awards there under. In *Fuerst Day Lawson* case the Supreme Court clearly pointed out:[109]

> In its clear demarcation of the applicability of Part I of the 1996 Act to domestic arbitration and Part II to the foreign arbitrations covered thereby, there is an implied bar that the Supreme Court read into the provisions of the 1996 Act, of the applicability of

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104 AIR (2004) 2 Cal LJ 197 (DB).

105 AIR 1998 SC 825.

106 AIR 2002 SC 1432.

107 AIR 2003 Guj 145.

108 AIR 2011 SC 2649.

109 *Supra* note 101 at 108.

> Pat I of the Act to matters covered by Part II thereof, except to the extent permissible under the UNCITRAL Model Law and the ICC rules of arbitration.

The court observed in the context of the Supreme Court ruling in *Furest Day Lawson* that the division bench opinion in *White Industries* may seem to have been impliedly overruled. In *Dozco India Pvt Ltd.* v. *Doosan Infra Core Company*[110] the contract provided that it would be governed and construed in accordance with the Law of Republic of Korea. The arbitration clause stipulated that the reference would be in Seoul and conducted according to ICC Rules. It was argued by the Korean party that since the Korean Law is both the proper Law of the contract and also that of the arbitration with Seoul being the agreed seat of arbitration, request for constituting the arbitral tribunal could not be made to authorities in India.

The Supreme Court held in this case that the governing law clause in the matrix contract also covered the arbitration agreement and with the seat of arbitration being Seoul, the clear language of the distributor ship agreement between the parties spells out a clear agreement between the parties excluding Part I of the Act and in such circumstances, there will be no question for applicability of section 11 (6) (In Part I) of the Act and the appointment of arbitrator in terms of that provision[111]

In *Videocon Industries Ltd* v. *Union of India*[112] the parties entered into a production sharing contract (PSC) and have agreed Kuala Lumpur as the seat of the arbitration. Parties also agreed that the arbitration proceedings to be conducted in the English Language and the arbitration agreement to be governed by the laws of England. When the disputes arose between the parties the matter went before arbitration held in Kuala Lumpur initially but later due to the outbreak of an epidemic SARS, the venue of arbitration was shifted to Amsterdam first and thereafter to London. The tribunal passed a partial award. With the continuance of the arbitration proceedings in London the respondents filed petitions in the Delhi High Court for stay of arbitral proceedings as also questioning the partial award. The appellants objected to the maintainability of the petition for stay on the plea of lack of jurisdiction of courts in India. The Delhi High Court overruled the objection of the appellant and held that the high court has the jurisdiction under the 1996 Act following the apex court's rationale in *Bhatia International.* The Delhi High Court was considering the issue whether the courts at Kuala Lumpur or London have the jurisdiction to decide upon the seat of arbitration. According to high court the answer squarely hinges on the proper law governing the arbitration agreement. The Supreme Court on these issues ruled that a mere change in the physical venue of hearing from Kuala Lumpur to Amsterdam and London did not

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110 (2011) 6 SCC 179.

111 *Id*. at 189.

112 AIR 2011 SC 2040.

amount to change in the juridical seat of arbitration and that the parties' choice of law of England to govern the arbitration agreement necessarily implied the exclusion of provisions of Part I of the India Act of 1996.

In *Louis Dreyfus Commodities Asia Pvt. Ltd.* v. *Govind Rubber Ltd.*[113] the Bombay High Court was considering the validity of a clause purporting to refer parties to arbitration. This case illustrates the liberal approach pursued by the high court in upholding the validity of arbitration clause. Two contracts were entered into by the parties. Both the sale contracts provided clause, governing terms: Singapore Commodity Exchange. All the correspondence referred to and relied upon in the petition by the parties refer to the sale contracts. The respondent acted upon terms and conditions of the sales contract which included the provisions of 'Singapore Commodity Exchange', containing arbitration clause. In this transaction the respondent did not sign the contract or did not return the copy thereof duly signed to the petitioner.

The contractual deal in this case is between an Indian company (Govind Rubber Ltd.) the respondent and a Singaporean company- the petitioner. The purchase order in the sale contract provided governing terms wherein the substantive law governing the contract to be Indian law operated as an Indian contract made in Mumbai and subject to the exclusive jurisdiction of Mumbai, Indian courts only.

It is the case of the petitioner that the dispute arose when the respondent did not make the payment. The dispute arose in respect of the second contract of sale. The petitioner hence referred the matter to the arbitration. The respondent's contention was that they suffered a huge loss due to the failure on the part of the petitioner to supply the goods in time, and also questioned the jurisdiction of the Singapore Commodity Exchange in view of the agreed jurisdiction of Mumbai, India. The tribunal passed an award after ruling the existence of arbitration clause and tribunal's jurisdiction over the matter.

The petitioner filed an execution petition to enforce the award in the Bombay High Court, and the respondent raised objections against the enforcement of the award. After studying the facts and circumstances of the case the court in its verdict confirmed the well established international practice, followed by Indian legal thinking as regards constructive approach to international trade and commerce. In the context of the facts of the case the court ruled that:[114]

> the petitioner is incorporated in the country other than India. The arbitration relating to disputes arising out of legal relationships between parties would fall within definition of international commercial arbitration. Considering the fact that

113 2013 (2) Arb.LR 270 (Bom).

114 *Id.* at 291.

> the dispute was resolved through arbitration which was international commercial arbitration within the meaning of Section 2(1)(f) of Arbitration and Conciliation Act and the arbitral award delivered by the arbitral tribunal was on the difference between the parties arising out of the legal relationship which was considered as commercial in law in force in India, in my view, the award delivered by the arbitral tribunal foreign award within the definition as contemplated under Section 44 of the Act.

International commercial arbitration – anti- suit injunction

In *Enercon(India) Ltd.* v. *Enercon GmbH* [115] petitioner and respondent entered into a joint venture agreement to carry out certain works in India. Even after the expiry of the technological knowhow agreement period was over the respondent continued to supply the machinery to Petitioner. Respondent the German company had the patent of windmill technology and respondent is the licensor to supply the said windmill technology. Petitioners are the licensees to use the technology. One more agreement after 6 years (of manufacturing windmills and using patents) between petitioner and respondent was entered into known as "Agreed Principles" for the use and supply of windmill technology. Under these "Agreed Principles" Petitioner and respondent entered into yet another agreement known as the "Intellectual Property License Agreement" (IPLA) which is the subject matter in the suit in question.

In about 2006 respondent sounded through letters to the petitioner for the completion of the contracts in accordance with all the agreements including IPLA, a fact which is not accepted by the petitioners. It is the petitioner's stand that "Agreed Principles" are binding while IPLA was merely a draft of the oral terms, and not a concluded agreement. The correspondence that ensued between parties resulted in respondent stopping the supplies and petitioner filing a suit, seeking resumption of supplies. The respondent also filed a company petition against the petitioner before the Company Law Board. A spate of litigations ensued between the parties. To sort out the issue relating to IPLA, respondent initiated arbitration proceedings. Petitioner on the other filed a regular civil suit before the civil judge, Daman, for a declaration that IPLA is not a concluded contract among other reliefs and also moved an application for temporary injunction *ex-parte* in the suit. The respondents appeared in the suit and filed an application under section 45 of the Arbitration Act, 1996 contending therein that the suit before the trial court ought to be referred to arbitration pursuant to the arbitration clause contained in the IPLA. The trial court granted the *ex-parte* injunction restraining the defendants/ respondents from proceedings they had filed in English courts. On the issue of IPLA, the trial court ruled the IPLA is not on a stamp paper and it does not bear the signature and seal of public office in authentication that the document is

115 2012 (114) BOMLR 3414.

enforceable in law. Aggrieved by this order, the respondents filed appeals, covering two aspects, as to the grant of anti-suit injunction and as to rejection of the application filed by them under section 45 of Indian Arbitration Act, 1996 which were allowed.

Next the lower appellate court also allowed all appeals. The present writs are against orders of lower appellate court. The high court after hearing the entire arguments of both the parties came to the conclusion on both the issues: (i) referring parties to arbitration and (ii) petitioner's entitlement to an anti- suit injunction.

The court initially was addressing the first issue. In this context the question whether IPLA is a concluded contract or not was discussed. The court found the IPLA was signed by the petitioners on every page of IPLA including the execution clause. Accordingly to the court's view, there is no escape for the petitioners from the consequences flowing from the signing of the IPLA which constitutes a strong circumstance in arriving at a *prima facie* conclusion for referring the parties to arbitration. In the opinion of the court the defining aspect is the intention of the parties to go for arbitration, which intention is clearly manifest in the IPLA, which is duly executed in writing and signed by the parties. In conclusion, the court affirmed the lower court verdict that parties must be referred to arbitration.

Insofar as the second issue is concerned the court though agreed with the lower appellate court's verdict by ruling against the petitioners, pursued a different route. In the course of its discussion the court relied on the conflicts principles, namely forum – non convenience and anti- suit injunction in cases where there is a prior choice of forum exists. The question before the court is whether the petitioners are entitled to an anti- suit injunction, and whether the English courts have jurisdiction. As adjudication of this aspect revolves around the interpretation of clause 18.3 of IPLA, the court chose to analyse this provision, for the purpose.

In this context court was making distinction between "seat and "venue" of arbitration. The court said: [116]

> the seat is a juristic concept and is not a linguistic concept" and "that the juristic concept of a seat is to be gathered from the terms of the agreement, as it expresses the consensual intent of the parties; that use of the expression "place", "venue" or directly referring to the "city" where arbitration is to take place, would mean that all such words, phrases are used to indicate the seat of arbitration and would not mean a geographical location. That the seat of arbitration has got far reaching consequences

Therefore, the defining words are, "The venue of the arbitration proceedings shall be London" and the provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply.[117]

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116 *Id*. at 33-35.

117 *Id.* at 37.

The court held in this context that inasmuch as the parties in this case did not have any agreement between them as regards the seat and, since the parties have agreed to hold the arbitration meetings in London, the parties have expressly not excluded the application of the English Arbitration Act and parties would therefore be entitled to approach the English courts for constitution of the arbitral tribunal.

Foreign judgments: recognition and enforcement

Recognition and enforcement of judgments delivered in foreign jurisdictions are enforced by Indian courts in accordance with provisions under sections 13 and 44-A of the CPC, 1908. This survey covers five such foreign judgments, all of them from England.

In *Pritam Ashok Sadaphule* v. *Hima Chugh*[118] a revision petition was filed when the petitioner/husband's suit under section 13 CPC, 1908 was dismissed. Parties, who met in England, got married in Delhi in India in 2005, and went back to England. As they could not live together the wife lodged complaints of domestic violence against her husband in England. She came back to India in 2009. In 2010 the husband filed a divorce petition against his wife in England, on irretrievable breakdown ground. At the time of the divorce proceedings in UK the wife was in India. She had filed a suit in India praying for a grant of decree of permanent injunction against the petitioner for continuing with the divorce petition before the court in UK. She also filed a petition for dissolution of marriage on the ground of cruelty in Delhi. In the meanwhile the UK court dissolved the marriage on the ground of irretrievable breakdown and provided six months for making the divorce 'absolute'. The copy of the said decree was placed before the Indian court by the petitioner. The respondent wife filed a detailed representation before the country court in England opposing making the divorce decree 'absolute' explaining also her acute financial difficulty to come to London to contest the divorce case. At this stage, the petitioner filed a petition under section 13 of CPC for dropping the divorce proceedings against him in India on the ground that the marriage between the parties has already been dissolved by a decree in UK and for that reason the wife's petition has become infructuous. On her part the wife opposed this argument by contending that the divorce decree passed by the foreign court is not recognized in Indian law, and that the ground on which the divorce is granted irretrievable breakdown was-no ground under Indian divorce law.

The court found the divorce granted by the county court in UK an *ex parte* divorce where the respondent never submitted herself to the jurisdiction of the county court. The Indian law on the subject of recognition of enforcement of foreign divorce decrees has been well laid, clearly in the *Narasimha Rao's* case through a contextual interpretation and application of the whole of section 13 of CPC to foreign decrees in matrimonial causes. Following the law laid down by the apex

118 AIR 2013 Delhi 139.

court the court concluded that the decree of dissolution of marriage granted by the county court, Essex UK cannot be recognized as the facts of the case fall within the purview of the exceptions of section 13 CPC, 1908 and accordingly dismissed the revision petition.

In *M/S Alcon Electronics Pvt Ltd.* v. *Celem S.A.*[119] a short question arose as regards maintainability of the Execution Petition filed by the respondents under section 44 A of CPC, 1908 in India. The respondents have filed this petition for execution of the order (for costs) passed by the English court in 2006, against the petitioners before the Bombay High Court. It is the petitioner's case that the district court's order in which the execution petition was filed by the respondent is against justice, equity and good conscience. It was also argued that in as much as the foreign court has not yet passed any order on merits, the present execution filed by the respondents is not maintainable and that the execution sought was for an interim order. The petitioner also added that only the interlocutory order for costs cannot be put to execution in India.

The respondent, on the other, argued that their execution application is according law and is maintainable. According to them there is no bar under law to execute the said order before the Indian court under section 44-A[120] of CPC. After

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119 AIR 2013 Bom 108.

120 S. 44-A: Execution of decrees passed by Courts in reciprocating territory.

(1) Where a certified copy of a 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 ifit 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 tire 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 II. -"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.)"

perusing the rival arguments the court first examined the relevant provisions of the CPC and in particular, section 44-A and observed: [121]

> Admittedly, in the present proceeding, the High Court of Justice, Chancery Division, Patents Court passed an order dated 19th October, 2006 dismissing the petitioner's Application challenging the jurisdiction of that Court. At the time of dismissing the petitioner's Application, the English Court passed an order for payment of costs in the sum of £12,429.75. In the Certificate under Section 10 of the Foreign Judgment (Reciprocal Encroachment) Act, 1933 in Para 6. it is specifically stated that the order carries interest at the rate of 8% per annum, therefore, the objection raised by the learned counsel for the petitioner that there is no order passed by the English Court about payment of interest is not correct. Another objection raised by the petitioner is about the quantum of costs. As per the rules and regulations of that country, the English Court has passed an order for payment of costs and the same is binding on the petitioner in view of Section 44-A of the Code of Civil Procedure, 1908, Whether the order passed by the English Court dated I9th October, 2006 executable or not is the main question involved in the present Civil Revision, Application.

VI CONCLUSION

At the outset it is important to register the visible spurt on issues concerning conflict of laws/Private international law in the decisions of courts of higher judiciary, both at high court and Supreme Court levels. Some judgments go into deeper discussions, *suo moto* referring to leading commentators and rulings in earlier decisions in deliberating issues on conflict of laws. Principles of private international law thus receive practical recognition in their application and interpretation. Such situations have been witnessed, particularly, in the context of application of statutory provisions. It is a known fact that principles of conflict of laws are found to be incorporated in a scattered manner in various enactments in India. There is no single legislation codifying all the rules of private international law under one roof as is found in European and other countries. This survey has witnessed principles relating to domicile, being interpreted with a new perception while applying provisions of Hindu Adoption and Maintenance Act,1956 and Hindu Marriage Act,1955 as regards their exterritorial application to foreigners of Indian origin who profess Hindu religion. The former Act, however, does not refer to Hindus who are Indian citizens specifically, and hence there appears to be no bar to extend its application to non-citizens so long as they are Hindus by

121 *Supra* note 121 at 115.

religion. Justification for such application of the said Act could have been based on the parties' domicile of origin— which is never abandoned but is protected by the 'doctrine of revival' as it is only kept in abeyance. This interpretation will not affect parties' current foreign domicile which is their domicile of choice acquired by them after leaving shores of India to opt for greener pastures. In the context of Hindu Marriage Act, 1955, the Supreme Court had to interpret Section 1(2) of this statute which directly extended the application of the provision to 'Hindus domiciled in the territories to which the Act extends who are outside the said territories. The Apex Court could have attributed domicile of origin of the propositus to the words in Section 1(2) of HMA, "Hindus domiciled" through its interpretation. These comments have been made in the context of *Urvishkumar Savitriben Patel* v. *Regional Passport Officer*[122] and *Sondur Gopal case*[123] which are discussed in this survey.

Welfare of the minor is the paramount consideration in all matters concerning children as has been established by courts all over the world. Indian judiciary is no exception. The Supreme Court has rightly cautioned the existence of the duty of a court to exercise its *paren patriae* jurisdiction in cases involving custody of minor children as is seen in *Ruchi Majoo's* case.

The bulk of cases of this survey has covered are of international commercial transactions and of international commercial arbitration. The judgments have included topics dealing with proper law of contract, bills of lading, enforcement and recognition of foreign arbitral awards, conflicts perspectives of international commercial arbitration such as, proper law of arbitration, *lex arbitri* (curial law), the subtle but legal differences between "seat" and "venue" of arbitrations including anti-suit injunctions based on the ground of forum *non-conveniens*. The decision in the *BALCO* case is indeed a path breaking judgment which had the effect of providing a huge relief for the investing foreign traders in India. Indian courts continue to follow the well laid policy in discerning the foreign judgments for their enforcement and recognition in terms of CPC, 1908 provisions under sections 13 and 44-A. All in all this survey finds regular progressive development of conflict of laws in India with an increased awareness of the subject.

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122 AIR 2010 Guj 100

123 *Supra* note 1.