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4

CONFLICT OF LAWS

*C Jayaraj**

I INTRODUCTION

THE FIELD of conflict of laws like that of any other branch of law is a by product of international and transnational social and economic factors such as movement of persons, goods and services from one sovereign territory to another sovereign territory. Territorially a country's laws are applied by its courts and there is no compulsion, legal or otherwise, to apply the laws of other countries in view of the concepts of sovereignty, sovereign equality and sovereign immunity. Rules relating to conflict of laws is an exception to this general rule evolved in view of the practical needs to render justice to those who are not in their own territorial jurisdiction but found within others with a dispute in hand. When a court in any jurisdiction is presented with a dispute involving a foreign element/law is aware that the court should think of the possible conflict between its own system of law and the system of law of the litigants. Thus, conflict of laws issues arise when a domestic court confronts two different systems of law in a given dispute.

Most of the nations around the world have enacted legislative rules on conflict of laws to guide their institutions to adjudicate a dispute involving conflict of law issues. There has been an increasing legislative activity during the second part of last century in view of the increased interaction between private individuals, both natural and legal, across jurisdictions due to increased international private trade, movement of individuals and married couples settling down in jurisdictions other than those of theirs acquiring new domicile/nationality/citizenship/habitual residence etc. Countries which made rules on conflict of laws much earlier, have taken steps to revise them from time to time to suit the contemporary needs.

The evolution of this branch of law in India is of recent origin. There has been legislative neglect in this field. The Indian superior courts i.e., the high courts and the Supreme Court of India have contributed, from case to case, to the evolution of a jurisprudential corpus which could be the only reference point regarding the status of law on various issues of conflict of law. In this exercise, the Indian courts keep relying on English case laws and academic authorities. The trend of legislative neglect in India is likely to continue in

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future as well. The Supreme Court of India had occasion to lament on this some time ago in the context of conflict of law issues regarding matrimonial disputes as follows :[1]

> Inspite, however, of more than 43 years of independence, we find that the legislature has not thought it fit to enact rules of private international law in this area and in the absence of such initiative from legislature, the courts in this country have been forced to fall back upon precedents which have taken their inspiration, as stated earlier, from the English rules. Even in doing so, they have not been uniform in practice with the result that we have some conflicting decisions in this area.

Though the Law Commission of India prepared two drafts on the conflict of law problems of inter-country adoption but the same could not be made into a legislative enactment. [2] Some conflict of law rules available in statutory form are made by either the colonial administration or after independence in a selective and piecemeal manner by the court.

The recent phenomenon of the Non-Resident Indian (NRI) marriages resulting in what are known as 'limping marriages' has provided the impetus to think on the need to make the necessary conflict of law rules. Hundreds of married Indian women are abandoned by their NRI husbands by obtaining decrees of divorce in overseas jurisdictions not in accordance with the proper law or applicable law with regard to such marriages. There are instances in which the NRI husbands take fraudulent or sham decrees of divorce and heap them on their wives in India on wrong grounds or effecting mechanical assumption of jurisdiction by an overseas court. There are problems which need immediate attention, such as, the provisions for service of summons abroad, taking of evidence abroad, legalization of documents, rules on inter-country adoption, international child custody, maintenance obligations, etc.

The movement against limping marriages and other issues have resulted in the government creating a full fledged ministry to deal with the problems of overseas Indians (people of Indian origin as well as non-resident Indians). One of its tasks is to address the legal and social issues of the NRI marriages and provide possible assistance to the needy.

The present survey examines the conflict of law issues arising from areas such as domicile, application of ICC Rules of Arbitration, maritime lien, forum conveniens etc. The survey also takes note of the activities of the Government of India in acceding to Rome Hague Conventions on private international law.

1 *PY Narasimha Rao* v. *Y. Venkatalakshmi,* (1991) 2 SCALE 1.
2 Adoption of Children Bill, 1980; Inter-country Adoption Bill, 1994, (156th Report of the Law Commission of India).

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II DOMICILE

Domicile is a term of art in the field of conflict of laws as it is a connecting factor between a person and territory and facilitates his status *vis-à-vis* the legal system to which the person belongs. Notwithstanding nearly a century of judicial consideration it has been said that the concept of domicile lends itself to illustration and not to definition.[3] It is also stated that the concept is a mixture of fact and law. Yet in every single situation of conflict of laws relating to matrimonial issues the question of domicile is sought to be established from the facts and circumstances of every single case. This question has been addressed and analysed thoroughly in *Sondur Rajini* v. *Sondur Gopal*[4] by the High Court of Bombay.

In the instant case the wife sought a decree of judicial separation, custody of minor children and maintenance under sections 10 and 1(2) of the Hindu Marriage Act, 1955. The respondent-husband raised objections to the maintainability of the petition on the ground that parties are citizens of Sweden and not domiciled in India. The family court accepted the contention of the husband and refused to exercise jurisdiction. Aggrieved by such stance, the wife filed an appeal before the High Court of Bombay. The case involves several questions such as the meaning of 'domicile', the factors leading to acquisition, abandonment and revival of domicile in the facts and circumstances.

The appellant and respondent had got married under the Hindu Vedic rites on 25.6.1989. The husband was at that time working in Sweden and after marriage he left for Sweden in the 1st week of July 1989 and the appellant joined him in November 1989. A girl child was born out of the wedlock on 19.9.1993. They also purchased their own house in Stockholm and obtained Swedish citizenship in 1997. Due to circumstances regarding his assignment, the couple had to live in India between June 1997 and mid 1999. In mid 1999, a Swedish company offered him a job in Sydney and on his acceptance of the job, he moved to Sydney. All three members of the family moved to Sydney on sponsorship visa 457 which allowed them to stay and work in Australia for a period of four years. In the meantime, the husband sold the house in Sweden and the couple was blessed with another child. The husband, however, lost job in July 2001 and had to shift to Stockholm and lived there in a leased house between January 2002 to October 2002. In October 2002, the husband got another job in Sydney with Infosys Technology Ltd. and he again got temporary visa 457. He went to Sydney on 18.12.2002 and four days before his departure, the wife left for Mumbai with the children and on 31.1.2003 the appellant-wife joined the husband in Sydney. After a short stay, she returned to India with children in December 2003 on a tourist visa. In January 2004 the wife informed the husband that she did not want to return to Sydney at all.

3 *Sondur Rajini* v. *Sondur Gopal*, 2005 (4) Mh LJ 688 at 698.
4 *Ibid*.

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The husband tried to persuade her to join him in Sydney but failed. The wife filed a petition under section 10 of the Hindu Marriage Act, (H M Act) seeking a decree of judicial separation and for permanent custody of minor children as well as maintenance.

The husband originally challenged the maintainability of the petition on the ground that the parties were citizens of Sweden and were not domiciled in India and therefore the petition by the wife was hit by the provisions of section 1(2) of the H.M. Act.[5] The husband also argued that Australia is their domicile of choice. On the contrary, the wife pleaded that they are having the domicile of origin in India and that was never given up or abandoned notwithstanding the factum of acquiring Swedish citizenship and then moving to Australia on sponsorship visa. She further argued that even if it is assumed that the husband acquired a domicile in Sweden she never changed her domicile and continued her domicile in India. She further contended that in the alternative even if it is assumed that she had also acquired the domicile of Sweden, that was abandoned by both of them by virtue of their shifting to Australia and therefore their domicile of origin i.e. Indian domicile got revived.

The high court while considering the case at hand examined it from various angles and analyzed sections 1, 2 and 19 of the H.M. Act by tracing the evolution of the Act with regard to the situations under which the jurisdiction of the court could be exercised in matrimonial matters. The court opined that domicile in India is a condition precedent for invoking the provisions of H.M. Act and sought to establish the relevant factors that would establish domicile.[6] It relied on the apex court judgment in *Y. Narsimharao & Ors.* v. *Y. Venkatalakshmi & Anr.*[7] wherein the Supreme Court had observed that :[8]

> Marriages which take place in this country can only be under either the customary or the statutory law enforced in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married and no other law.

The court after analyzing the law in this regard held that the provisions of H.M. Act will continue to apply to the marriage of parties who were admittedly domiciled in India on the date of their marriage and they cannot be heard to make a grievance about it later or allowed to bye-pass it by subterfuges.

The high court considered the principal contention raised by the husband that on the date of filing of the petition the respondent, and as a consequence

5 S. 1 (2) states "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.

6 *Supra* note 3.

7 1991 (3) SCC 451.

8 *Ibid.*

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thereof the appellant also, were not domiciled in India and therefore the family court had no jurisdiction to entertain the petition filed by the wife. Before establishing the factum of domicile of the parties, the high court systematically traced the general rules in respect of domicile as obtaining both in Indian and English private international law and considered a plethora of cases with regard to the question of domicile in relation to matrimonial disputes. After a long and careful analysis of the precedents, the high court enumerated cogently the available rules in this regard as follows:[9]

(a) Every person must have a personal law, and accordingly everyone must have a domicile. The law attributes to every person at birth a domicile, which is called domicile of origin. This prevails until a new domicile, which is called a domicile of choice, has been acquired by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely.

(b) A domicile of origin continues and does not get divested until a domicile of choice is acquired by conscious act. By merely leaving ones own country, even permanently, such person will not in the eye of law lose his domicile until he acquires a new one.

(c) For acquiring a domicile of choice, one must not only give up a country/domicile of his origin but he must make up his mind to stay for an indefinite period where he desires to acquire a domicile of choice.

(d) The intention to acquire new domicile must be manifest and carried into execution. The two constituent elements that are necessary for the existence of the domicile law are : (i) a residence of a particular kind; and (ii) an intention of a particular kind. There must be a factum and there must be the animus.

(e) The onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon one who asserts that the domicile of origin has been lost.

(f) In order to determine a domicile of a person at a particular time, the course of his conduct and facts and circumstances before and after the time are relevant. Therefore the petitions involving an issue of domicile, before decreeing such petition seeking reliefs under H.M. Act, it is necessary to carefully enquire into the question of domicile.

(g) It must be established that an individual who claims change of his domicile of origin has voluntarily fixed the habitation of himself and his family in a new country and not for a mere special or temporary purpose but with the present intention for making it his permanent home.

(h) The fact of residing in a country other than that of his domicile of origin even the intention of continuing to reside there for long time,

9 *Supra* note 3 at 703.

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is not sufficient. A resident is a mere physical fact and means no more than personal presence in the locality. If he claims that he acquired a new domicile at a particular time, he must prove that he had formed the intention of making his permanent home in that country and of continuing to reside there permanently.

(i) Citizenship and domicile represent two different conceptions. Citizenship has reference to political status of a person and domicile to his civil rights. A person may have one nationality and different domicile.

(j) A domicile of a married woman does not follow that of her husband. She is capable of having an independent domicile.

(k) If the domicile of origin is displaced as a result of acquisition of domicile of choice, the domicile of origin is merely placed in abeyance for the time being. It remains in the background ever ready to revive and to fasten upon the propositus immediately he abandons his domicile of choice.

Having thus clarified the rules for determining the domicile the high court considered the evidence and the averments of both parties with reference to section 1(2) of the H.M. Act. It observed that "from the perusal of the aforesaid cross-examination, it is clear that he (husband) was looking for a job either in Sweden or in Australia. He has categorically stated that without an employment visa is not granted to anyone in Australia and since he was not having a visa he had to leave Sydney, Australia and went back to Sweden. He has transferred all his goods by shipment to Sweden including his car and was staying in Sweden from January 2002 to February 2003. He has also stated that at present he does not have a house in Sydney".[10] The high court further examined relevant documents to find out whether there is sufficient intention to acquire domicile of Australia after the husband abandoned his first domicile of choice i.e. Sweden. After examining the relevant documents, the court held that it would not be possible for them to hold that respondent had ever given up his domicile of origin. Recognizing that till 1997 his domicile was in India, the court held that he abandoned his first domicile of choice i.e. Sweden and in Australia he could not stay for long. Based on such analysis and the sequence of events, the court held that the husband did not acquire domicile of Australia inasmuch as no intention to remain there permanently was reflected either from his conduct or state of mind. The court was satisfied that the respondent had totally failed to establish that the respondent-husband ever abandoned Indian domicile and/or intended to acquire domicile of his choice. Further, observing that husband's domicile in India got revived immediately on his abandoning Swedish domicile, the high court held that the family court was wrong in holding that domicile can be acquired without owning a house or change in one's habit, and their stay in Australia was

10 *Id.* at 707.

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sufficient to hold that they are domiciled in Australia. The high court set aside the judgment of the family court and directed it to proceed with the hearing of the petition under section 10 of the H.M. Act.

III INTERNATIONAL COMMERCIAL ARBITRATION

International Chamber of Commerce Rules of Arbitration

The interface between section 9 of the Arbitration and Conciliation Act, 1996 and the rules of International Chamber of Commerce and the scope of section 9 in relation to interim and conservatory orders by an Indian court was the issue involved in *Paragon Steels Pvt. Ltd.* v. *European Metal Recycling Ltd. and Anr.*[11]

The petitioner before the district court was a company incorporated under the laws of United Kingdom and was engaged in the business of exporting steel scraps and other metals. The respondent was a private limited company incorporated under the Indian Companies Act. Both parties entered into a sale contract dated 21.9.2005 for sale of 27,000 metric tones of shredded steel scrap. The contract also stated the time for delivery, the terms of payment etc. The contract specifically provided for arbitration as follows :[12]

> All disputes, controversy which may arise between buyer/seller under this contract should be settled under the rules of Indian Law. The Rules of Arbitration shall follow those laid down by International Chamber of Commerce whose arbitration procedures and Arbitrators both parties accept. This method is to be adopted only after all reasonable efforts to settle amicably have failed. The place of Arbitration shall be London.

The petitioner filed O.P. (Arb.) No. 5 of 2006 before the district court under section 9 of the Act seeking an order of injunction restraining the 1st respondent from removing the goods comprising of steel scrap approximately 37,000 M.T. being discharged from the vessel 'New Wind' lying in Cochin Port without securing the claim of the petitioner for a sum of US $ 1,497,940.29 and for a direction to the Cochin Port Trust not to release the cargo of respondent no.1 until further orders. The district judge decreed as prayed for by the petitioner.

In the appeal, the appellant contended that the district court had committed a serious error in entertaining a petition under section 9 of the Act since a petition under that section could be maintained only by a party who is governed by the ICC Rules of arbitration if request is made and arbitrator is appointed. Further, it was contended that interim prayer in terms of section 9 could be granted only if the same is in conformity with the ICC Rules of Arbitration. The 1st respondent in the appeal contended that since the

1 1 AIR 2006 Ker 303.
1 2 *Id*. at 305, para 5.

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appellant has breached the contract, the petitioner has right to settle the dispute under the ICC Rules of Arbitration and that he had already informed the appellant of his intention to refer the dispute to arbitration as per contract and that he has got a legal right to invoke section 9 of the Arbitration and Conciliation Act before and after initiating the arbitration proceeding and moreover, the disputes have to be settled in accordance with the Indian law.

After analyzing the documentary evidence in this regard as well as the stipulations of Ext.A-1 i.e. the contract between the parties, the high court observed that it was clear that according to the district court the 1st respondent had failed to perform the terms of the contract.

However, the major issue is whether petition under section 9 of the Arbitration Act is maintainable, which was examined extensively by the high court. After analyzing the provisions of section 9 of the Arbitration Act and article 23 of the ICC Rules dealing with conservatory and interim measures, the court held :[13]

> Section 9 of the Arbitration and Conciliation Act, 1996 read with Article 23(2) of ICC Rules of Arbitration, in our view, would enable a party to invoke the provisions of Section 9 as an interim measure till application is moved before the arbitral tribunal constituted under the ICC Rules of Arbitration.

The high court had relied on the apex court's judgment in *Bhatia International's case*.[14] The apex court in that case had held with reference to Section 9 of the Act "that application for interim measure can be made to the courts in India whether or not the arbitration takes place in India, before or during arbitral proceedings. It had further held that provisions of Part-I of the 1996 Act would apply to all arbitrations and proceedings. It also had held that where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of part-I. In cases of International Commercial Arbitration held out of India, provisions of Part-I would apply unless the parties by agreement, expressly or impliedly exclude all or any of its provisions." By referring to the contents of the contract between the parties in the present case i.e. Ext.A-1, the high court held that parties neither expressly nor impliedly had excluded any of the provisions of part-I of the Act. It finally upheld the district court's decision that a petition preferred under section 9 of the Act in this case was perfectly maintainable.

IV FORUM SELECTION / FORUM NON-CONVENIENS

The issues of conflict of laws such as forum selection / choice of forum doctrine of forum conveniens, determination of the principal place of business,

13 *Id.* at 306, para 7.
14 AIR 2002 SC 1432.

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implication of an exclusion clause restricting jurisdiction of court etc. arose for consideration in *Mayar (H.K.) Ltd. and Anr*. v. *Owners and Parties, Vessel, M.V. Fortune Express and Ors*.[15]

The appellant/plaintiff filed a suit for recovery of damages against respondents/defendants for short-landing of certain logs of wood for which appellants had chartered a vessel from respondents to ship the same from Malaysia to Calcutta. The parties had entered into a bill of lading wherein clause 3 contained an exclusion clause as follows:[16]

> 3. Jurisdiction – Any dispute arising under the Bill of Lading shall be decided in the country, where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein.

Under the charter party agreement the defendant company Transtrade Enterprises Pte. Ltd. (incorporated in Singapore who are also the owners of the Vessel MV Fortune Express) agreed to carry on board the vessel a quantity of 5200 CBM Barawak wood logs or upto vessel's full capacity for discharge at the Port of Calcutta, India. As per the stowage plan of the vessel, 578 logs were lying on the deck of the vessel. When the vessel arrived in Calcutta Port, it was found 458 logs out of 578 were missing. The holders in due course/ endorsees of the bill of lading filed suits demanding damages to the tune of Rs.1,30,19,688.49 and also prayed for the arrest of ship.

A single judge of the Calcutta High Court on 27.3.2000 passed a conditional order to arrest the ship stating that the arrest order would be vacated if the vessel could give bank guarantee for the amount of Rs.1,30,19,688.44. The Punjab National Bank furnished a bank guarantee binding itself and the defendants that they would submit to the jurisdiction of the court.

The defendant Singapore company, on 7.7.2001 filed an application alleging that the suit filed by plaintiffs ought to be dismissed on the ground that as per clause 3 of the bill of lading the court having jurisdiction to entertain the suit, was the court of the carrier's country (i.e. Singapore) and thus Calcutta High Court had no jurisdiction. The single judge, however, dismissed the said application holding that the defendants having received a favourable order from the Indian court could not turn around and challenge the jurisdiction of the very court at a later stage. The defendants, preferred an appeal before the division bench of the high court which while allowing the appeal held that 'under the forum selection clause (clause 3) of bill of lading any dispute arising therefrom shall be decided in the country where the carrier has its principal place of business and thus, Singapore court alone will have

15 2006 (3) SCC 100.
16 *Id*. at 117.

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jurisdiction to entertain the suit.[17] The division bench also rendered other findings :[18]

- The parties have chosen the Singapore Court and the Singapore law by express contract. They should be held bound to it.
- Arrest of the ship was obtained from the Calcutta High Court in Calcutta wrongfully since it was in breach of above clause.
- The defendants never submitted to the Calcutta jurisdiction as they have made reservation about the maintainability of the suit within about a fortnight of the arrest when the order for furnishing bank guarantee and release of the vessel was obtained on their behalf.
- The plaintiffs suppressed the jurisdiction clause.

The Supreme Court considered the basic legal issues of forum conveniens i.e. proper forum to try the suit. The plaintiffs/appellants argued that the cause of action had arisen in Calcutta as non-delivery of logs was claimed at Calcutta and that the appellants would suffer irreparable injury if they were directed to file a suit in Singapore court after expiry of one year. They also argued that since objection to the jurisdiction of the Calcutta High Court was raised by the defendants (Singapore company) only on 7.7.2001 the defendants could not claim advantage of *forum non conveniens*. [19]

In this regard the Supreme Court analysed the views of the high court on the question of *forum non conveniens* and its implication to the forum selection clause. The high court observations ran as follows :[20]

> The factor for leaning heavily in favour of Singapore is that the parties have chosen the Singapore law. We have not had any experts on Singapore Law attending the proceedings before us and indeed this choice of law was also suppressed by the plaintiffs like the choice of court. No doubt, arrest of a ship and the consequent obtaining of security would be of a great advantage to the plaintiff if it were shown that the owners of the ship were difficult to trace or hard to sue. Not so here. The owners have come forward. They can be sued in their country…..We do not see why in view of these circumstances we should not hold the parties to their bargain and send them away from a court which they have not agreed to come to.

The Supreme Court, while examining the validity of the above observations of the division bench of the Calcutta High Court, has also relied on the pleadings of the defendants that 'the case of the defendant carrier/ owner of the ship, of exclusion of the Calcutta Court, is solely based on the

17 *Id.* at 111.
18 *Id.* at 113.
19 *Id.* at 123.
20 *Id.* at 125-6.

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exclusion clause which conferred jurisdiction on the Court, where the defendant has the principal place of business, which according to us has to be determined only after sufficient material is placed before the court'. [21] Having observed so, the Supreme Court went on to define the meaning of the principal place of business to be the place where the governing power of the corporation is exercised or the place of a corporation's executive office, which is typically viewed as the nerve centre or the place designated as the principal place of business of the Corporation in its incorporation under the various statutes'.[22]

Applying the meaning of principal place of business, propounded by it, the Supreme Court approached the case from a different perspective from that of the division bench of the high court. The court stated that the defendants had not placed any material before the court that Singapore Court was another available forum which was clearly or distinctly more appropriate than the Indian courts.

Further, the Supreme Court observed that the action commenced by the plaintiffs/appellants in the Calcutta Court was founded on facts which were most real and substantially connected with, in terms of convenience or expense, availability of witnesses and the law governing the relevant transaction in the Indian court.

Basing itself on the absence of any relevant pleadings on the part of the defendant ship-owner regarding any possible injustice, in case the action in Calcutta High Court continued, the Supreme Court held :[23]

> There was no material before the court as to how the trial at Singapore would be more convenient to the parties vis-à-vis the trial of the suit at Calcutta and that justice could be done between the parties at substantially less inconvenience and expenses. Nor has it been shown that stay would not deprive the plaintiffs of legitimate personal or financial available to them. In the facts of case, we are not satisfied that there is another forum having jurisdiction in which the case may be tried more suitably for the interests of all the parties and for ends of justice.

The court finally set aside the order of the division bench of the Calcutta High Court and ordered that the admiralty suit should proceed in the Calcutta High Court in accordance with law.

V ADMIRALTY JURISIDCTION

The nature and the scope of seamen's right to wages under the Merchant Shipping Act *vis-à-vis* the concept of maritime lien, the concept of comity of

21 *Id.* at 126.
22 *Id.* at 127.
23 *Id.* at 127.

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nations in the context of individual rights in a foreign court were some of the issues involved in *O. Konavalov* v. *Commander, Coast Guard Region and Others*.[24] The customs department of the Government of India captured a vessel named *Kobe Queen I* also known as *Gloria Kopp* registered in Panama whose crew members are Ukranian and the ship registered in Panama, for violations of the provisions of the Customs Act. The ship was ordered to be arrested and a receiver was appointed to take possession of the cargo and for valuing the same. The single judge ordered the sale of the ship. One O. Konavalov filed an application praying for a direction that the receiver should pay wages to crew members out of the proceeds of the sale of the vessel. In the meantime the coast guard moved the division bench of the high court seeking the stay of the sale of the ship in view of pending investigations. After a series of proceedings initiated by both sides with regard to seizure and capture of the vessel and cargo and the payment of wages from the sale proceeds etc. the single judge of the high court directed the coast guard authorities and the customs authorities to pay the wages lawfully due to the crew members on board in the ship and that the crew should be deported to their country and that the expenses should also be made by the government agency out of the funds retained by them after selling the cargo.

The coast guard and the customs department preferred an appeal before the division bench of the high court and contended that : (a) the Merchant Shipping Act, 1958 is not applicable to foreign seamen; (b) since the government has confiscated the ship the crewmen has no lien on the ship. The division bench allowing the appeals held "We hold that the Chief of the Ship and Crew can invoke the provisions of Merchant Shipping Act as they are the Seamen in a ship under the Act or in other words, the words 'under this Act' would refer and qualify the words 'the ship' and not 'employed or engaged as a member of the crew'."

The high court further held that there is no transfer by the owner of the ship to a foreign Government and the ship has become the property with absolute ownership of Indian state merely by virtue of confiscation order. The Supreme Court commented on the High Court in this regard that "it has compared this with the category the matter where a government could claim sovereign immunity and the maritime lien for wages on the ship extinguishes on the ship being confiscated by the Government".[25]

After hearing both the parties, the Supreme Court held that "The most unique concept of all in admiralty law is the maritime lien. It is a concept which is *sui generis*, but for practical purposes may be considered as a charge upon maritime property, arising by operation of law and binding the property even in the hands of a bona fide purchaser for value and without notice but which can only be enforced by an admiralty claim *in rem*". Relying on the observations made in *M.V. Elizabeth* case[26] regarding the nature of the

24 2006 (4) SCC 620.
25 *Ibid.*
26 *MV Eligabeth* v. *Harwan Investment & Trading (P) Ltd.*, 1993 Supp (2) SCC 433.

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admiralty powers of the judiciary, the court observed that "admiralty jurisdiction is an essential aspect of judicial sovereignty which under the constitution and the laws is exercised by the High Court as a superior court of record administering justice in relation to persons and things within its jurisdiction. Power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them".[27]

In the context of the issue of the seamen's wages, the Supreme Court observed relying on judicial opinion and text book writers[28] that "a maritime lien such as seamen's wages is a right to a part of property in the *res* and a privileged claim upon a ship, aircraft or other maritime property and remains attached to the property travelling with it through changes of ownership." It is also acknowledged that it detracts from the absolute title of the "*res*" owners. The court further continued : The seamen's right to their wages have been put on a high pedestal. It is said that a seaman had a right to cling to the last plank of the ship in satisfaction of the wages or part of them as could be found in *Neptune*[29] and *Ruta*. [30]

Referring to the facts situation of the present case the court held that the crewmen by virtue of them being crewmen have a lien on the vessel and are entitled to claim such wages that are due to them. The rationale being wage lien arises from service rendered to the ship and thus the Supreme Court differed with the single judge who ordered the payment of wages to the crewmen from the proceeds of the sale of cargo and also differed from the division bench which held that in the face of the confiscation of the vessel the crewmen lost their lien on the vessel even to get their wages.

The court held in the facts and circumstances of the case that 'the confiscation of the ship should not be treated as prized catch of an enemy ship deserving condemnation without exception……. The comity of nations is a reciprocal courtesy which one member of the family of nations owes to the others. In our opinion the crew members are not responsible for the confiscation and the sale of the ship and the cargo. It is settled law that the action of the State has to be based on reasonableness and cannot deprive the basic human rights afforded under the Constitution more so, under Article 21".[31]

The court finally directed the Commander, Coast Guard Region (East) Customs Department etc. to pay wages forthwith to all the crew members within three months.

27 *Supra* note 24 at 634.
28 For the authorities relied on by the Supreme Court, see *ibid.*
29 166 ER 81 : 1 Hegg 227.
30 *The Ruta* (2000) 1 Lloyd's Rep. 359 : 2001 CR 1624.
31 *Supra* note 24 at 642..

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VI HAGUE CONVENTIONS ON PRIVATE INTERNATIONAL LAW AND INDIA

The problems created by the NRI marriages have made the Government of India to use beneficially the Hague Convention on Private International Law with the purpose of solving some procedural problems. Thus, so far, India has become a party to the Hague Convention on the inter-country adoption, legalization of documents, service of summons abroad, etc.

The issue of inter-country adoption has been a thorny issue since there is no legislative framework to regulate the process of adoption of Indian children by foreign nationals. The abuse of the inter-country adoption system has made the Supreme Court of India to intervene issuing a set of guidelines in this regard. The absence of rules in this regard is inexplainable even though the Adoption of Children Bill, 1980 was introduced in Parliament but was not passed. Further in 1994, the Law Commission of India made another draft, known as the Inter-Country Adoption Bill, 1994 incorporating some of the basic guidelines provided by the Supreme Court of India in *Lakshmi Kant Pandey* v. *UOI*.[32] The fundamental paradigm of the inter-country adoption from India is the notion of the 'best interests of the child' while effecting adoption. Everybody concerned, i.e., the adoptive parents, the biological parents, the governmental and non-governmental agencies involved should bear this fundamental perspective in mind. The Supreme Court, in order to protect this fundamental perspective, has made guidelines in this regard, such as :

- applicability of Guardians & Wards Act, 1890;
- notice to non-governmental agencies engaged in child welfare;
- child study reports prepared by professional social workers;
- sponsorship of foreigners' application for adoption by recognized welfare agencies of the foreign country;
- home study report regarding a family living in India or abroad and on their suitability;
- terms of undertaking by the sponsoring agencies;
- role of foreign agencies engaged in inter-country adoption;
- position of biological parents; etc.

The Government of India acceded to the Hague Convention on protection of children and cooperation in respect of inter-country adoption in 2003. The provisions of this convention are intended to protect the best interest of children who are the subject matter of inter-country adoption.

Though India has acceded to the inter-country adoption convention in 2003, there is no move so far to make a legislative framework to implement the convention within India.

32 AIR 1984 SC 469.

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Service abroad of judicial and extra judicial documents in civil or criminal matters

The broken NRI marriages have brought out some legal issues for the consideration of the Government of India. In a typical case, a deserted Indian woman was rendered unable to contest the matrimonial proceeding which was filed against her in overseas jurisdiction in view of the lack of necessary notice to her. On the other hand, even if an abandoned Indian married woman residing in India wants to seek from an Indian court, matrimonial reliefs, such as restitution of conjugal rights, maintenance or child custody have no way of proceeding in a proper manner in view of the inability to serve the summons effectively, inspite of some provisions in the Civil Procedure Code, 1908. There are occasions in which the summons emanating from India are not effective since in most cases the overseas defendant refuses to receive the summons or avoids them by foul means. Such situations result in the so-called limping marriages due to *ex-parte*/sham decrees obtained by the NRI husbands. As a result, in order to overcome some of the procedural problems, the Government of India has acceded to the 1965 Hague Convention on the service abroad of judicial and extra judicial documents in civil and commercial matters, in 2006. The objects of the convention are :

- Creating appropriate means to ensure that judicial and extra judicial documents are served abroad;
- such service shall be brought to the notice of the addressee in sufficient time;
- improving the mechanism of mutual judicial assistance; and
- simplifying expediting the procedure;

The convention functions on the principle of reciprocity wherein any two state parties could effect the service of judicial and extra judicial documents much more easily within their territories mutually. The convention is applicable to all cases of civil and commercial matters including matrimonial ones, where there is a need to transmit a judicial or extra-judicial document for service abroad. The service mechanism involves the creation and designation of central authority in the territories of the state parties which would undertake to receive the request for service coming from other contracting states. The convention also provides for the methodology of framework for the request of service to be made to another contracting party besides providing for the formalities of service, proof of service, alternative modes of service, the consequences of refusal to serve, etc.

VII CONCLUSION

The year under survey has not witnessed many cases in the field of conflict of laws. It is, however, to be noted that the few cases which have been surveyed here would demonstrate that the evolution of jurisprudence in this field is continuing due to the active consideration of issues by the high courts and the Supreme Court.

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The survey also indicates that while there has been absolutely no legislative initiative for decades to bring a legal framework regarding conflict of laws, the judiciary is rendering the basic duty of clarifying the rules of private international law from case to case. However, it is heartening that the executive has started moving in the right direction of acceding to the Hague Conventions on private international law. This indicates that by embracing the Hague conference system, India is likely to make more legislative moves atleast for implementing the conventions, which in turn may provide the necessary impetus for framing Indian legislation on conflict of laws.

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