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CONFLICT OF LAWS

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I INTRODUCTION

THIS SURVEY covers a large number of judicial decisions which is an indication of greater awareness of private international law. This also shows growing global interaction on sound legal notions in this area. Globalization is seen in the increasing number of judicial decisions at various levels. Case law being the major source for the growth of private international law, the progressive development of the subject is on a speedy path in India.

In view of significant role played by judicial decisions in the area of international commercial arbitration manifesting the growing international trade and commerce a sizeable number of cases in this field have been given coverage. Similarly, the topic enforcement of foreign judgments provides respect and demand for justice in international interactions.

II INTERNATIONAL COMMERCIAL ARBITRATION

This is one area involving a foreign element that has undergone a successful harmonization. The national courts address various issues in international commercial arbitration in their judgments which constitute the state practice. The current survey considers the frequent issues that emerge before the domestic courts, particularly, as regards the scope and extent of the application of the Arbitration and Conciliation Act, 1996 (1996 Act) among other matters concerning international commercial arbitration.

UNCITRAL model law on arbitration depicts the harmonized law on international commercial arbitration and the national legislations which adapt this model. Law plays a significant role in its implementation globally in the domestic forum. Indeed model law is an illustration of unified conflicts principles in this area.

Definition

In *M/s Comed Chemicals Ltd.* v. *C.N. Ramchand,*[1] the appellant company and respondent, a 'Britain National' and a professional expert

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1 AIR 2009 SC 494.

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entered into an agreementunder which the expert was to provide "technical knowhow." The respondent was made director (technical) and CEO. The agreement provided for arbitration. In violation of the agreement, respondent resigned without completing the stipulated period of assignment in the MoU. The relevant clause of the agreement which provides for arbitration read:[2]

> If there be any dispute pertaining to meaning of this MoU or of any nature, will be solved and decided by appointing an independent Arbitrator acceptable to all the parties and if not solved by him can be referred to court of law and for which the jurisdiction will be Vadodara.

In view of absence of agreement on the choice of an arbitrator acceptable to both the parties, the applicant company filed the present application. Clause (f) of sub-section (1) of section 2 of the Arbitration and Conciliation Act, 1996 defines "international commercial arbitration".[3] C.K. Thacker J, in the context of the facts and circumstances of the case, allowed the petition and observed:[4]

> [T]he case is covered by clause (f) of sub-section (1) of Section 2 of the Act. It is a case of International Commercial Arbitration and is covered by Clause 12 of MoU. Since there is a dispute between the parties, it has to be decided by an arbitrator.

When does an arbitration become international?

In *TDM Infrastructure Pvt. Ltd.* v. *UE Development India Pvt. Ltd.*,[5] parties were companies registered and incorporated under the Companies Act, 1956. However, the directors and shareholders of the petitioner company were residents of Malaysia. The board of directors of the petitioner also sat in Malaysia. The parties entered into contracts containing an arbitration clause. The petitioner approached the apex court with a prayer for appointment of a sole arbitrator when disputes arose between them. The petitioner's case was that the apex court alone had the jurisdiction to appoint an arbitrator as the central management and control of the petitioner company was exercised in Malaysia and that would mean

2 *Id.* at 497.

3 Section 2(1)(f) of the Act reads thus: "International commercial arbitration means an arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is – (i) an individual who is a national of, or habitually resident in, any country other than India, or. …"

4 *Id.* at 500. The court referred to the decisions in *R.M. Investment & Trading Co. Pvt. Ltd.* v. *Boe*ing *Co.*(1994) 4 SCC 541; *Renusagar Power Co. Ltd.* v. *General Electric Co.,* AIR 1985 SC 1156 *and Kochi Navigation Inc.* v. *Hindustan Petroleum Corporation Ltd.,* AIR 1989 SC 2198.

5 2008 (8) SCALE 576.

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that day-to-day management did not take place in India and as such it was covered under sub-clause (iii) of section 2 (i)(f) of the 1996 Act. The court opined:[6]

> International Commercial Arbitration" and "Domestic Arbitration" connote two different things. The 1996 Act excludes domestic arbitration from the purview of International Commercial Arbitration. The Company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its central management and control is exercised in any country other than India… Part II of the 1996 Act deals with enforcement of foreign awards. The 1996 Act keeping in view the scheme of the statute must be read in its entirety. It takes into consideration various situations. Power of this Court to appoint an arbitrator would arise in view of sub-section (12) of Section 11 of the 1996 Act only if it is to be held that the dispute has arisen in relation to an international commercial arbitration… Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration…. Once it is held that both the companies are incorporated in India, and thus, they have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement and, thus, the question of applicability of clause (iii) of Section 2(1)(f) would not arise.

The court referred at length the issues of nationality and domicile of a body corporate from the perspective of control and management over such bodies. In conclusion, the court added:[7]

> [I]t is noticed that the nationality of a company is determined by the law of the country in which it is incorporated and from which it derives its personality. However, for the purpose of taxation, test of residence may not be registration but where the company does its real business and where the central management and control exists. A distinction, thus, exists in law between a nationality and the residence.

6 *Id.* at 581-582.
7 *Id.* at 585.

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In view the on facts and circumstances of the case, the court ruled against its jurisdiction to nominate the arbitrator.

Applicability of Part I of 1996 Act to International Commercial Arbitration where the seat of arbitration is outside India

In *Venture Global Engineering* v. *Satyam Computer Services Ltd*.,[8] a foreign arbitration award recognized and upheld by the foreign court (USA) was challenged in an Indian court. Briefly, the facts that lead to the above situation were these: The appellant, Venture Global Engineering (VGE), was incorporated in the USA. The VGE and respondent *Satyam Computer Services Ltd. (CSL)*, a registered company having its office in Secunderabad (India), entered into a joint venture agreement to form a company, *Satyam Venture Engineering Services Limited (SVES)*, in which both the appellant and the respondent each had 50 per cent equity shareholding. Another agreement was also executed between the parties, *viz*. shareholders agreement (SHA) which provided for disputes resolution through arbitration. SHA provided certain terms and conditions for resolution of disputes. Thus, section 11.05 (b) and (c) read thus:[8a]

> (b) This agreement shall be construed in accordance with and governed by the laws of the State of Michigan, United State, without regard to the conflicts of law rules of such jurisdiction. Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration.
>
> (c) Notwithstanding anything to the contrary in this agreement, the Shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/ Rules being in force, in India at any time.

When dispute arose between the parties, the respondent filed a request for arbitration with London Court of International Arbitration. An award was passed directing the appellant VGE to transfer the shares to the respondent. The respondent filed a petition to recognize and enforce the award before the US court in Michigan. The appellant appeared to defend by filing a cross-petition objecting to the enforcement on the ground that transfer of shares ordered by the award was in violation of Indian laws specifically the Foreign Exchange Management Act, 1999 (FEMA). In addition, the appellant filed a suit in the Indian court seeking a declaration to set aside the award and permanent injunction on the transfer of shares under section 34 of the 1996 Act. However, the US court upheld the award and ordered the transfer of the shares. When the matter came up in the Supreme Court of India, it considered the main issue, *viz.* whether the aggrieved party was

8 AIR 2008 SC 1061.
8a *Id*. at 1071.

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entitled to challenge the foreign award which was passed outside India in terms of section 9 read with section 34 of the Act. The Supreme Court following the *Bhatia International* case[9] ruled that the ultimate conclusion that Part I would apply even to foreign awards was an answer to the main issue raised in this case.

As regards the SHA, the appellant contended that the *non-obstante* clause therein would override the entirety of the agreement. The appellant claimed that sub-section (i) would apply to the enforcement of the award which declares that notwithstanding that the proper law or the governing law of contract was the law of the state of Michigan, their shareholders shall at all times act in accordance with the (Indian) Companies Act, 1956 and other applicable Acts/rules being in force in India. The apex court agreed with the appellant's submission and noted that the award had an intimate and close nexus to India in view of the fact that (a) the company was situated in India; (b) the transfer of the 'ownership interests' shall be made in India under the laws of India and (c) all the steps necessary have to be taken in India before the ownership interests stood transferred. The Supreme Court thus found that the respondent had violated the agreement between the parties by seeking enforcement of transfer of the shares in the Indian company by approaching the courts in the US.

The court made it clear that inconsistencies in the 1996 Act *vis-à-vis* the position of India's state practice of international commercial arbitration was a vital area in dispute settlement in international trade and commerce. The court pointed out the *rationale* thus: *Bhatia International* sets out four independent reasons for arriving at the conclusion that Part I would apply to foreign awards that are as follows:[10]

(i) to hold to the contrary would result in a lacunae as Non – Convention country awards cannot be enforced in India.
(ii) Section 1 (2) expressly extends Part I to the state of Jammu and Kashmir so far as it relates to international commercial arbitration giving rise to an anomaly in so far as the rest of India is concerned unless Part I applies to international commercial arbitration in other States as well.
(iii) If the word "only" is read into Section 2 (2), it would then render the sub section inconsistent with sub sections (4) and (5) of Section 2 which apply Part I to all arbitrations, meaning thereby, including foreign international arbitrations.
(iv) As otherwise, no relief can be sought in India even though the properties and assets are situated in India, merely because the arbitration is an international commercial arbitration.

9 (2002) AIR SCW 1285.
10 *Id*. at 1067.

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In *National Agricultural Co-op. Marketing Federation India Ltd.* v. *Gains Trading Ltd.*,[11] parties agreed for settlement of disputes through arbitration in Hong Kong in accordance with the provisions of the 1996 Act. The petitioner in his application under section 11(5) of the Act sought appointment of the sole arbitrator. The respondent, *inter alia*, argued that part I of the Act applied only at the place of arbitration and since the agreed venue for arbitration was Hong Kong (outside India), the provisions of part I including section 11 (appointment of arbitrators) were inapplicable and, therefore, the apex court had no jurisdiction to appoint an arbitrator. The respondent also argued that the arbitration agreement required that the disputes to be referred and resolved in Hong Kong according to the law of arbitration as in force in Hong Kong. It also contended that as per the Hong Kong law, the arbitrator could be appointed only by the Hong Kong International Arbitration Centre. Upon these contentions, the court framed the following issues:[12]

(i) Whether an arbitration clause comes to an end, if the contract containing such arbitration agreement, was abrogated?
(ii) Whether section 11 of the Act is inapplicable in regard to the arbitrations which are to take place outside India?
(iii) Whether the appointment of the Arbitrator, and the reference arbitration are governed by the laws in force in Hong Kong and not by the Arbitration and Conciliation Act, 1996?

Addressing these issues, the apex court observed:[13]

> While considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contact, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.... In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail.

The arbitration clause stated that the 1996 Act (of India) will apply. Therefore, the said Act will govern the appointment of the arbitrator, the reference of disputes and the entire process and procedure or arbitration

11 (2007) 5 SCC 692 : AIR 2007 SC 2327.
12 *Id*. at 2329.
13 *Id*. at 2329-30.

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from the stage of appointment of arbitrator till the award was made and executed/given effect to.

Shivnath Rai Harnarain (India) Ltd. v. *M/s A.G. Abdul Rehman*[14] illustrates a situation where the parties had agreed to refer to the arbitrator for resolution of dispute at Singapore, *i.e.* outside India. The award of the arbitrator was set aside by the High Court of Singapore with liberty to apply for fresh arbitration. The applicant, the aggrieved party, in the award did not apply for fresh arbitration before the arbitrator in Singapore; instead filed the present application for appointment of arbitrator under section 11 (6) of the 1996 Act. The application was dismissed on the premise that the CJI had no jurisdiction to consider the application under the facts and circumstances of the case. The court observed:[15]

> Having mutually agreed to have the dispute referred to an arbitrator at Singapore, the applicant is not permitted to turn around and say that this court be appointed an arbitrator.

In *Geo-Group Communications Inc.* v. *IOL Broadband Ltd.*,[16] the applicant company incorporated under the laws of USA, engaged in the business of providing telecommunication services, entered into share subscription and shareholders agreement with Exatt Technologies Pvt. Ltd. The applicant agreed to supply certain CISCO equipments to Exatt and that Exatt would in lieu thereof issue equity shares to the applicant. Later in 2007, Exatt entered into a scheme of amalgamation with the respondent company which was known (earlier) as *IOL Broadband Ltd*. Under the scheme, the liabilities, duties, obligations and guarantees of the Exatt company stood transferred to the respondent company, a fact that has not been disputed by the respondent company. It was agreed under the scheme that the shareholders of Exatt shall be entitled to equity shares of the respondent company.

A dispute arose in respect of non-transfer of shares of Exatt by respondent to the applicant. This dispute is arbitrable under SHA. But the dispute regarding non-transfer of shares under the scheme of Amalgamation also became an issue in this case. In the present case the court is essentially concerned with the question whether a valid arbitration agreement with reference to the claims exist between the parties and whether conditions for the exercise of power under section 11(6) are fulfilled. The court found, besides the existence of the dispute, the procedure for appointment of arbitrator was agreed upon between the parties in clause 11.7 of SHA. Accordingly, the court ruled: [17]

14 AIR 2008 SC 1906.
15 *Id*. at 1908.
16 2009 (14) SCALE 75.
17 *Ibid*.

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> The conditions precedent set out in Sec.11(6) of the Act are completely satisfied and the applicant is entitled to approach the court for securing the appointment of Sole Arbitrator for resolution of the disputes.

In *Geophysical Institute of Israel* v. *M/s Geoenpro Petroleum Ltd*.,[18] the respondent company registered under the Company Act, 1956 approached the petitioner, an organization run and owned by government of Israel, to perform 3D seismic data acquisition, processing and interpretation of data for oil field (Kharsang oil field in the state of Arunachal Pradesh). A contract was executed setting out the terms and conditions between the parties. A dispute arose when respondent failed to make payments to the petitioner for the works executed. Since the parties did not agree on a sole arbitrator, the petitioner approached the court. The counsel for the parties suggested for a tribunal of three members as the dispute involved complicated technical issues. The apex court accepted the suggestion.

In *Vanna Chaire Kaura* v. *Gauri Anil Indulkar,*[19] the applicants U.S. citizens and respondents entered into agreement for setting up water and amusement park in India. Disputes arose between them in respect of implementation and working of the agreement. In terms of the arbitration clause in the agreement, the applicant filed an arbitration petition for appointment of an arbitrator. The court having heard the contentions ruled that the dispute needed to be adjudicated and accordingly appointed an arbitrator.

In *Sime Darby Engineering SDN.BDH* v. *Engineers India Limited,*[20] the petitioner filed an arbitration petition before the apex court for the appointment of a sole arbitrator. The applicant company was incorporated in Malaysia while the respondent was a company registered under the Companies Act, 1956. These two companies entered into a contract for fabrication, load-out and transportation of jacket, piles, conductors and deck for a platform project of ONGC at Bombay high for a lump sum price of US $ 20,162,460. In terms of the contract, the petitioner carried out its work but it did not receive full payment and hence dispute arose between the parties. The petitioner invoked the arbitration clause and was firm about appointment of sole arbitrator. The respondent, on the other hand, was insisting for a panel of three arbitrators constituting a tribunal. The parties had chosen the applicable law - the Arbitration and Conciliation Act, 1996 and New Delhi as the place of arbitration. The court found that the arbitration clause in the contract was silent about number of arbitrators. In

18 2009 (14) SCALE 539.
19 AIR 2009 SC 3136.
20 (2009) 7 SCC 545: AIR 2009 SC 3158.

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the context of the facts and circumstances of the case, the court appointed a sole arbitrator with the consensus of the parties.

In *M/s. Indtel Technical Services Pvt. Ltd* v. *W.S. Atkins Rail Ltd.*,[21] by a MoU, the appellant and the respondent agreed to collaborate jointly for a project of the Indian Railways. The MoU had the following dispute settlement clause:[21a]

CLAUSE 13 – SETTLEMENT OF DISPUTES

13.1 This Agreement, its construction, validity and performance shall be governed by and constructed in accordance with the laws of England and Wales;

13.2 Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the Parties shall be referred to adjudication;

13.3 If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the Sub-Contract agreements, then the Parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant Sub – Contract Agreement and the Parties hereto agree to abide by such decision as if it were a decision under this Agreement.

In as much as the clause did not mention the venue for adjudication or arbitration, the choice of venue appeared to have been left to the parties. The apex court had two questions to answer. They were: (i) Could clauses 13.2 and 13.3 of the memorandum of understanding be construed to be an arbitration agreement?; and (ii) Had the Supreme Court jurisdiction to appoint an arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 having regard to clause 13.1 of the Memorandum of Understanding indicating that the construction, validity and performance of the agreement would be governed by and constructed in accordance with laws of England and Wales.

The threadbare arguments by both the counsel about the proper law of arbitration in the context of the two aforementioned questions resulted in the apex court's focus on the theme laid down by *Bhatia International* case, *viz.* part I of the Arbitration Act, 1996, would be equally applicable to international commercial arbitration held outside India, unless any of the said provisions was excluded by agreement between the parties expressly or by implication. According to the court, such was not the situation in the

21 AIR 2009 SC 1132.

21a *Id.* at 1133.

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present case. Furthermore, the court held that from the wording of clause 13.2 and 13.3, the parties to the memorandum intended to have their disputes resolved by arbitration. For these reasons, the application for appointment of arbitrator made under section 11 of the 1996 Act was held to be maintainable.

In *Standard Corrosion Controls Pvt. Ltd* v. *S.E. Services SDN* BHD,[22] the applicant company, an Indian concern, and the respondent company incorporated in Malaysia has in their deal agreed on a procedure for appointing the arbitrator. Having agreed for arbitration in Mumbai (India), applying the arbitration rules of the ICC, the applicant company did not follow the procedure for appointment of an arbitrator which required submission of a request to the ICC secretariat. Without following this procedure, the applicant rushed to the court. For this reason, the apex court held that the application filed by the applicant was not maintainable.

Citation Infowares Limited v. *Equinox Corporation*[23] concerns an international commercial agreement governed by laws of a foreign country. The applicant company registered under the Companies Act, 1956 and the respondent company (Equinox Corporation) registered under the U.S. laws, entered into three outsourcing agreements. The respondent company terminated one of the three agreements which resulted in huge loss to the applicant company. Disputes having arisen between the parties, the applicant company (CIL) invoked the arbitration clause contained in the said terminated agreement. As the respondent US company did not agree to the appointment of arbitrator, CIL moved the apex court under the 1996 Act for appointment of arbitrator by the Supreme court as the matter involved an international arbitration. The apex court's jurisdiction became an issue in the context of the parties' choice of U.S. law as governing law in the said agreement. While CIL argued that only the Supreme Court would have the jurisdiction to appoint the arbitrator Equinox Corporation contended that the Supreme Court did not have the jurisdiction as the 1996 Act stood excluded in terms of the clause of the said agreement wherein the governing law was agreed as that of California, USA. The said clause 10.1, *inter alia*, provided:

> 10.1 Governing Law: This agreement shall be governed by and interpreted in accordance with the laws of California, USA and matters of dispute, if any, relating to this agreement or its subject matter shall be referred for arbitration to a mutually agreed arbitrator.
>
> This clause clearly establishes :(i) Governing law of the agreement and ii Procedure for dispute settlement of matters arising from the agreement, *viz.* by arbitration.

22 AIR 2009 SC 1138.

23 (2009) 7 SCC 220.

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Obviously the clause was silent as to the law governing arbitration. The interpretative arguments by the learned counsel in the case as well as the court itself brought in various perspectives. A dispute settlement clause in an international commercial contract was treated as an independent agreement to submit disputes to arbitration and as such parties had an option to choose the applicable/governing law of the arbitration. However, in this case, clause 10.1 which referred 'matters of dispute' to arbitration was silent as to this aspect. If a dispute settlement lacked an agreed/chosen applicable law, in an international situation, in conflict of laws, there are two known methods to ascertain the proper law, *viz*. (i) inferred choice and (ii) gather elements closely associated with agreement/contract to find out the intention of the parties in the objective sense (*The Assunzione* case)[24] as regards the governing law. In fact, the court itself has admitted that "there is no agreement in respect of the law governing the procedure of arbitration." (para 27). It was also true that the place where arbitration would be held was not mentioned in clause 10.1. In view of the conflicting claims in the case, the apex court held, "That such appointment can be made by this court only and only if part I of the Arbitration and Conciliation Act is applicable to the present arbitration proceedings." In this aspect the court relied on *Bhatia International*[25] and added: "It cannot be forgotten that one of the contracting parties is the Indian party. The obligations under the contract were to be completed in India."[26] In the light of the foregoing observations, the Supreme Court ruled that it had the jurisdiction to appoint arbitrator under the provisions of 1996 Act.

Visa International Ltd v. *Continental Resources (USA) Ltd.*[27] illustrates international commercial arbitration when the place of arbitration was in India and the 1996 Act governed the entire process and procedure of arbitration till award was made and executed. The applicant company was engaged in the business of providing services in international trade (Ship Chartering, *etc*.) entered into a MoU (dated 14.2-2005) with the respondent company (an American concern) whereby and whereunder it was agreed to set up an integrated aluminium complex. This MoU was followed by execution of another agreement (dated 15.2.2005) between these parties. Differences arose between the parties as regards the agreement and its workability. The applicant asserted that the agreement dated 15.2.2005 continued to be valid while the respondent contended the said agreement became unworkable and stood cancelled. The whole controversy centered round the interpretation of article VI of the said agreement which, according to the applicant, contained the arbitration clause. Under these

24 (1954) 1 All ER 278 (CA).
25 Supra note 29.
26 *Id.* at. 228.
27 AIR 2009 SC 1366.

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circumstances, the applicant approached the apex court, under the provisions of the 1996 Act. The court considered the following issues in this case: (i) Whether there existed a valid arbitration agreement between the parties? and (ii) Whether there existed a live claim between the parties? The disputed arbitration clause read thus: "Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996." On the facts and circumstances of the case, the apex court observed:[28]

> Once the parties agree for resolution of dispute in accordance with the Arbitration and Conciliation Act, 1996 the said Act will take care of the entire processes and procedure. Be that as it may when the specific intention of the parties is clearly evident from the arbitration clause the same cannot be treated as vague on the ground that it does not satisfy the suggested checklist of all matters to be considered while drafting an arbitration agreement.

As regards the second issue, the court observed:[29]

> It is amply clear from the facts as pleaded and as well as from the exchange of the correspondence between the parties that there has not been any satisfaction recorded by the parties with respect to their claims. There has been no mutual satisfaction arrived at between the parties as regards the dispute in hand. The claims are obviously not barred by any limitation. It is thus clear that there is a live issue subsisting between the parties requiring its resolution.

In the light of the facts and circumstances of the case the apex court came to the conclusion that a clear case had been made out for appointment of arbitrator to decide the dispute between the parties.

M/s. Aurohill Global Commodities Ltd. v. *M/s. M.S.T.C. Ltd.*[30] concerned with an international commercial contract for the supply of steel products. The parties had agreed to settle their disputes by arbitration in London and in accordance with rules of arbitration of Great Britain. The petitioner filed an application under the 1996 Act for the appointment of arbitrators to settle the dispute. The dispute in this case was as to whether draft purchase order acquired the character of concluded contract or not. In this case, a draft purchase order was issued by the respondent which was accepted by the petitioner. The petitioner contended that the said purchase order was issued as a result of negotiations between the petitioner and the respondent at Kolkata. Clauses 19 and 20 of the purchase order read:

28 *Id.* at 1373.
29 *Ibid*.
30 AIR 2007 SC 2706.

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19. Arbitration: Any disputes, controversies and/or claims arising out of or relating to this agreement or any modification thereto, or any alleged breach or cancellation thereof, which cannot be settled amicably between Seller and buyer, shall be settled by arbitration in London and in accordance with rules of arbitration of the Great Britain arbitration and the award in pursuance thereof shall be binding on the parties.
20. Jurisdiction: The competent court under the laws applicable in Great Britain alone shall have exclusive jurisdiction to decide all matters, disputes and controversies relating to this contract, including arbitration proceedings instituted or to be instituted. The jurisdiction of Court will be London.

When the differences as regards reduction of the price arose, the petitioner gave a legal notice requesting the respondent to settle the dispute through arbitration. The petitioner also stated in the notice that it was agreeable to be governed by 1996 Act for the purposes of procedural law as the substantive law applicable was the Indian Contract Act, 1872. The respondent argued that the purchase order was a draft and that it never became a binding contract, much less an agreement to arbitration. However, respondent gave its concurrence to be governed by the Indian Acts, namely, 1996 Act, for procedural law and the Indian Contract Act for substantive law. After hearing the rival arguments the apex court observed:[31]

> In the circumstances, the parties shall abide by the terms of the alleged contract. Moreover, it is well settled that parties have to stand by the terms of the contract. We have before us an international transaction. Petitioner is a company registered in Cyprus. The parties entered into the alleged contract with open eyes. They agreed to settle their disputes by arbitration in London and in accordance with the rules of arbitration of Great Britain. Moreover, vide Clause 20 of the alleged contract the parties argued that the competent court in Great Britain alone shall have exclusive jurisdiction to decide all matters including arbitration proceedings to be instituted. Reading Clauses 19 and 20 conjointly, it is clear that the procedural law application to the arbitration proceedings had to be the British Rules of Arbitration. In the circumstances, it is not possible for this Court to substitute the British Rules of Arbitration by the procedural law under the said 1996 Act.

The court accordingly held that the question as to whether there existed a concluded contract, the question as to whether the alleged contract was *non est* and the question as to whether M/s. Survijay Rolling and Engineering

31 *Id.* at 2709.

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Ltd. was a necessary and proper party were questions to be decided in the arbitration proceedings and to that extent, the petition was maintainable under the 1996 Act.

> In *Great Offshore Ltd.* v. *Iranian Offshore Engg. & Construction* Company,[32] the applicant submitted that it had entered into a charter party agreement, containing an arbitration clause, with the respondent company. The latter, however, claimed that the parties were yet to conclude their negotiations and in the absence of any concluded agreement there could not be any reference to arbitration. Factually, the current project work involving the parties was their second phase of ONGC project. Earlier, the parties had done business with each other in 2004 to carry out construction work on ONGC's installations at Bombay high, at which time they had entered into a charter party agreement. The first phase was completed in November, 2004. In this case, the court was called upon to decide whether the parties had entered into a valid contract containing an arbitration clause. After review of the correspondence between the parties and upon consideration of the totality of facts and circumstances, the court held that the "faxed CPA stands on its own as the record of agreement… Once it is established that the faxed CPA is valid, it follows that a valid contract and a valid arbitration clause exists."[33]

The court found that the other correspondence between the parties also led to a definite conclusion, namely the parties had entered into a valid contract containing an arbitration clause. Since a dispute had arisen which needed to be referred to the arbitration in terms of parties understanding, the court ruled that the applicant was entitled in law to an order for appointment of a sole arbitrator. The apex court was upholding in this case one of the objectives of the UNCITRAL model law which read:[34]

> The liberalization of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine "autonomy of will," allowing the parties the freedom to choose how their disputes should be determined.

Appealability of an order of execution of foreign award – procedure

LMJ International Ltd. v. *Sea Stream Navigation Ltd*.[35] concerns the appealability of an order allowing execution of foreign awards. The

32 AIR 2008 SC (Supp.) 429.
33 *Id.* at 438.
34 *Ibid.* See Policy Objectives adopted by UNCITRAL. UN doc. A/CN. 9/07, paras 16-27.
35 AIR 2007 Cal 260.

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procedure laid down under the law of the forum needs to be followed. In conflict of laws, the procedure is governed by *lex fori* in executing/ enforcing the foreign orders including foreign awards. The 1996 Act lays down the procedure for appeal against the enforcement order of a foreign award. In this case, admittedly a foreign award had been enforced by way of execution under the provisions of sections 48 and 49 of the 1996 Act and the respondent company had filed an appeal against the execution. The appellant was questioning the appealability of the order of execution. The issue before the court was "whether by virtue of provision of section 50 of the said Act it excludes applicability of the provisions of clause 15 of the letters patent as far as right of appeal is concerned against an order allowing execution of foreign award or not." The court observed that it was clear under section 50 of the said Act that appeal "can be preferred in the event amongst others the executing court refuses to enforce a foreign award, meaning thereby by necessary implication if there is no refusal there is no right of appeal under the above section." In the context of the case, the court opined:[36]

> Part II is not complete code. This part deals with the method and procedure for enforcement of foreign awards and provision of appeal and this provision do not provide any machinery to deal with any situation which might arise. Unlike Part I this part nowhere says what would be the period of limitation for enforcement of the foreign award and there is no period of limitation fixed within which the appeal has to be preferred and this part does not say specifically by which court the foreign award has to be enforced… We are therefore of the view that because of compartmentalization of this Act this portion cannot be said to be a complete Code. As such, the provisions of appropriate laws namely general law or procedural law has to be applied by the court.

Referring the matter to arbitration

M/s. Shakti Bhog Foods Limited v. *Kola Shipping Ltd.*[37] concerned with an issue as to whether there existed a charter party agreement between the parties and whether on the request of party the matter can be referred to arbitration. The appellant company dealing in export of food products had agreed to load for transportation to Cotonou (Niger) from an Indian port (Kakinada). The respondent issued a bill of lading. Due to some problems, the appellant could not get the export order from the state of Niger and thus could not fortify his commitment. The appellant, however, agreed to compensate the respondent for the loss suffered by it. Dispute arose between the parties with regard to the quantum of demurrage. Both parties

36 *Id.* at 266-267.
37 AIR 2009 SC 12.

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initiated legal actions. The respondent further moved an application successfully to refer the dispute between the parties to arbitration in London under the provision of English Arbitration Act, 1996 and stay all further proceedings. Appellant's CRP before the A.P. High Court was dismissed with a finding that there was in existence a charter party agreement. The order of the High Court order was challenged in the apex court by the appellant. In the course of the proceedings, the respondent admitted that it was a fixture note that was signed by them at Delhi and not any charter party agreement. This fixture note indicated Delhi as the place of signature and London as the venue of arbitration. The apex court noted that by this fixture note, charter party agreement dated 18.7.2005, the appellant agreed to load and the respondent agreed to carry from the Indian port of Kakinada to Cotonou (Niger). The court also observed:[38]

> [A]n arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement. In the present case, the appellant had not denied the fact that it had signed the first page of the Charter Party Agreement. Moreover, the subsequent correspondences between the parties also lead us to conclude that there was indeed a Charter Party Agreement, which existed between the parties.

Clause 19(a) read with Box 25 of the Charter Party Agreement between the appellant and the respondent stated as follows:

CLAUSE 19 – LAW AND ARBITRATIO N

(a) This charter party shall be governed and construed in accordance with the English Law and any dispute arising out of this carter party shall be referred to arbitration in London in accordance with Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three man tribunal thus constituted or any two of them shall be final. On the receipt of one party of the nomination in writing of the other's arbitrator, that party shall appoint their arbitrator within fourteen days. Failing which the decision of the single arbitrator appointed shall be final. For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25, the arbitration shall be

38 *Id.* at 15.

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> conducted in accordance with the small claims procedure of the London Maritime Arbitrators Association.

It is clear from the abovementioned clause that the venue of the arbitration chosen by both the parties is London in the United Kingdom and the law chosen by both the parties is the English Law." The court accordingly ruled: [39]

> In view of the mandatory provision of Section 45 of the Act, the Court is duty bound to stay all further proceedings in the suit and refer the matter to Arbitration as per Clause 19 of the Charter-Party Agreement.

III FOREIGN JUDGEMENTS - RECOGNITION AND ENFORCEMENT

Under section 44-A of the Code of Civil Procedure, 1908 (CPC), India entered into bilateral agreements with many countries on the basis of reciprocity for mutual execution of judgments. Hong Kong is one such country. It was an overseas colony of Britain till 1997. *Sumikin Bussan International (Hong Kong) Ltd*. v. *King Shing Enterprises Ltd.*[40] illustrates the position after 1997 when Hong Kong became part of China. China exercises its sovereignty over Hong Kong since 1997. In this case, the second defendant in this chamber summons (Sumikin Bussan International (Hong Kong) Ltd) sought the dismissal of execution application filed by the plaintiff (King Shing Enterprises Ltd) in whose favour the High Court of Hong Kong special administrative regional court had passed a judgment and decree. It was a common ground that the decree had become final. It was contended by the defendant no. 2 that the Hong Kong special administrative region was not a reciprocating territory within section 44-A, CPC and that the court of first instance of Hong Kong special administrative region court was not a superior court notified under section 44-A, CPC. Factually, it is known that from the central government's *gazette* notification dated 18.11.1968, published on 23.11.1968, that Hong Kong became a reciprocating territory. With effect from 1.7.1997, the People's Republic of China (PRC) assumed sovereignty over Hong Kong when United Kingdom (UK) handed over Hong Kong to China. The court noted that no new notification had been issued after 1.7.1997.

The present case derives support from *Kevin George Vaz*[41] case on both the issues, *viz*. (i) Can Hong Kong still be considered as a reciprocatory territory from the Indian point of view? and (ii) Are the courts

39 *Ibid*.
40 2008 AIHC 2134 (HC Bom).
41 *Kevin George Vaz* v. *Cotton Textiles Exports Promotion Council*, 2006(5) Bom CR 555.

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the judgments of courts considered as superior courts of that country? In particular, more important and basic among the two issues was the former. One of the important arguments advanced as regards the reciprocatory status of Hong Kong was that the 1968 notification could not be of any assistance once the regime had changed. The 1968 notification would not survive after 1997 when Hong Kong became part of China,. Hong Kong was no longer an independent country.

The Bombay High Court neither in this case nor in the *George Vaz* case ascertained the status of Hong Kong after 1997 from the central government, the authority that issues the notification to confer the reciprocatory status.[42] Besides, the court's interpretation of the definition of reciprocating territory "as provided in section 44 A, explanation is misleading. The term 'reciprocating territory' clearly indicates two components, *viz*., the reciprocal process and the land territory of a country. Minus either of these in the definition cannot constitute a reciprocating territory as envisaged in explanation 1 of section 44 A of CPC. Discussing the definition of "reciprocating territory "the court referred to its observation in *George Vaz* case to the effect:[43]

> (a) territory outside India may be part of a country or may cease to be so and come under authority of another State or country and whenever such a contingency occurs, care is taken to see that holder of a foreign decree does not suffer. It (legislature) took care, therefore, to exhaustively define the term, "reciprocating territory" to mean any country or territory outside India. If reciprocating territory is defined to mean any country or territory outside India and as in the present case Hong Kong is admittedly a territory outside India, then as to which country exercises sovereign power over Hong Kong is wholly immaterial and irrelevant for our purpose.

In terms of explanation 1 of section 44-A, CPC, no country outside India can be called a "reciprocating territory." A country or territory outside India which the central government may by notification in the official *gazette* declare as a reciprocating territory becomes a reciprocating territory for purposes of section 44-A. This position was clear from the definition provided in the said explanation 1 to section 44-A which reads:

> *Explanation* 1: "reciprocating territory" means any country or territory outside India which the central government may by notification in the Official Gazette declare as a reciprocating

42 See www.Indianembassy.org.cn –Section (Trade and Commerce) Legal/dispute resolution system.

43 *Supra* note 56 at 2138 (*Emphasis Supplied*).

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> territory, becomes a reciprocating territory for purposes of this section…..

In other words, the countries outside India will become 'reciprocating territories' upon being declared so by central government notification in the official *gazette* on the basis of mutual understanding.

On the second issue of status of the court of first instance of Hong Kong special administrative region which passed the decree, it was considered as superior court notified under section 44-A. The Bombay High Court thus observed: "Once a court is notified under Section 44 A of the CPC it would not be taken out of the purview of the notification merely by reason of a change in its name."[44] The court relied on the Hong Kong Reunification Ordinance which dealt with "construction on and after 1.7.1997 of words and expressions in laws previously in force" for the changes that have been effected in Hong Kong. The court accordingly dismissed the chamber summons. The court illustrates in this case implementation of section 44-A in the context of prorogation so as to establish continuity in the enforcement of foreign judgment when there was reorganization of a country's sovereignty.

Marine World Shipping Corporation Limited v. *Jindal Exports Private Ltd.*,[45] concerns the enforcement of foreign arbitration award. This issue got compounded because of the new arbitration law under the 1996 Act which conferred the status of a judicial decree on all the awards on the one hand and the explanation (2) of section 44-A, CPC which excluded from its ambit an arbitration award 'even if such an award is enforceable as a decree or judgment.' In this case, a charter party agreement was executed between the appellant and the respondent by which the latter chartered the vessel of the former. A dispute arose about the claim of the appellant, M.W. Shipping Corporation, for demurrage, resulting in arbitration proceedings between the parties in London. The sole arbitrator gave an award in favour of the appellant who filed a petition before the Queens Bench Division and obtained a decree along with a certificate to comply with section 44-A for the purposes of enforcement of the award in India.

The appellant petitioned under section 44-A to enforce the decree. The petition was contested by the judgment-debtor. In view of the pleadings of the parties, the court framed the following issue:

> Whether the execution petition is maintainable in view of the provisions of explanation to section 44 – A of the CPC? It is the case of the appellant – decree- holder that the exception in section 44 A (2) is not applicable to his case and the provision is applicable 'only in respect of an endeavor to obtain the execution of an award

44 *Ibid.*
45 MANU/DE/7368/2007.

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> *per se* and would not include in its ambit an award which has been sanctified by the court by a decree or judgment being passed in pursuance to the award. As against the appellant-decree-holders argument, it was contended by the respondent-judgment debtor that the relief for the appellant is available only under part II of the Arbitration and Conciliation Act 1996 and that under section 48 of this Act in part II the enforcement of a foreign award may be refused if shown that the award has not yet become binding on the parties and that the object of obtaining the certificate which the decree holder so obtained in this case was to ensure that the award is enforceable. The objections which are available to the judgment-debtor under section 48 can be exercised by the judgment-debtor-respondent.

Considering the contentions of both parties the court observed:[46]

> It is obvious that Section 44 A of the CPC was enacted to make the decrees of superior courts of reciprocating territories executable in the same manner as decrees passed in the courts in India… The exception contained in the Explanation 2 (of Section 44 A) excludes from within its ambit an arbitration award. The object is clear that where an award is executable as a decree, the court should not straightaway execute the award….A reading of the provisions of Part II of the 1996- Act makes it clear that the mode and manner of enforcement of foreign award is specified there in…The enforceability of a foreign award is of course a prerequisite since without the same there can be no question of even an endeavour to enforce the said award.

The court, accordingly on the merits of the case observed:[47]

> A reading of the Queens Bench Division order itself makes it clear that the object of the said order was to make the award enforceable as a decree or judgment. It will not make the same equivalent to a decree of a superior court of a reciprocating territory when specifically an exception is carved out in Explanation 2.

As regards the legal position, the court said:[48]

> The legal provisions as enacted make a decree of a superior court executable but not a foreign award even if it be sanctified in the form of a judgment or decree…. In case of a reciprocating country

46 *Id.*, para 27-28.
47 *Id.*, para 28.
48 *Id.*, para 30.

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> the methodology for enforcement of the award is as contained in Part II of the 1996 Act.

The court ruled that the appellant-decree-holder had remedy in filing appropriate proceedings under the 1996 Act.

In *Shri Rajkumar Gupta* v. *Barnnesa Investments Ltd*.,[49] the plaintiff filed objections to the execution of decree passed by the High Court of Justice, Queens Division Bench, Commercial Court in England in favour of defendants for US Dollars 1,248,415.49 equivalent to Rs.36,09,821.01 alongwith its interest @ 15 per cent *per annum* The case of the plaintiff was that the defendants (Barnes Investments Ltd - two foreign companies managed by 2nd defendant) obtained an *ex parte* judgment/decree without serving any notice to the plaintiff and as such the said decree was a nullity and void *ab initio*. Based on the facts, the court noted that the foreign decree in question "states" the said judgment in the action….was given on the grounds that no defense had been served by the first defendant. It was thus apparent that it was the absence of the plaintiff to defend the suit which had resulted in such a decree. The court also observed:[50]

> The fact that a bare perusal of the decree shows that the judgment has been returned against the plaintiff on the sole ground of his not having entered any appearance…The decree being a foreign judgment, the same is open to being categorized as non conclusive if it has not been given on the merits of a case as mandated by clause (b) of section 13 of the CPC.

The court proceeded on the premise that in case of a foreign judgment and the conclusiveness in respect of the same, an *ex parte* decree could not be presumed to be on the merits. Following the apex court ruling in *International Woollen Mills* v. *Standard Wool (UK) Ltd*.,[51] the court ruled:[52]

> The defendants cannot execute the decree on the ground that the judgement and decree fails to meet the parameters of clause (b) of section 13 of CPC.

The Madras High Court was concerned with a foreign custody order in *Ramakrishna Bala Subramanian* v. *Ms. Priya Ganesan*.[53] The petitioner's grandparents filed a *habeas corpus* petition on behalf of their son against the respondent - wife of their son to secure their grand-daughter. The

49 MANU/E/8917/2007.
50 *Id*., para 20.
51 AIR 2001 SC 2134.
52 *Id*., para 29.
53 AIR 2007 Mad 210.

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petitioner husband and the respondent were married in India and left for USA. A daughter was born to them in USA. The respondent wife filed a divorce petition in USA, including for the custody of her daughter. Not finding the mother and daughter, the petitioner husband approached the court of Common Pleas in Pennsylvania for securing the custody of the child. The court passed an interim custody order directing the mother to hand over interim custody of minor child to father. This foreign order was not a final judgment but an interim one until further orders. The petitioner's case was that the action of respondent wife in keeping the child with herself in Madras was in contravention of the order passed by the American court and amounted to illegal detention. The respondent wife contended that she left USA due to harassment of her husband and, after reaching India, she had initiated divorce proceedings including custody of her daughter and alimony. In the rival contention, the petitioner husband sought the return of his daughter under the provisions of section 13, CPC which will enforce the U.S. custody order while the respondent wife averred that the U.S. order being *ex parte* was not an order on merit and further being an interim order could not be enforced. In the context, the court observed:[54]

> The order relied upon by the petitioner expressly purports to be an interim order relating to interim custody until further orders. Therefore, such order cannot assume the characteristic of a foreign judgment as the order does not appear to be a final order.

The court quoted *Halsbury's Laws of England*[55] with emphasis thus:[56]

> Even where the infant is a foreign national, the court, while giving weight to the views of the foreign court, is bound to treat the welfare of the infant as being the first and paramount consideration whatever orders may have been made by the courts of any other country.

In the present case, while the parties (though Green card holders staying in US) were Indian citizens with Indian passports, the child, was a citizen of USA by birth. The court further held:[57]

> While considering the question of grant of custody, even where one or the other party is armed with a decision of a competent foreign court, the Indian court asked to give effect to the decision of such foreign court is not to be guided merely by the considerations

54 *Id*. at 212.
55 3rd edn., para 428, pp.193-94.
56 *Supra* note 72 at 215. Emphasis added by court.
57 *Id*. at 216.

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highlighted in section 13, CPC regarding enforceability of foreign judgment but required to consider the welfare of the minor as the paramount consideration.

With this opinion, the court directed the family court at Madras to dispose off the matter. *Hari Narayanan.* v. *Meenakshi Narayanan*[58] clearly establishes Indian court's jurisdiction in matrimonial matters in terms of the apex court ruling in *Narasimha Rao* case in 1991. It also establishes India's stand on *ex parte* foreign judgments recognition which constitute an absolute nullity in the eye of law and not a judgment passed on merit. The subject of private international law has also been touched upon concerning the issues relating to domicile and nationality.

In the above case, the petitioner and the respondent were married in India according to 'Hindu customary rites' and the marriage was registered soon thereafter. After marriage, the parties went to US, where a son was born. Differences having arisen between parties, the petitioner decided to return to India with the idea of setting up an industry upon his return. The petitioner sold his house in USA (California) and deposited 50 per cent of the sale proceeds to the account of the respondent. After returning to India, as the differences could not be sorted out, the petitioner filed a divorce petition against his wife including custody of the child in additional family court, Chennai. He also filed an interim application (IA) in the said court for interim custody of the minor child pending disposal of the main original petition. The IA having been dismissed, the revision petition was filed. The respondent wife contended that the order passed by the Superior Court of California (USA) gave 'sole legal and sole physical custody of the child to her.' The Californian Court order also recorded that it was a temporary order and shall remain in effect until written stipulation of the parties setting forth a different custody arrangement.[59]

The petitioner's non-participation in Californinian court's proceedings was also recorded in the said order by stating that "respondent did not appear." Also, the Californian court referred to the respondent wife application before it as "petitioner's *ex parte* application for order." Further, the said Californian court order said that neither party shall remove their son from the State of California without the written consent of the other party or court order. In sum, the respondent's wife plea was that the petitioner was not entitled to have the interim custody of the child without the order of the superior court of California, USA. The petitioner's contention was that the Californian superior court's order was (i) an '*ex parte* foreign judgment' (ii) not binding on the Indian courts and (iii) that parties having married in India according to 'Hindu Customary Rites,' the

58 (2007) 3 MLJ 772.
59 *Id*. at 775.

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same law would govern the matter both in terms of substantive law and jurisdiction. The court, after considering the entire situation, observed:[60]

> The order being ex parte (order of the Superior Court of California)....not being contested by the respondent and the custody given by the Superior Court of California being temporary in nature…the same cannot be treated as an order passed on merits and it appears on the face of the said order that there is a clear refusal to recognize the law of this country, viz., violation of natural justice and in such circumstances the same is not binding on the courts in India.

The court also referred to the concepts of 'domicile' and 'nationality' from the perspective of bases of jurisdiction. It distinguished the concepts from one another generally. The court did deal with domicile as practised in India by referring to Part II of the Indian Succession Act, 1925 which lays down the basic principles of domicile. The court's reference to wife's domicile during judicial separation from her husband to be that of her husband may not be in line with the provisions of the exception to section 16 of Indian Succession Act. The effect of the exception to this section is that wife's domicile no longer follows that of the husband if they were separated by a decision (be it civil or criminal) of a competent court. Although the said exception refers to the 'sentence of a competent court', the courts have expanded the operation of the provision by including instances of judicial separation as well.[61]

60 *Id.* at 781.

61 *Kashiba* v. *Shripat* (19 Bom 697), where Bombay High Court held that the word 'sentence' in s. 16 meant both a decree of divorce and a decree for judicial separation.

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