7

CONFLICT OF LAWS

*Lakshmi Jambholkar**

I INTRODUCTION

IN THE field of conflict of laws major part of the state practice is contributed by the judicial pronouncements from various courts. Survey of the case laws carried out year after year constitutes the manifestation of the growth and progressive development of the law. This survey has found case laws in the fields of recognition of foreign notaries, proof of foreign law, Family laws, and International Commercial Arbitration, involving conflict of laws issues and foreign judgments. Insofar as conflicts of laws is concerned, this survey plays a vital role in the sense it creates awareness amongst the entire legal fraternity - students, teachers, the bench and the bar and all those who are otherwise interested in the subject. It was found in the course of the surveying the various law reports not necessarily classify conflicts of laws cases under a separate head. At times cases involving conflicts of laws issues can be located clearly from the factual situation of the cases themselves though they are not listed separately under head "Conflict of Laws / Private International Law." Even a casual perusal of the survey in the last few decades would reveal the progressive changes in the subject.

Reciprocal Recognition of foreign notarisation

In the matter of *Rei Agro Ltd.*,[1] a question had arisen as to whether an Indian court (High Court of Calcutta in this case) can recognise a notarial act which took place before a notary public at Singapore. The court was to act on a power of attorney that was notarized by a Notary Public in Singapore. The court clearly ruled that for an Indian court to recognise a notarial act done by a notary public at Singapore, it is imperative for the Central Government to issue a notification under section 14 of the Notaries Act, 1952, declaring that the notarial acts lawfully done by notaries in Singapore shall be recognised within India for all purposes, or as the case may be, for such limited purposes as may be specified in the notification. In other words, unilateral recognition by an Indian court of a notarial act done by a foreign notary is impermissible

* Former Professor of Law, University of Delhi. The author is thankful to Nadani Jambholkar for her assistance in pereparing this survey.

1 AIR 2015 Cal 54.

in the absence of reciprocity of recognition as contemplated under section 14 of the Notaries Act, 1952. Factually, in the absence of such notification granting recognition to the notarial acts done by the notary public of Singapore, the court was unable to take any judicial recognition of the document produced before it.

Proof of foreign law

In the case *Transport Corporation of India Limited* v. *Ganesh Polytex Limited*,[2] illustrates the rule of private international law / conflict of laws as regards proof of foreign law before a domestic court. This also includes proof of official documents of foreign country. Export of the goods to Bangladesh from India is the subject matter in this case. The appellant was to transport the consignments by loading at Petrapole Customs Station in India and deliver at the Benapole Customs Station Warehouse of Bangladesh. It is the case of the appellant that its legal obligation as transporter ended on its delivering the goods entrusted to it at Benapole Customs Station in Bangladesh.

The respondent had engaged the appellant for transporting his goods to Bangladesh. The respondent was required to dispatch the goods and negotiate various documents including invoice, consignment copy of the good received and consignment note bill of exchange *etc*. through M/S Islami Bank Bangladesh Ltd. In view of certain problems confronted, the transporting of the goods and negotiating the documents ran into trouble. The respondent Ganesb Polytex Ltd., filed a complaint against the appellant before the National Consumer Disputes Redressal Commission (NCDRC) for non-delivery of certain consignment entrusted for transport on road to Benapole Customs Frontier of Bangladesh. The NCDRC held that the appellant has failed to discharge its legal obligation to deliver goods entrusted to it. On appeal, the apex court pointed out that, except making a bald assertion in the written statement before the as regards the delivery of the consignments entrusted to it at Benapole, the appellant did not make any specific pleading as to the proof of the alleged delivery of consignments at the Benapole Customs Station Warehouse of Bangladesh. Referring to the law regulating exports and imports of goods both in India and Bangladesh the court observed: "It is the pleaded case of the appellant that its legal obligation as transporter ends on its delivering the goods entrusted to it at Benapole Customs Station. Unloading of imported goods at any customs station in this country is also regulated by the provisions of the Customs Act, 1962. We are sure that it must be equally regulated by the law of Bangladesh. What exactly the law of Bangladesh is in this regard and how the factum of delivery of goods allegedly carried and delivered by the appellant at Benapole is to be proved are two distinct and different matters. It is a settled principle of private international law that foreign law is always a question of fact which is required to be pleaded and proved by the party whose rights or obligations flow from such foreign law. There is no pleading or proof in this regard in the instant case. The appellant did not plead as to what is the procedure prescribed under the law of Bangladesh for the unloading of the imported goods at its customs stations? Nor does

2 (2015) 3 SCC 571.

the appellant give the details of the dates of the actual delivery of each of the four consignments at Benapole."[3] In the result, the court held that the appellant has failed to discharge its legal obligation and dismissed the appeal.

Family law – Child custody

The Supreme Court in *Surya Vadanan* v. *State of Tamil Nadu* [4] explains certain conflict of laws / Private international law principles. They are: Jurisdiction of domestic court or foreign court in child custody matters at interim stage, principles of comity of courts, most intimate contact, closest concern and first strike. The litigation matter in this case concerned with child custody in a matrimonial dispute. The concerned facts briefly are:

The parents are citizens of the United Kingdom (UK) and their children are also citizens of the UK. The parents have been residents of the UK for several years and worked for gain over there. They own (jointly) immovable properties. Their children were born and brought up in the UK in a social and cultural milieu of the UK. The mother in about 2012 left the UK along with her two daughters and came to India because of some matrimonial problems. Soon thereafter she filed a divorce petition in the Family Court in Coimbatore (India) including an application for the custody of her two daughters. Faced with this situation the father initiated a legal action in the UK for making the children wards of the court. The High Court of Justice in the UK passed an order making the children wards of the court, requiring the mother to return the children to the jurisdiction of the court in the UK.

As the mother failed to respond to the UK court's order, the father filed a writ petition in the High Court of Madras for issuance of a writ of *habeas corpus* for the production of children in the court. This writ petition was dismissed on the premise that the welfare of the children who are rightly in the custody of their mother – legal guardian was of paramount importance (and not the legal right of either of the parties).

The father has thereafter approached the apex court as against the ruling of the High Court of Madras, on the child custody issue. The Supreme Court first studied its earlier decisions in the context. It referred to *Saritha Sharma* v. *Sushil Sharma;*[5] *Shilpa Aggarwal* v. *Aviral Mittal;*[6] *V.Ravi Chandran* v. *Union of India;*[7] *Ruchi Majoo* v. *Sanjeev Majoo,*[8] and *Arathi Bandi* v. *Bandi Jagadrakshaka Rao.*[9]After extensive deliberation of these decisions, the Supreme Court observed: The principle of the comity of courts is essentially a principle of self –restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There

3 *Id*. at 584.
4 (2015) 5 SCC 450.
5 (2000)3 SCC 14.
6 (2010) 1 SCC 591.
7 (2010) 1 SCC 174.
8 (2011) 6 SCC 479.
9 (2013) 15 SCC 790.

may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self – restraint and respect the direction or order of the domestic court (or *vice versa*) unless there are very good reasons not to do so.

From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood that this is the final goal or the final objective to be achieved – it is not the beginning of the exercise but the end.[10] Continuing further, the apex court said :[11] we are concerned with two principles in a case such as the present . They are:

(i) the principle of comity of courts ; and

(ii) the principle of best interests of and the welfare of the child

The Supreme Court pointed out that the " most intimate contact" doctrine and " the closest concern" doctrine as key circumstance and factor to be taken into consideration for reaching the final goal – the best interest and welfare of the child. Referring to "comity of courts" principle also as a second key circumstance and factor the court observed that "we must give due respect even to interim or interlocutory orders of a foreign court, "if the foreign court does have jurisdiction over the child whose custody is in dispute based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction. The court went on to observe that if the jurisdiction of the foreign court is not in doubt, the 'first strike' principle becomes applicable. Explaining the said principle the court said," due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic)."[12] The court however was quick enough to caution, "merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result. Finally, this court has accepted the view that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary enquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court." [13] Discussing the issue on inquiry the apex court opined, "if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry

10 (2015) 5 SCC 450 at 470-71.

11 *Ibid.*

12 *Supra* note 10 at 473.

13 *Id.* at 474.

(as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be order as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:[15]

i. The nature and effect of the interim order passed by the foreign court

ii. The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court

iii. The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country.[14] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

iv. The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

On the facts and circumstances of the case the court pointed out that the mother "has not taken any steps to give up her foreign citizenship and to acquire Indian citizenship. She has taken no such steps even with respect to her children. Clearly she is desirous of retaining her foreign citizenship at the cost of her Indian citizenship and would also like her children to continue with their foreign citizenship, rather than take Indian citizenship."[16] Such being the situation , according to apex court, mother and her children must be encouraged to submit to the jurisdiction of the foreign court which has the most intimate contact with them and closest concern apart from being located in the country of their citizenship. According to the court, besides, mother being a person of Indian origin cannot be an overwhelming factor.

Finally, on the facts and circumstances of the case, the Supreme Court ruled that there is no doubt that the foreign court has the most intimate contact with the mother and her children and also the closest concern with the well being of the family and under these circumstances mother's continued refusal to abide by the interim and interlocutory order of the foreign court is not justified and it would be certainly in the best interests and welfare of the children if the foreign court takes the final decision on the custody of the children. The decision in this case though displays a well balanced

14 The reference here is to *Arathi Bandi* v. *Bandi Jagadrakshaka Rao* (2013) 15 SCC 790, see *supra* note 10 at 474.

15 *Supra* note 10 at 474.

16 *Id.* at 475.

approach on the issue of parental removal of children in child custody matters, it does call for a short comment on the doctrine of "first strike" in point of time. It is common knowledge in litigation "right to appeal" is available for all parties irrespective of time of pronouncing of judgment in a court of law – be it first court or appellate court. By sanctifying the 'first strike' – a decision delivered first in point of time does not provide it unassailable mandate to be complied with.

Special Marriage Act, 1954

Special Marriage Act, 1954 provides legal regime irrespective of the religions in matrimonial matters. Indeed it has harmonised all those matrimonial issues which are otherwise governed by different personal laws based on various religions in India. Inter-personal conflict of laws that resolve family law matters, in particular, marital issues are codified in Special Marriage Act, 1954.

The case, *Rajesh Kumar Tripathi* v. *State of Madhya Pradesh*,[17] concerns with the issue of registration of marriage between an Indian citizen and a citizen of a foreign country (Germany in this case). The court ruled that the Special Marriage Act, 1954 imposes no bar for registration of marriage between an Indian citizen and citizen of any other country. The parties in this case are an Indian citizen and a German national (wife) who converted herself to Arya Samajist, and their marriage was performed in India under Arya Samaj Validation Act, 1937. It may be pointed out here, that performing the marriage and registering the same in accordance with laws in India constitute the formal validity of marriage between two persons governed by two different laws, in conflict of laws.

In *Devika Raj* v. *The State of Kerala*,[18] the issue is as regards solemnisation of marriage of an Indian citizen with a foreigner (a Canadian citizen) under the provisions of Special Marriage Act, 1954. The High Court of Kerala ruled in this case, that the Special Marriage Act, 1954 does not contain any prohibition for solemnisation of the marriage, if one of the parties is a foreigner. The court observed that section 4 contemplates a marriage between "any two persons" if the conditions specified therein are fulfilled.

II CONFLICT OF LAWS AND INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration is part and parcel of conflict of laws. The presence of foreign element in matters of international trade and commerce makes it imperative for the application of conflict of laws principles in resolving the disputes. Resolution of cross-border trade disputes through arbitration is based on conflicts principles. An agreement to submit disputes to arbitration by parties from different countries is an international commercial contract and is governed by principles on

17 AIR 2015 MP 61.

18 AIR 2015 Ker. 226.

choice of law concerning international commercial contracts. The present survey concerns with select cases which illustrates choice – of – law issues in international commercial arbitration.

Procedure : *lex fori*

ONGC Petro Additions Limited v. *Daelim Industrial Company Ltd. Korea,*[19] concerns with a contract with a foreign company. Under the agreement clause relating to "applicable laws" parties agreed that all questions or disputes arising between them would be settled in accordance with the laws of India, in force from time to time. The dispute arose, as the non-applicant, Daelim Industrial Company Ltd., Korea could not fulfill its obligation. Parties, agreed to an arbitral adjudication. However, controversy arose as to the appointment of the presiding arbitrator. The applicant referred to the agreement clause regarding "General Conditions of the Contract" which stated *inter alia*, all questions , disputes or differences arising under, out of or in connection with this contract shall be settled in accordance with the laws of India (both procedural and substantive) from time to time in force and to the exclusive jurisdiction of the courts in India…..".[20] The non-applicant asserted that the parties would be bound by the provisions of the Singapore International Arbitration Act and in consonance with the UNCITRAL Rules.

On facts and circumstances, the apex court observed that "A perusal of clause 1.3.1 of "applicable laws " leaves no room for any doubt , for recording an effective conclusion, that the parties had agreed, that all questions or disputes arising between them would be settled in accordance with laws of India (both procedural and substantive) in force from time to time. Insofar as the instant aspect of the matter is concerned, it is apparent that the provisions of the Indian Arbitration and Conciliation Act, 1996 lays down the procedural as well as substantive provisions, relating to the settlement of arbitral disputes in India."[21]

This case is a clear illustration of upholding the express choice of parties as regards the governing law of an arbitration agreement for resolving the disputes. However, the question does arise whether the proceedings in Singapore (consequent upon request, it was agreed between the parties) would be conducted in accordance with procedure laid down under the 1996 Indian Act in view of the well established conflict of laws rule that procedures are governed by "*lex fori*".

Parties' Intention

In *Harmony Innovation Shipping Ltd*. v. *Gupta Coal India Limited,*[22] an agreement was entered into between the appellant and the respondent in respect of appellant's 24 coal voyages from Indonesia to India in 2010. However the respondent

19 AIR 2015 SC 2861.
20 *Id.* at 2866.
21 *Ibid.*
22 (2015) 9 SCC 172.

could undertake only 15 voyages and this resulted in the dispute between the parties which was referred to arbitration. An additional "addendum" was executed later in 2013 in respect of the remaining voyages without making any changes in the arbitration clause. In the present case the agreement stipulates that the contract is to be governed and construed according to English law. It forms part of the arbitration clause. The issue posed before the court was whether the parties intended London as the seat of arbitration. The apex court applied the test of presumed intention adopting an objective approach to ascertain the parties' intention to make London as the seat of arbitration. As the parties did not exclude the application of part I of the 1996 Act, the Supreme Court had relied on the test of the presumed intention of the parties to establish whether there was implied exclusion of the Indian court's jurisdiction. Parties' intention in international commercial contracts is ascertained in three modes according to modern rules of private international law, namely (i) where there is express choice by the parties (ii) by inferred choice and (iii) where there is no choice by the objective test of real and substantial connection.

On the facts of the case the court pointed out that coming to the stipulations in the present arbitration clause, it is clear as day that if any dispute or difference would arise under the charter, arbitration in London to apply; that the arbitrators are to be commercial men who are members of the London Arbitration Association ; the contract is to be construed and governed by the English law ; and that the arbitration should be conducted, if the claim is for a lesser sum, in accordance with small claims procedure of the London Maritime Arbitration Association. There is no other provision in the agreement that any other law would govern the arbitration clause.

In the present case the agreement stipulates that the contract is to be governed and construed according to the English law. This occurs in the arbitration clause. As we perceive, it forms as a part of the arbitration clause….As we perceived, it forms as a part of the arbitration clause. There is ample indication through various phrases like "arbitration in London to apply", arbitrators are to be members of the "London Arbitration Association" and the contract "to be governed and construed according to the English law". It is worth noting that there is no other stipulation relating to the applicability of any law to the agreement. There is no other clause anywhere in the agreement. That apart, it is also postulated that if the dispute is for an amount less than US$50,000 then, the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association. When the aforesaid stipulations are read and appreciated in the contextual perspective," the presumed intention" of the parties is clear as crystal that the juridical seat of arbitration would be London.

In *Union of India* v. *Reliance Industries Ltd.*,[23] the Supreme Court read the parties' implied intention to exclude the application of part I of the 1996 Act on the basis of facts and circumstances of the case. Factually the parties chose London as the venue of arbitration and English law as the governing law of the arbitration agreement.

23 (2015) 10 SCC 213.

Two production sharing contracts were executed between Reliance Industries Ltd., the Union of India, Enron Oil and Gas India Ltd. and ONGC. Parties inserted the dispute settlement clause in which London was chosen as venue of arbitration and the arbitration agreement to be governed by the laws of England. When the differences arose the arbitral tribunal was appointed. The tribunal passed a final partial award which was being challenged in the instant case, by filing an application under section 14 of the Arbitration and Conciliation Act, 1996.

The apex court was giving effect to the parties' intention when it ruled, that where the parties have chosen foreign law as the governing law of arbitration agreement and London as the venue of arbitration, by implication, part I of the 1996 Act is excluded. In other words, where law other than Indian law governs arbitration agreement, Part I is excluded by necessary implication. In the instant case, the Supreme Court conclusively decided on the facts of the case that juridical seat of arbitration being London and arbitration agreement governed by English Law, Part I would consequently not be maintainable. Clearly the case establishes Supreme Court's recognition of parties' intention in the context of party autonomy to indicate by implication non-application of part I of the 1996 Act to their foreign seated arbitration and the enforcement of resultant foreign awards in India.

M/S ICICI Bank Limited v. *M/S IVRCL Ltd.*,[24] is a case in which parties' intention to exclude consciously the application of provisions of part I of the Arbitration and Conciliation Act, 1996 to issues involving in part II (as regards international commercial arbitration) has been established. The issues before the court are concerned with contract between parties entered into in Nepal, for works to be executed in Nepal. Contractual clauses stipulated that laws of Nepal would govern the contract; and contractual disputes are to be settled under UNCITRAL Rules and the juridical seat of arbitration to be in Nepal – Kathmandu. In terms of the contract thus entered into between respondents 1 and 2. And the aforementioned facts established according to the court "the parties to the contract (respondents 1 and 2) had ruled out the applicability of part I of the Act by a conscious decision; and the provisions of part I of the Act, being wholly inconsistent with the arbitration agreement, is excluded by necessary implication in the arbitration agreement. Section 9, which is in Part I of the Act, could therefore not be invoked by the first respondent and consequently, the court below lacked jurisdiction to entertain the application filed by the first respondent under Section 9 of the Act."[25]

In *Carzonment India Pvt Ltd* v. *Hertz International Ltd.*,[26]respondent raised the maintainability of petitions filed by the petitioner under section 34 of the Arbitration and Conciliation Act, 1996 challenging the foreign awards. The law governing the contracts entered into between the parties is Indian law. The procedural rules of arbitration are the ICC Rules and the venue and seat of arbitration is Singapore. The

24 AIR 2015 Hyd 179.

25 *Id*. at 186.

26 2015 (151) DRJ 628.

court referred to the term of the contract which housed the dispute settlement clause. According to this clause " the disputes between the parties are resolved by 'compulsory arbitration in accordance with the Rules of Conciliation and Arbitration of the ICC, "the arbitration shall be held at Singapore; the governing law of the contract is the Indian Law, a fact not disputed by the parties. The dispute between the parties, however centered around as to the law governing the arbitration agreement and what the seat of arbitration is. On these facts and circumstances, the court ruled." In the present case there is absolutely no connection between Singapore and the present contract except that the arbitration did took place there. The petitioner is an Indian party and the respondent company is incorporated in the US. The contract was to be performed entirely in India…the governing law of contract is Indian law. Applying the "closest and most real connection" test, it can safely be concluded that there is no implied exclusion of the applicability of Indian Law to the arbitration proceedings.[27]

This judgment calls for comments. The court was concerned with the issue totally related to arbitration of the dispute. It is common knowledge that the governing law of the contract *per se* need not necessarily include the applicable law to the arbitration which is independent from the main contract. An agreement to submit disputes arising in an international contractual transaction to arbitration is by itself a full fledged "international commercial contract" which is governed by "proper law of arbitration". Further, such an arbitration law has both, substantive as well as procedural perspectives. The Supreme Court has clearly stated this position in the NTPC case, referred to by this decision in para 24 of the judgment. It maybe pointed out that the concerned section 9(b) on the basis of which NTPC case was decided is no longer the part of the 1996 Act.

The court did not read the implied choice of the parties in the present case. Their choice of ICC Rules to govern the arbitration agreement and Singapore as the venue/ seat of arbitration clearly and impliedly negated the application of the 1996 Act for arbitration. This rule is found in Bhatia International where the apex court stated part I will not be applicable if the parties exclude its application expressly or impliedly, and choosing non Indian law amounts to exclusion of Indian law by implication , as is laid down in many decisions of the Supreme Court. [28]

The case *Govind Rubber Ltd* v. *Louis Dreyfus Commodities Asia (P) Ltd.*[29]illustrates significance of parties' intention in an agreement pertaining to international commercial agreement. The appellant was carrying on business in India at Mumbai, of import and export of commodities and the respondent was having his office at Singapore. The business transaction between the parties concerned with offer and purchase of natural rubber (of Thailand origin). The parties were ad idem in the matter of the terms of the sale contract which contained the resolution of dispute by arbitration through Singapore Commodity Exchange.

27 *Id.*, para 25.

28 See for example, *Reliance Industries* v. *Union of India* (2014) 7 SCC 603.

29 (2015) 13 SCC 477.

The main issue in this case pertained to: "the sale contract issued by the respondent containing and referring the arbitration to Singapore Commodity Exchange was not signed and returned by the appellant.

The Supreme Court after hearing the rival contentions observed, "an arbitration agreement even though in writing need not be signed by the parties if the record of the agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication. Section 7 (4) (c) provides that there can be an arbitration agreement in the exchange statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. If it can be prima facie shown that the parties are at ad idem, then the here fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day of e-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established and there is a record of agreement, it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties…. It is clear that for construing an arbitration agreement, the intention of the parties must be looked into…In the present case the intention of the parties, as appearing from the correspondence, can safely be inferred that there had been a meeting of the minds between the parties and they were ad idem to the terms of sales contract which contained the forum of dispute resolution at Singapore Commodity Exchange."[30]

In *E -City Entertainment (I) Pvt Ltd.* v. *IMAX Corporation*,[31] E -City Entertainment is part of Essel Group of Companies. IMAX is a Canadian Corporation. The parties entered into an agreement . Under the agreement E City was to take delivery of certain projection systems. According to IMAX, E-City committed breach of this agreement. The agreement had a dispute resolution clause which provided for arbitration in accordance with ICC Rules. IMAX was the claimant of damages. The arbitral award held E-City liable for the breach of the terms of the said agreement. E-City filed an arbitration petition in Bombay High Court under section 34 of the 1996 Act, which was allowed. IMAX by filing a special leave petition (SLP) in the Supreme Court got the proceedings in the arbitration petition stayed.

IMAX after getting confirmed from the Superior Court Justice at Ontario of the foreign award, initiated proceedings for execution in New York Supreme Court which resulted in default judgment as E-City did not appear. E-City filed the application for anti–suit injunction to restrain IMAX from proceeding with execution or implementation of certain arbitral awards from the Supreme Court of New York.

In the context of the facts and circumstances of the case, the court observed: [32]

30 *Id.* at 484;486 and 487.

31 2015 (2) Arb LR 107 (Bom).

32 *Id.*, para 14.

> The agreement in question itself contain a jurisdiction clause. It said that the agreement was to be governed by and construed according to the laws of Singapore; that the parties had attorned to the jurisdiction of the Courts in Singapore; and all disputes would be settled by arbitration pursuant to the ICC Rules of Arbitration. This …..is therefore, a foreign award , one that is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards…the terms of that convention and in particular Articles V and VI….require that such an award can only be set aside or suspended by a competent authority of the country in which or under the law of which that award was made….a suit seeking restraint against civil proceedings is in law and in conception, materially different from an action that seeks a restraint against the enforcement of an arbitral award.

Continuing further on the same context, the court observed: [33]

> It is most inequitable that an Indian party that enters into a commercial transaction should be permitted to delay the enforcement of award passed by a properly constituted tribunal indefinitely….these actions undermine the very basis of arbitration and arbitration law…. It is not for courts to interfere in the legitimate working of international contracts and the enforcement of awards of properly constituted arbitral tribunals except in the narrowest of circumstances.

In the end the court rejected the E-City's approach by opining: [34]

> What E-City suggests is, shorn of all the legalese, an extreme proposition: every losing party in a foreign arbitration, with a foreign award against him, only has to lodge a petition under Section 34 of the arbitration Act (and no matter that Section and the entire part in which it sits applies only to domestic awards) and there is an instantaneous and automatic global stay against injunction . If there is anything that is oppressive or vexatious, it is E-City's approach….

The court, accordingly, refused E-City's petition for anti-suit injunction.

Enforcement of foreign award

In *Ssangyong Engineering & Construction Co. Ltd* v. *Yograj Infrastructure Ltd*., [35] decree holder Ssangyong Engineering and Construction Co. Ltd filed the execution petition for the enforcement of a partial award and the final award against

33 *Id*., paras 17-18

34 *Id*., para 18

35 295 SCC Online Del 8428.

the judgment debtor. The said awards are passed by the Singapore International Arbitration Centre (SIAC) as per terms agreed between the parties. The judgment debtor is a Delhi based company. The facts which led to the dispute were, the decree holder was awarded the contract by the NHAI for the construction and rehabilitation of the national highway in the State of Madhya Pradesh By a contract the decree holder entrusted certain obligations in the highway project to the judgment debtor which the latter failed to fulfill, as agreed under the contract. The decree holder, as a result terminated the contract and invoked arbitration proceedings under the SIAC Rules as per agreed terms.

As per the SIAC Rules, all partial awards and final awards are independently enforceable. It was argued by the judgment debtor that the partial award is opposed to public policy in India. The court rejected this plea and observed relying on the apex court's ruling in the case of *Shri Lal Mahal Ltd.* v. *Progetto Grano SPA* as follows: [36]

> …..A clear and fine distinction was drawn by this Court while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It has been held in unambiguous terms that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved.
>
> …The application of (Public Policy of India doctrine for the purposes of Section 48 (2) (b) (of Arbitration and Conciliation Act, 1996) is more limited than the application of the same expression in respect of domestic arbitral award.
>
> Moreover, Section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award-enforcement stage. The scope of enquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under section 48 (2) (b) the enforcement of a foreign award can be refused only if such enforcement is found to be

36 2013 (3) Arb LR 1 (SC), paras 22,25,43 and 45.

contrary to (i) fundamental policy of Indian Law ; or (ii) the interests of India ; or (iii) justice or morality. The court disposed off the case accordingly.

Public policy exception

In *ONGC Ltd.* v. *Western Geco Intl. Ltd*.,[37] a contract was entered into between the appellant and respondent for technical upgradation of seismic survey vessel with a view to modernise. The tender floated by the appellant did not specify the national origin of hydrophone – equipment used for upgradation. As the equipment of US origin could not be fitted due to some reservation of US authorities, respondent offered to use the equipment of Canadian origin and accordingly informed the appellant corporation.

After the upgradation of the ship with Canadian equipment, the ship was returned to the appellant corporation (after a delay of nine months). Disputes arose thereafter as regards the payment of charges. Matter went before the arbitral tribunal. Aggrieved by the resultant award, the appellant corporation filed a petition under section 34 of the 1996 Act, which was dismissed allowing only in part. The division bench did not interfere with earlier single bench decision, which allowed the award partly. The current appeal questions the award and the order passed by the high court. The Supreme Court found none of the grounds enumerated under section 34 (2) (a) to assail the arbitral award. It was urged before the high court as well as the Supreme Court that the award was in conflict with the public policy of India, relying on the *Saw Pipes* case[38] for its interpretation (in para 31 of *Saw Pipes* case). The apex court said that though *Renusagar* case gave a narrower meaning to the term, 'public policy' it is required to be held that the award could be set aside if it is contrary to:

a. fundamental policy of Indian law; or
b. the interest of India or
c. justice or morality or
d. in addition if it is patently illegal

Continuing its view in the *Saw Pipes* case the court observed: "Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

The apex court observed as regards "Fundamental Policy of India" that 'Saw Pipes' case does not elaborate this aspect. In the present case the Supreme Court opined, "the expression must include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. "Without

37 (2014) 9 SCC 263; AIR 2015 SC 363.
38 AIR 2003 SC 2629.

going into the meaning exhaustively, the court referred to "three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the "Fundamental Policy of Indian Law."[39]

The first and the foremost principle –

(i). Judicial approach – Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair , reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court , Tribunal or Authority vulnerable to challenge ". (para 26 of ONGC v. Western Geco)

(ii). Principle – Determination of rights and obligations of parties – in accordance with principles of natural justice as well as the application of mind . Application of mind is best demonstrated by recording reasons in support of the decision taken by the court, authority. This is the fundamental policy of India.

(iii). The next principle – relates to irrational decision that 'no reasonable person would have arrived at.'. 'Perversity or irrationality of decisions is rested on the touchstone of "Wednesbury's principle of reasonableness. "Decisions that fall short of reasonableness are open to challenge in a court of law ".

After the aforesaid in depth analysis of as to what constitutes "Fundamental Policy of Indian Law," the court dwelt upon the facts and circumstances of the case. The court ruled that no taxes were payable under the Income Tax Act, 1961. The court allowed the appeal that the deductions made by the appellate-corporation shall stand affirmed and to that extent amended the award.

In *Armada (Singapore) Pte. Ltd.* v. *Ashapura Minechem Ltd*.,[40] two arbitrations were filed by the petitioner under the section 47,48 and 49 of the 1996 Act for a declaration for enforcement of foreign arbitral award, for and also for an injunction, restraining the respondent from disposing funds and assets.The dispute arose out of a contract of affreightment between the parties. The Court of Appeal (COA) had an arbitration clause as under :

Clause 28

> Any dispute arising under this COA is to be settled and referred to Arbitration in London ….the Arbitrators and Umpire to be Commercial Shipping men. English Law to apply…the Arbitration shall be conducted in accordance with the Small Claims Procedure of the L.M.A.A.

39 *Id.,* para 26.

40 Bombay High Court decided on Sep.8, 2015.

This clause however, was not an issue in this case concerning the enforcement of foreign awards. Under the COA, the respondent was under an obligation to provide cargoes (for each of 37 vessels and 32 vessels) for the carriage of bulk bauxite from the West Coast, India to China. The contract was terminated without fulfilling the obligation under the terms of the contract. The issue before the court was whether non-obtaining of permission to load the foreign vessels in accordance with Merchant Shipping Act, 1958 in India would constitute violation of Indian Law simplicitor so as to raise objection for enforcement of the foreign awards under section 48 of the Arbitration Act, 1996. The court observed: "This court after adverting to the judgment of the Supreme Court in the case of Shri Lal Mahal Ltd. in the case of POL. India Projects Limited has held that simplicitor violation of the provisions of the regulations of the Indian Law would not be contrary to the fundamental policy of the Indian Law and thus enforcement of the foreign award cannot be objected to on this ground."[41]

In *Centravis Production* v. *Gallium Industries Limited*,[42] a foreign award from Ukraine came for its execution before the High Court of Delhi. The judgment debtor who opposed the award contended that he was not given an opportunity to present his case in the arbitration. He raised a number of objections such as violation of natural justice by denying opportunity to present his case; 100% reimbursement of arbitration fee amounting to "wagering" which in conflict with public policy of India. The court perused the objections filed by the judgment debtor. Held, perusal of award showed detailed hearing in which submissions of both parties placed on record were considered. The court also ruled that the adjudication of the dispute between the parties to the contract is not an uncertain event. Accordingly, the court rejected the contention of the judgment debtor that direction of payment of arbitrator's fees amounted to wages which conflicted with public policy of India. The court also held that the award which is in foreign currency, the applicable conversion rate will be one which is operative, on the date of the decree.[43] After having found no merit in any of the objections raised by the judgment debtor, the court dismissed his plea.

In *Sims Metal Management Limited* v. *Sabari Exim Pvt. Ltd*.,[44] parties – petitioner and respondent entered into a contract. It was contract of sale whereby the petitioner (Australian company) undertook to sell to the respondent 30,000 MT of steel scrap. The respondent breached the contract by not opening the letter of credit. Therefore, petitioner invoked the arbitration clause contained in clause 12 of the contract to recover the damages for the losses suffered. The arbitration was conducted in Sydney by referring the matter to the Australian Maritime and Transport Arbitration Commission (AMTAC). As per the requirement of the rules, the respondent did not file the statement of the defense. Even so, the commission, appointed a sole arbitrator who after a detailed

41 *Id*., para 40.

42 2015(1) Arb LR 113 (Del.)

43 *Id.*, para 13.5 This is the law pertaining to the date of foreign exchange involving foreign currencies established in *Renusagar* v. *General Electronic Co*., AIR 1985 SC 1156.

44 2015 (1) Arb LR 225 (Mad.)

analysis of the rival contentions passed an award. To enforce this award the present petition has been filed. The court after a thorough analysis held that there is no material against the enforceability of the foreign award and allowed the petition.

In *POL India Projects Limited* v. *Aurelia Reedrei Eugen Friederich GmbH*,[45] the respondent had entered into a voyage charter party with one DB Shipping LLC, a company incorporated under the laws of UAE, having its office at Dubai. The petitioner in the instant case *viz.*, POL India Projects Limited has impleaded DB Shipping LLC, as respondent no.2 in the instant case, though none appeared to represent the said DB Shipping LLC. The petitioners and the respondents entered into a contract of guarantee under which the petitioner guaranteed the performance of the said DB Shipping LLC. Respondents duly incorporated the voyage charter party containing an arbitration agreement in to the contract of guarantee. The said DB Shipping LLC committed default in their performance of the voyage charter party resulting in losses for the respondent. The respondents simultaneously commenced arbitration proceedings against the petitioners herein in which the tribunal validated the voyage charter party with the respondents, which included the arbitration agreement that provided arbitration in London according to English law. The tribunal passed a declaratory *ex parte* award. DB Shipping LLC did not participate in the proceedings. The petitioners on their part, refused the invitation to make submissions in these proceedings. The tribunal thereafter passed the final award holding the petitioners liable to pay to the respondents. The petitioners filed an arbitration petition to challenge the final exparte award under section 34 of the 1996 Act. They averred that provisions of part I of the 1996 Act are applicable to international commercial arbitration held outside India. It is the case of the respondents (Aurelia) that the award rendered by the tribunal is a foreign award. The arbitration proceedings were held in London in accordance with English Arbitration Act, 1996 in accordance with the arbitration agreement between the parties. The petition filed under section 34 of the 1996 Act is not maintainable. Part I of the Arbitration and Conciliation Act, 1996 does not apply to the foreign award. It was pointed out by the court in its 'Reasons and Conclusions' that if the party had accepted English law as the governing law of the contract and the seat of the arbitration would be in London , the dispute would be settled according to the law of England. In an application for challenging the validity of an arbitral award under section 34, the court would necessarily have to revert to the law governing the arbitration agreement.[46]

As regards the curial law governing the arbitration, the court following Bhatia International observed, "Bhatia International does not prohibit the exclusion of the application of part I on account of the proper law of the contract being foreign law. Where the proper law governing the contract is expressly chosen by the parties , which they have done in the present case by selecting English Law as the proper law of the contract, that law must, in the absence of an unmistakable intention to the contrary,

45 Decided on April 8, 2015 in High Court of Bombay.

46 *Id*., para 98.

govern the arbitration agreement."[47] The court further ruled: "Once the parties have agreed that the jurisdictional seat of arbitration would be London and the arbitration governed by the proper law of arbitration would be the law of England and provisions of Part I of Arbitration & Conciliation Act, 1996 were not applicable to the arbitration agreement."[48] The court ruled further, "the award rendered by the arbitral tribunal was a foreign award in international commercial arbitration. The parties were governed by the laws of England….The arbitration petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 is thus not maintainable."[49]

The next issue raised by the petitioners against the enforcement of the foreign award is that the award is in conflict with public policy of India, in as much as the award is based on a document (of guarantee) which was illegal, since petitioners have executed the letter of guarantee without prior permission of the Reserve Bank of India. Relying on the apex courts' view in *Lal Mahal* and *Renusagar* cases in the context of public policy defense, the court pointed out that public policy issues must be construed narrowly in the context of foreign awards. The following views of Supreme Court was observed, " that the concept of public policy must be construed as applied in the field of private international law consequently to be against public policy it should be contrary to the fundamental policy of Indian Law ; or the interests of India ; or justice or morality.[50] The court also relied rightly on the High Court of Delhi decision in *Penn Racquet Sports* v. *Mayor International Ltd*,[51] wherein after confirming the Supreme Court's views as mentioned above it was observed, "Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality".[52]

The High Court of Bombay further strengthened its view from the apex court's observation in the case of Renusagar in which it was held that since the Foreign Awards Act,1961 was concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in section 7(1)(b)(ii) of the Foreign Awards Act, 1961 must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to the fundamental policy of Indian law; or the interests of India; or justice or morality.

In *Louis Dreyfus Commodities Suisse S.A.* v. *Sakuna Exports Limited*,[53] High Court of Bombay is concerned with enforcement of foreign arbitral award under section

47 *Ibid*.

48 *Id*., para 99.

49 *Id*., para 106.

50 *Id*., para 145.

51 34 ILR (2011) Delhi 181: 2011 (1) Arb LR 244 at para 147.

52 2011 (1) Arb LR 244 (Del) at 264.

53 2015 (6) Arb LR 172 (Bom).

48 of 1996 Act. Parties entered into purchase contract. Disputes arose and arbitration took place under refined sugar association. A foreign award was passed by arbitral tribunal. The petitioner filed execution petition for execution of foreign award. The court upheld the foreign award observing that enquiry under section 48 does not permit review of foreign award on merits, and that all findings of fact cannot be interfered with at the stage of enforcement of foreign award. The court said that the foreign award is final insofar as merits of claim awarded by arbitral tribunal is concerned. Distinguishing the domestic and the foreign award in the context of violation of fundamental policy of Indian law, the court observed that the powers of the court under sections 34 and 48 of the 1996 Act either to set aside or to refuse to enforce – respectively – differ in degree and are not identical.

The relevant facts before the court were, the petitioner herein was the original claimant and the respondent was the original respondent in the arbitral proceedings. The petitioner is a company having its registered office at Switzerland and the respondent is a public limited company registered under the Indian Companies Act, 1956 carrying its business at Mumbai. The parties were dealing with purchase contract in Brazilian white sugar. The purchase contract provided for arbitration clause in case of dispute between the parties.

In the facts and circumstances of the case, the court observed as follows, rejecting the objections for the enforcement of the foreign award: [54]

> The enquiry under Section 48 does not permit review of the foreign award on merits . The Supreme Court in the case of Shri Lal Mahal Limited has taken a view that Section 48 of the Arbitration Act does not give an opportunity to have a second look of the foreign award at the award enforcement stage. The said judgment clearly applies to the facts of this court. I am respectfully bound by the said judgment of the Supreme Court.

Relying on the Supreme Court ruling in *Renusagar Power Co. Ltd.* case, in matters of defence of public policy in enforcement of foreign awards the court pointed out: [55]

> The Supreme Court drew a clear and fine distinction while applying the rule of public policy between a matter governed by domestic laws and the matter involving the conflict of laws. It has been held that the application of the doctrine of "public policy" in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in case involving a foreign element than when purely municipal legal issues are involved.

54 *Id.* at 191.
55 *Id.* at 193-4.

Taking forward the private international law perspective in the enforcement of foreign arbitral awards, the Supreme Court held that since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law.

Foreign Judgment

High Court of Bombay was concerned with the execution of a decree of the High Court of the Republic of Singapore as the reciprocating territory, filed under section 44-A of the CPC in *Masterbaker Marketing Ltd*. v. *Noshir Mohsin Chinwalla*.[56] This case also concerns with the enforcement of a foreign judgment under section 13 of the CPC. This judgment provides a brilliant analysis of the ground of fraud for non-execution of foreign judgment.

Factually speaking the plaintiff / judgment creditor (JC) had obtained a decree against the defendant who remained ex parte in the proceedings. The court, went ahead and examined whether the foreign decree sought to be executed in the instant case is given on merits, on the plaintiff's claim. The court quoted the Supreme Court in this context from *M/s International Woolen Mills Ltd*. v. *M/s Standard Wool* (UK) Ltd.,[57] the court was of the view: [58]

> whether or not a judgment is on merits would be apparent from the judgment itself. It is not enough if there is decree or decision of the court. It has to be a judgment. The judgment must have directly adjudicated the question arising between the parties. The court should have applied its mind and considered the evidence in which case there would be adjudication on merits. The plaintiff should have adduced evidence in support of the claim so that the court duly considered such evidence instead of passing a decree merely on default of appearance of the defendant. The Supreme Court has held that in the former case there is judgment on the merits of the case; in the latter case when the decree is upon default of appearance the judgment is not on merits. Hence whether or not it is ex parte it can be a judgment on merits upon the aforesaid tests.

Pinpointing the issue, the High Court of Bombay quoted the Supreme Court's views further as follows :

(i) If the judgment is solely on account of the default of the defendant without considering whether the claim well founded or not and whether there is evidence to sustain it, it could be a decree passed by way of penalty.

56 2015 ALL MR 686.
57 AIR 2001 SC 2134.
58 *Id.*, para 30.

(ii) If there is an application of mind by the court it would be a judgment on merits. If it is without any evidence of any kind but passed only on the pleadings it cannot be a decision on merits.

(iii) If the judgment is passed as a matter of course or by way of penalty it would not be a judgment on merits. If it is passed on consideration of the truth or otherwise the plaintiff's claim it is on merits. Following the analysis the issue of the ex parte decree being a judgment on merit, the court ruled that "the judgment in this case is seen to have been passed on merits.

In the next issue the court dealt with judgment obtained by fraud. It was pointed out, by the court, that judgment obtained by fraud which falls within the mischief of section 13(e) of the CPC "should be a fraud by perjury or otherwise which could be shown to the court by evidence which was not known to parties during the former trial."[59]

The court found that fraud which was perpetrated by the plaintiff was in the suit itself. It was a fraud perpetrated prior to obtaining the judgment. Further, the court pointed out that: "It is only if there were new material facts which were not presented before the court during the trial but which could be shown to the executing court to hold that the foreign judgment was obtained by fraud and hence could not be conclusive under Section 13(e) of the CPC." The court was following the rationale established by the apex court in *Sankaran Govindan* v. *Lakshmi Bharathi* [60] in this context. Accordingly, the court said, "the fraud which is stated to have been perpetrated, is the fraud not known to the defendant when the decree was passed. It is only when the defendant is taken by surprise of the fraud played by the plaintiff when the defendant is served the notice of execution that he can challenge the decree or foreign judgment on the ground of fraud."[61]

The Bombay High Court next contrasted the fraud on merit with fraud on jurisdiction to claim the jurisdiction of the court, relying again on the Supreme Court's view in *Satya* v. *Teja Singh*,[62] in which the plaintiff had obtained an *ex parte* decree by playing fraud on the jurisdiction of the American court. Distinguishing both fraud on merit and fraud on jurisdiction, the court opined that while the former relates to an intrinsic fraud which would be within the trial and does not warrant non-recognition of the judgment. The latter, on the other hand, being extrinsic fraud that would warrant non-recognition of the judgment.

The court clearly pointed out "fraud if played by the plaintiff could have been suppressed by the defence of the defendant which the defendant failed to show". Finally on the facts and circumstances of the case the court confirmed the execution of the foreign judgment holding it to be a judgment given on merit.

59 *Supra* note 56.

60 Civil Appeal No. 1887 of 1967, decided on April 15, 1974 (SC).

61 *Supra* note 56.

62 AIR 1975 SC 105.

This case calls for a comment as regards enforcement of ex parte foreign decrees/ judgments as such in conflicts of laws. It is submitted that foreign ex parte decree is an absolute nullity and it has been treated so in conflict of laws,[63] It has been pointed out by the Privy Council in *Sirdar Gurdial Singh*'s case as follows :

> In a personal action to which none of these causes of jurisdiction previously discussed apply, a decree pronounced in absentum by a foreign court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity . He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity, by the courts or every nation except (when authorized by local legislation) in the country of the forum by which it was pronounced. [64]

The court in this case should have examined the issue "what conditions are necessary for giving jurisdiction to a foreign court before a foreign judgment is regarded as having extra territorial validity." The conditions referred to includes that the defendants were not the subjects of the foreign country, they did not owe any allegiance to the ruler of the foreign country and therefore they were under no obligation to accept the judgments of the courts of that state,they were not residents in that state when the suit was instituted, they were not temporarily present in that state when the process was served on them, they did not in their character as plaintiffs in the foreign action themselves select the forum where the judgment was given against them, they did not voluntarily appear in that court and they had not contracted to submit to the jurisdiction of the foreign court.

It was observed in *Kakadap Krishna Murthy* v. *Godmatla Venkat Rao*,[65] relying on Sirdar *Gurdial Singh's* case that "a decree passed in absentum was a total nullity as a foreign judgment….As foreign judgments, they have no validity and they are, as it were non est so far as the area outside the jurisdiction of the adjudicating courts is concerned, if they do not conform to the principles of Private International Law. Such a judgment is an absolute nullity in the international sense".[66]

In *Kolmar Group AG* v. *Traxpo Enterprises Pvt. Ltd.*,[67] the applicant is the decree holder / judgment creditor (plaintiff) who has obtained a judgment from the Royal Courts of Justice, London, UK against the respondent / judgment debtor (defendant), desires to execute in this petition. The court pointed out that the judgment of the foreign court is conclusive under section13 of the CPC with regard to all matters

63 The Privy Council case, *Sirdar Gurdial Singh* v. *Maharaja of Faridkot*, 21 Ind. App.171. See also, AIR 1951 Mad 289; *Moloji Nar Singh Rao* v. *Shankar Saran*, AIR 1962 SC 1737.

64 *Sirdar Gurdial* at 185.

65 AIR 1962 AP 400.

66 *Id* at 403.

67 (2015) 5 Bom CR 39.

directly adjudicated between the parties except those which fall within 6 exceptions set out therein. In the context of facts leading to the execution of the judgment, the court opined, " This court as executing court cannot go behind the judgment …Such a judgment is entitled to execution . It is not merely prima facie evidence. It is conclusive as to matters adjudicated between the parties. It falls within the parameters of conclusively under Section 13 of the CPC."[68]

III CONCLUSION

Emphasis on rules and principles of conflicts of laws / Private International law is found to be more in cases concerning international commercial arbitration than in other areas. It appears that there is less or minimum percolation of the subject. The globalisation has more effect in the trade and commerce area – particularly with respect to resolution of trade related disputes. In the family law section, child-custody decision by the Supreme Court has brought in a precision and balanced view in matters of best interests of child, welfare of the child and role of the judiciary. Recognition of foreign notarization and proof of foreign law in conflict of laws, have been added in this survey. Cases on recognition and enforcement of foreign judgments have illustrated the progressive development of conflict of laws in Indian state practice through their thorough analysis of grounds of defence in section 13 of CPC.

68 *Id.*, para 38.