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CONFLICT OF LAWS

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I INTRODUCTION

THIS YEAR'S coverage includes issues relating to Family Law, International Commercial Contracts, Anti-Suit Injunctions, International Commercial Arbitration (conflicts of laws perspectives only), Recognition of Foreign Notarial Acts, and Foreign Judgments Recognition and Enforcement. This bouquet of decisions from the Indian courts contribute to the Indian State practice of Private International Law/Conflict of Laws – a primary source.

II FAMILY LAW

Child Custody

The apex court confronted with child custody issues in *Nithya Anand Raghavan* v. *State of NCT of Delhi,*[1] *Bindu Philips* v. *Sunil Jacob,*[2] *Jitender Arora* v. *Sukriti Arora*[3] and *Prateek Gupta* v. *Shilpi Gupta.*[4] The main issue in all these cases deal with inter-country parental removal and child custody disputes. In *Nithya Anand Raghavan's* case, both husband and wife lived in U.K. The appellant wife had to return to India along with the child due to husband's violent behavior and child's illness – cardiac disorder. As the wife did not return to UK along with the child, husband filed a custody petition in UK, seeking the return of his daughter. The UK court passed an *ex parte* order directing wife to produce the child in UK court.

While in India, the appellant filed a criminal complaint with Crime against Women Cell (CAW Cell). The respondent husband filed a habeas corpus writ petition before the High Court of Delhi. The high court passed the impugned judgment directing

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1 AIR 2017 SC 3137.

2 AIR 2017 SC 1522.

3 (2017) 3 SCC 726.

4 (2018) 2 SCC 309.

the appellant wife to produce her daughter. The present appeal before the apex court arose from judgment of writ petition filed by the respondent husband for issuance of a writ of *habeas corpus*. A catena of apex court rulings on child custody matters including parental removal have been analyzed from the point of welfare principle of the child by both, the high court and Supreme Court in the present case.[5]

The Supreme Court made important observations in the course of the judgment. It observed "being a girl child, the guardianship of the mother is of utmost significance".[6] While considering whether the minor is in lawful or unlawful custody of another person the apex court observed: it is enough to note that the respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained it can be presumed that the custody of the minor with his/her mother is lawful".[7] Again the court said, "Even on a fair reading of this order (of the foreign court), it is not possible to hold that the custody of the minor with her mother has been declared to be unlawful…We hold that the custody of the minor with the appellant being her biological mother will have to be presumed to be lawful".[8]

The court further pointed out that "the order of the foreign court must yield to the welfare of the child".[9] Finally, the court ruled, "taking the totally of the facts and circumstances into account it would be in the interest of Nethra (child) to remain in custody of her mother and it would cause harm to her if she returns to the UK".[10] The apex court held in the present case, we are of the considered opinion that taking the totality of the facts and circumstances of the case into account, it would be in the best interests of the minor (Nethra) to remain in custody of her mother (appellant) else she would be exposed to harm if separated from the mother. We have, therefore, no hesitation in overturning the conclusion reached by the hgh court. Further, we find that the high court was unjustly impressed by the principle of comity of courts and the obligation of the Indian courts to comply with a pre-existing order of the foreign court for return of the child and including the "first strike" principle referred to in *Surya Vadanan's case*.[11]

5 *Arathi Bandi* v. *Bandi Jagadrakshaka Rao,* AIR 2014 SC 918; *Surya Vadanan* v. *State of Tamil Nadu,* AIR 2015 SC 2243; *Surinder Kaur Sandhu* v. *Harbax Singh Sandhu,* AIR 1984 SC 1224; *Elizabeth Dinshaw* v. *Aravand M. Dinshaw,* AIR 1987 SC 3; *Marggarate* v. *Chacko*, AIR 1970 Kerala I; *Kuldeep Sindhu* v. *Chanan Singh,* AIR 1989 Punjab & Haryana 103; *Ruchi Majoo* v. *Sanjeev Majoo,* AIR 2011 SC 1952; *Dr. V. Ravichandran* v. *Union Of India*, AIR 2010 SCC (Supp) 257; *Saritha Sharma* v. *Sushil Sharma*, AIR 2000 SC 1019; *Shilpa Aggarwal* v. *Aviral Aggarwal*, AIR 2010 SCC 174; *Dhanwanti Joshi* v. *Madhav Unde,* (1998) 1 SCC 112.

6 AIR 2017 SC 3137 at 3155.

7 *Id.* at 3151.

8 *Id.* at 3154.

9 *Id.* at 3151.

10 *Id.* at 3156.

11 *Id.* at 3159.

This being a landmark case, the principles laid down therein are set out here below. These have been culled out by an in depth analysis carried out by a high level committee constituted by the Ministry of Women and Child Development to examine in detail the legal issues involved when large number of women married to Indians abroad, are compelled to return to India with their children when they undergo violence in their marriage.

The Report of Justice Rajesh Bindal Committee's observations:[12] In *Nithya Anand Raghavan's* case the Supreme Court has done away with the principle of comity of courts and the principle of 'first strike' in matters relating to inter - country parental child custody disputes and have laid down the following principles to be followed:

- Concept of *Forum Conveniens* has no place in wardship jurisdiction.
- Principle of Comity of Courts not to be given primacy in child custody matters.
- Child removal cases to be decided on merits on welfare of child principle.
- Foreign Court order to be one factor to be taken into consideration.
- Courts free to decline relief of return of child within its jurisdiction.
- Courts may conduct summary or elaborate enquiry on question of custody.
- High Court exercises parens patriae jurisdiction in cases of custody of minors.
- Remedy of Habeas Corpus cannot be used for enforcement of foreign Court directions.
- Parties can avail other substantive remedy permissible in law for enforcement of foreign Court order.
- High Court can examine return of minor without being 'fixated' on foreign Court order.
- 'First strike' principle disagreed as being in conflict with the welfare of the child.
- Summary jurisdiction to return child be exercised in interest and welfare of child.

In *Prateek Gupta* v. *Shilpi Gupta,*[13] the issue is again custody of child. The parents were married in India and shifted to US after marriage and were blessed with two sons. Due to domestic matrimonial discord the couple separated and the appellant father left for India leaving the children and wife back in US. He was shuttling between India and US and in one of the visits to US he took along his elder son to India and didn't return. Under these circumstances, the mother approached Juvenile and Domestic Relations Court Fairfax County; she filed "Emergency Motion for Return of Minor Child and Established Temporary Custody". The US Court granted sole legal and physical custody of the child to the respondent mother. The appellant father in the meanwhile instituted a legal action against the respondent mother under the Indian enactments, Hindu Marriage Act, 1955 under section 9 for restitution of conjugal rights and also under Guardianship and Conjugal rights and also under Guardianship

12 Report of Justice Rajesh Bindal Committee, Vol. I p. 198-199.

13 *Supra* note 4.

and Wards Act, 1890 in Delhi seeking a declaration that he was the sole and permanent guardian of the child. Further the appellant father also instituted a suit in Delhi praying to adjudge the proceedings initiated by the respondent mother as null and void and not binding on him. The appellant father also sought a decree for permanent injunction against the respondent mother. In the absence of any response to the US Court's proceedings and did not appear even after personal service, the respondent mother invoked the writ jurisdiction of the High Court of Delhi seeking a writ of *habeas corpus* against the appellant for the custody of the child. The apex court observed in the context of the facts and circumstances of the case, "that the dislodgement of the child as directed by the impugned decision would be harmful to it…we are of the opinion that the child, till he attained majority, ought to continue in the custody, charge and care of the appellant",[14] till such time a court of competent jurisdiction decides the issue of its custody in accordance with law. The Supreme Court in its considered view of allowing the children to live apart for a considerable length of time could have viewed that separation of siblings as not being in tune with "welfare principle" of children. The in depth analysis of a host of cases concerning child custody matters by the apex court. Justice Rajesh Bindal Committee on the issue of inter-country parental removal of children made the following observation in the context of this case:[15] Further, *Prateek Gupta* v. *Shilpi Gupta,*[16] it has been held by the Supreme Court as follows:

- It has been reiterated that the notion of 'first strike principle' is not subscribed to and the judgment of the Supreme Court in *Nithya Anand Raghavan* has been subscribed to.
- Notwithstanding the principles of comity of courts, and the doctrines of 'intimate contact and closest concern', issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of the overall well-being of the child.
- In the process of adjudication on the issue of repatriation, a Court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the applicant parent is prompt and alert in the initiative to do so. Overwhelming exigency of the welfare of the child will be the determining factor for such process. With hurry we cannot bury justice.
- Doctrines of 'intimate contact and closest concern' are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language custom etc. with focus on process of overall growth and grooming.

14 *Supra* note 4.

15 Report of Rajesh Bindal Committee on the Civil Aspects of International Child Abduction Bill, 2016 Vol. I at p.199.

16 *Supra* note 4.

- There is no forum convenience in wardship jurisdiction and the welfare of the child as the paramount consideration will be the mandate.
- Considering that the child in question was barely 2.5 years old when he came to India and is now over 5 years old, the child of tender years, he ought not to be dislodged from the custody of his father whilst proceedings are pending before the Guardian Judge, Delhi.

In *Bindu Phillips* v. *Sunil Jacob*[17] concerns with custody of children sought by mother residing abroad. The appellant mother despite having the orders in her favour from a US Court order for custody of her children, she has neither got the custody of her children nor has she been able to meet and spend some time with them. The mother, a resident of USA in her prayer to the apex court sought that she be allowed to meet her children on any terms and conditions. As the respondent father did not object to grant such visitation rights the Court passed the following order: we consider it just and proper and in the interest of all family members to pass the following order:

1. The appellant (mother) is granted visitation rights to meet her two children, who are presently with the respondent.
2. The venue of meeting of the appellant with her two children would be at Mangalore.
3. The total duration of visiting rights to the appellant would be one week (7 days).
4. The timings to meet would be from 9.00 a.m to 9.00 p.m. every day.
5. The meeting would be at a place where the appellant would be staying in Mangalore – be that in a good Hotel or a residence, as the case may be, and at the discretion of the appellant.
6. During meeting hours, the respondent would not, in any manner, interfere or participate in the meetings between the appellant and the children.
7. During one week or till the appellant leaves India, the respondent would not try to enforce any order or directions issued by any court/authority against the appellant in any pending or/and decided case nor would create any embarrassing situation for the appellant and her parents.
8. Similarly, the Appellant would not try to enforce any order or direction issued by any court/authority of United States of America or any other foreign country against the Respondent and their two children for whom the visitation rights are being given herein.
9. Needless to say, the appellant would be free to give any kind of gifts to the children of her choice and of the liking of the children.
10. Since the appellant has to arrange for visa, air tickets *etc*. to visit India, she will accordingly inform her exact date of arrival in India and the date of reaching

17 AIR 2017 SC 1522.

> Mangalore well in advance to the respondent directly, or/and to the respondent's lawyer (Advocate-on-Record) through her lawyer (Advocate-on-Record) by email so that the respondent and the children would be able to reach Mangalore well in time.
>
> 11. The appellant while fixing her dates of arrival in India would keep in mind the availability of the children during those days".[18]

In continuation the apex court observed:[19]

> In our view, both must realize that the main object of the meeting is to allow the children to meet their mother in a most dignified, congenial and happy atmosphere. The respondent should therefore, ensure that such meeting brings some kind of happiness to their children and mother.

Parties in *Jitendar Arora* v. *Sukriti Arora*[20] were married in India and thereafter shifted to UK. A daughter was born out of this wedlock in Delhi. After the birth of a second daughter, the couple's matrimonial discord began and soon the wife filed a divorce petition in UK, which resulted in a divorce decree. The appellant father thereafter shifted to India along with elder daughter. In the absence of the appellant and the elder daughter the respondent wife obtained British citizenship for their daughter (first) and filed a habeas corpus petition in the Punjab and Haryana high court against the appellant to produce the daughter. The high court allowed the petition and directed the appellant to hand over the custody of the daughter to the respondent mother. As against the highcCourt judgment, the present appeal has been filed in the apex court by the appellant father. As a consequence of the stay order of the high court decision, the custody of the daughter remained with her father with visitation rights to the respondent mother. On the factual situation the mother and daughter along with her father – all have been shuttling between India and UK. But all along the girl has been in close contact with father continuously than with the mother. This is a case wherein the apex court has dealt with the concept of "welfare of the child" at length through analysis of bulk of case laws. Further, the court also examined the Indian law on the custody of children. In particular, the court examined the situations of "age of discretion" among children who are grown up and matured between the age group of 10 and 15 years. The court came to the conclusion of child custody in the instant case only after a due discussion with the child directly. The court granted the custody to the father after due consideration of facts and circumstances of the case. The Supreme Court observed: "It thus becomes apparent that in the instant case, we are dealing with the custody of a child who is 15 years of age and has achieved

18 *Id.* at 1523.

19 *Id.* at 1523-24.

20 (2017) 3 SCC 726.

sufficient level of maturity. Further inspite of giving ample chances to the respondent by giving temporary custody of Vaishali to her, the respondent has not been able to win over the confidence of Vaishali. We, therefore, feel that her welfare lies in the continued company of her father which appears to be in her best interest…On the facts of the present case, we are convinced that custody of the child needs to be with the father. She is already 15 years of age and within 3 years she would be major and all this custody battle between her parents would come to an end".[21]

In *Shriram Sankaran* v. *The Inspector General of Police,*[22] the petitioner, Shriram Sankaran has filed a writ of habeas corpus to produce his child Baby Srishti about 3 years before the High Court of Karnataka. Briefly the related facts are: the petitioner and respondent got married in Bengaluru according to Hindu rites in 2010 and shifted to US. A girl child was born in 2013 in USA and as such the child is a US citizen by birth. The petitioner filed a divorce petition against the respondent on the ground of cruelty in the superior court of the State of Arizona in 2014. The respondent submitted himself to the jurisdiction of the court in US. The court passed a consensual order wherein it held that the petitioner and respondent to make joint legal decision as regards the child. As the wife violated the terms of the joint custody, the petitioner filed an emergency petition for enforcement of the custody order and warrant for immediate production and issuance of writ of habeas corpus in US. The US Court in its order granted the petitioner sole legal decision making authority in respect of the child. The petitioner in this case is seeking a writ of habeas corpus directing the respondent wife to cause the production of the child and handover the child to the legal custody of the petitioner. It was contended by the petitioner that the respondent cannot deprive the American Court of its jurisdiction to decide upon the custody of the child by removing her to India, more so when the child is a citizen of America. The petitioner further argued that their matrimonial home is in America and when the American Court has passed the order regarding the custody of the child the respondent is not justified in approaching the Family Court in Bengaluru for the same cause of child custody. The respondent wife on the other pleaded that when her marital life was miserable, the petitioner coerced her into submission to the jurisdiction of the American Court, trapped her and made her helpless in a foreign country. The respondent wife further argued that the American Court's order being foreign court order cannot be enforced by an Indian court as section 44A of CPC provides for execution of decrees passed by courts of reciprocating territory and that there is no reciprocatory agreement between India and America. It was also pointed out that India is not a signatory to The Hague Convention on International Child Abduction. As the mother of a 3-year-old girl child, the respondent mother submitted that the child requires the care, concern and protection of the mother and under the existing law in India section 6(a) of the Hindu Minority and Guardianship Act, 1956, the custody of a minor below

21 *Id.* at 739.

22 MANU/KA/1724/2017.

5 years shall ordinarily be with mother. Again, the American Court's order cannot be treated as conclusive in terms of section 13(c) (e) and (f) of the CPC.

After having heard marathon arguments by the learned advocates relying on a host of leading cases on the subject of inter-country parental removal of children decided by the apex court, the court dismissed the habeas corpus writ petition with an observation in the context of the facts and circumstances of the case, "the petition for habeas corpus is unavailable when the child is in the custody of the mother under the process issued by a competent court of law in pursuance of a subsisting order".[23]

Jasmeet Kaur v. *Navtej Singh*[24] is a case concerning child custody before the High Court of Delhi. The couple who were living in US since childhood were married first in US in 2006. Subsequently, their marriage was solemnized in India in New Delhi in 2007 according to Sikh rites and customs. Both parties are US nationals and running a professional dental practice in US. Their first child, a girl was born in US in 2012 and is a US passport holder. Some disputes and differences between the parties arose due to husband's deviant behavior. The wife along with her minor daughter came to India and was attending her brother's wedding at Delhi. After the marriage she decided to remain in India with her parents. The respondent husband who also came to India to attend the wedding of the appellant's wife's brother returned to US alone. The appellant, who was pregnant when she arrived in India, had her second child – a boy in Delhi in 2016. The husband in the meanwhile after his return from India instituted a case against the appellant in the US County Court of Connecticut for obtaining the custody of their older daughter.

The appellant wife, in Delhi filed a guardianship petition before the Family Court, in Tis Hazari, praying *inter alia* for the permanent custody of both the minor children. The US County Court on its part passed the first order granting temporary custody of both the children to the respondent husband with visitation rights to the appellant and also directed the appellant to return to US and bring back both the children with her. The respondent husband appeared before the Family Court seeking rejection of the appellant's guardianship petition. He challenged the Family Court's jurisdiction to entertain the guardianship petition in view of section 9 of the Guardianship & Wards Act which contemplates that an application with respect to the guardianship of a minor should be made "to the District Court having jurisdiction in the place where the minor ordinarily resides". He questioned the jurisdiction of the Family Court on the ground that in the instant case, both the parents are US nationals who are permanently residing in US and their daughter was born in US. He also argued that even though their second child is born in India, he cannot acquire India citizenship automatically, as neither of his parents are citizens of India, in terms of section 3 of the Citizenship Act, 1955. The family court under the facts and circumstances of the case, ruled lack of jurisdiction in the matter and that the US law is applicable to them in custody and other relief sought by Navtej Singh.

23 *Id.* at para 20.

24 2017 SCC Online Del 10593.

Aggrieved by the family court's order, the appellant filed the present appeal before the High Court of Delhi. The respondent husband also filed a writ of *habeas corpus* petition for recovering custody of his children from the appellant. The high court conducted a thorough study of almost all the leading authorities which laid down the law on child custody such as:

- *Ruchi Majoo* v. *Sanjeev Majoo*[25]
- *Dhanwanti Joshi* v. *Madhav Unde*[26]
- *Elizabeth Dinshaw* v. *Arvand M. Dinshaw*[27]
- *Surinder Kaur Sandhu* v. *Harbax Singh Sandhu*[28]
- *Nithya Anand Raghavan* v. *State (NCT of Delhi)*[29]

among many other cases. The Court ruled, "In our opinion, the conclusion arrived at in the impugned judgment is amply backed by valid reasoning and is in consonance with the law on the subject. The family court has correctly analysed and appreciated the facts of the case and we are in agreement with the view taken that the US law is applicable to the parties for the relief of custody of the children and the courts in India lack the jurisdiction to entertain the case. Accordingly, the impugned judgment is upheld and the present appeal is dismissed".[30]

Marriage – Domicile

In *Mandeep Kaur* v. *Dharam Lingam*[31] the question arose of application of provisions of the Hindu Marriage Act, 1955 (hereinafter the Act) to a person, though a Hindu, but lives abroad as a foreign citizen. A divorce petition was filed by one Mandeep Kaur against her husband respondent under section 13(1)(a)1(b) of the Hindu Marriage Act, 1955 in the Additional District Court, Ludhiana which was dismissed. The appellant wife preferred the present appeal. Initially the respondent husband appeared through a counsel but later absented from hearing and the case proceeded *ex parte*. Earlier in the first instance the petition was dismissed on the short ground that the Hindu Marriage Act would not extend in the case of respondent husband since he is a citizen of Canada.

The relevant provisions of Hindu Marriage Act, 1955 states-

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

25 AIR 2011 SC 1952.
26 (1998) 1 SCC 112.
27 (1987) 1 SCC 42.
28 (1984) 3 SCC 698.
29 AIR 2017 SC 3137.
30 *Id.* at para 37.
31 1 (2017) DMC 124 P&H; AIR 2017 (NOC) 916 (P&H).

The court pointed out that "From a plain reading of section 1(2) of the Act, it is evident that the Act extends to the Hindus of the whole of India except the State of Jammu and Kashmir and also applies to Hindus domiciled in India, who are outside the said territories. In short, the Act, in our considered opinion, will apply to Hindus domiciled in India even if they reside outside India".[32] For this interpretation of section 1(2) of Hindu Marriage Act the court relied on the apex court's opinion in *Sondur Gopal* v. *Sondur Rajini*[33] which affirmed the extra territorial operation of the Hindu Marriage Act, in clear terms. The rational expounded by the Supreme Court stated "in short, the Act, in our opinion, will apply to Hindus domiciled in India even if they reside outside India. If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra territorial operation has no nexus with India. In our opinion, this extra-territorial operation of law is saved not because of nexus with Hindus domiciled in India.[34] Extending the same rationale to section 2 of the Hindu Marriage Act also by the Supreme Court and the Punjab and Haryana high court quoted further: "This section contemplates application of the Act to Hindu by religion in any of its forms or Hindu within the extended meaning *i.e*., Buddhist, Jain or Sikh and, in fact applies to all such persons domiciled in the country who are not Muslims, Christians, Parsi or Jew, unless it is proved that such persons are not governed by the Act under any custom or usage. Therefore, we are of the opinion that section 2 will apply to Hindus when the Act extends to that area in terms of section 1 of the Act. Therefore, in our opinion, the Act will apply to Hindus outside the territory of India only if such a Hindu is domiciled in the territory of India".[35]

(b) The second contentious issue is concerning the court to which a petition under the Act can be presented.

The respondent, a citizen of Canada, when the petition notice reached him, he had appeared before the trial Court and without filing a reply to the petition or pleading as to his status as domicile of India or jurisdiction of the court, walked out of proceedings. His marriage was solemnized in India at Ludhiana and after a period of 1.5 months living as married couple, he left for Canada. It was pointed out by the Court that the wife's rights to initiate proceedings before the local District Court where she is actually residing did not depend upon the plea of husband's foreign citizenship or his domicile in another country.[36] The court taking cue from the apex court ruling in *Y. Narasimha Rao* v. *Y. Venkatalakshmi*[37] that marriages performed under the Hindu Marriage Act can be dissolved only under the said Act.

32 *Id.* at para 8.

33 (2013) 7 SCC 426, Also see, Lakshmi Jambholkar, "Conflict of Laws" XLIX *ASIL* 202 (2013).

34 As quoted by the present case in para 10.

35 *Ibid.*

36 *Id.* at para 15.

37 (1991) 3 SCC 451.

Having answered both the contentious issues in accordance with law, the court remitted the case back to the Additional District Court Ludhiana with the direction to proceed as per law.

Dissolution of Marriage

In *Divya Ramesh* v. *N.S.Kiran,*[38] parties were married in Bangalore. After the marriage appellant wife left her job and joined her husband in US. As the wife had completed her LLB course in India she pursued Paralegal studies and joined a law firm as a Legal Assistant. As differences cropped up she returned to India along with her daughter. While in India she filed a petition for dissolution of her marriage wherein she claimed permanent alimony and a two-bedroom accommodation and maintenance for her daughter. The trial court dismissed the petition with an award of Rs.10 Lakhs as maintenance for daughter. The present appeal is against the trial court's order. The appellant wife contended that she was subjected to many difficulties in the matrimonial home in US and hence she returned to her parents in India. It was said that the respondent husband though had filed a divorce proceedings against his wife, did not hesitate to make a false declaration wherein he denied of having moved any proceeding as regards his marriage or its dissolution. The court in the course of analysis of the circumstances, clearly pointed out the problems faced by women as victims of NRI marriages. It observed: 'The respondent's own evidence shows that he was aware of the departure of his wife with child…. Still he filed a complaint alleging that his wife had abducted the child'.[39]

Referring to the plight of the appellant wife in her matrimonial home in US the court said, " When she was alone with her tender aged daughter without any support in an alien country, the respondent who was supposed to be the only supporter for them to reap the benefits of a divorce at a cheaper cost in a foreign country subjected her to financial distress and helplessness".[40]

The court relied on the apex court's ruling in *Narasimha Rao* v. *Venkata Lakshmi*[41] for principles to recognize the foreign matrimonial judgment in the context of the trial court's wrongful dismissal of the appellant's divorce petition in the family court, in view of the husband's divorce decree from New Jersey Court.

The court, in this case in view of the facts and circumstances partly allowed the appeal granting dissolution of her marriage.

III CONTRACTS

M/S Inter Asia Impex v. *Freightscan Global*[42] concerns with a contract of carriage from Chennai to Houston. The buyer of the cargo is Maldonade Imports LLC. The

38 AIR 2017 Kar 94.

39 *Id.* at para 32.

40 *Id.* at para 33.

41 (1991) 3 SCC 451.

42 AIR 2017 (NOC) 849 (Madras): MANU/TN/1874/2016.

bill of lading is the evidence of the contract of affreightment upon the arrival of the goods. The buyer got the delivery order issued without the payment. The plaintiff issued legal notice to the defendant buyer. The buyer informed the consignee bank that they could not make the payment to the bank as they received the goods in a damaged condition. The plaintiff put in a claim for the loss suffered including compensation for the mental agony, suffering and loss of business. According to defendant the new payment of the value of the cargo by being due to damage to the cargo for which the plaintiff should settle its dispute with the consignee and cannot blame the defendant. It was also revealed that the consignee did not take delivery of cargo within the stipulated time of three months (due to bad condition of the cargo). The suit filed by plaintiff was therefore dismissed. The present appeal has been filed by the appellant-plaintiff that the defendant being the carrier is bound to deliver the cargo to the buyer on production of the original documents after full payment the consignee bank – the Bank of America. It was further argued that having delivered the goods to the buyer without any payment to the Bank of America, the respondent-defendant is liable to pay. On the facts of the case, the defendant was actually representing Freightscan Global Inc., whose principal office is at US. It was averred on behalf of the appellant since part of cause of action arose at Chennai as the place of acceptance of goods of carriage and as place of issuance of bill of lading, the High Court at Chennai has jurisdiction. This was countered on behalf of respondent who argued that US Court alone has jurisdiction as per the terms in the Bill of Lading. The Bill of Lading reads as:

"3. (Law and Jurisdiction) – Whenever the carriage of Goods by Sea Act, 1936 (COGSA) of the United States of America applies, this contract is to be governed by United States law. In all other cases actions against the carrier may be instituted only in the country where the carrier has its principal place of business and shall be decided according to the law of such country".

It was further pleaded on behalf of defendant respondent that Bill of Lading issued by the carrier being a Sea Way Bill, as per the custom and law of US, consignee would be entitled to take delivery without surrender of the original Bill of Lading and neither the forwarder nor carrier could prevent the delivery, as the same amounts to a serious offence under the US laws. Again it was pointed out that the practice of delivering goods on production of original documents is only in India and when the plaintiff accepts the Bill of Lading as contract all the clauses, binds the appellant plaintiff.

On the basis of facts and circumstances of the case, the court held that "As per Clause 3 of the Bill of Lading, the parties accepted United States law to be followed for the contract and also agreed to lay the case against the carrier in the place where it has its principal place of business. The present suit filed in Chennai, against the defendant, who is the agent of the carrier is not maintainable".[43]

43 *Id.* at para 21.

In *Bharat Heavy Electricals Limited* v. *Electricity Generation Incorporation,*[44] the plaintiff has filed the present suit in pleading Electricity Generation Incorporation, having its office at Ankara, Turkey (defendant-1), A. K. Bank TAS (A.K. Bank) at Istanbul Turkey (defendant-2) and Bank of Baroda (BoB) having its office at New Delhi (Defendant-3).

A contract for rehabilitation of eight units of Keban Hydroelectric Power plant was entered into between BHEL and EGI. BHEL is a Public Sector Undertaking of the Government of India. EGI (Electricity Generation Incorporation) is a state owned company duly incorporated under the laws of Turkey, engaged in the business of power generation and transmission and having its office at Ankara, Turkey (defendant-1). Under the terms of the contract (article 11 of the contract) a Performance Bank Guarantee had to be furnished. Accordingly, BHEL got issued a counter guarantee in favour of AK Bank (at Istanbul, Turkey Defendant 2). Soon thereafter BHEL was informed by Bank of Baroda (BoB International State Banking and financial service company with its Headquarters at Vadodara, Gujarat) that EGI has terminated the contract of BHEL. Upon the termination of the contract which according to plaintiff is unjust and illegal, he filed the present suit seeking declaration and permanent injunction from encashment of Performance Bank Guarantee and counter Guarantee. In the complaint the plaintiff had stated that jurisdiction of the counter Bank Guarantee being conferred on the Commercial Court at London. Due to paucity of time it is impossible for the plaintiff to approach the said jurisdiction. BHEL was approaching the present court. All the defendants were served with notice. The defendants argued on the point of jurisdictional issue. They concluded that Commercial Court of London has the exclusive jurisdiction on the facts and circumstances of the case. The Court observed, "the Commercial Court at London has the exclusive jurisdiction to try the suit and the present suit was filed only because of paucity of time for BHEL to approach the court of competent jurisdiction, dehorns the admission of BHEL this court finds that it has no territorial jurisdiction to entertain the present suit, for it is well settled that contract of Bank Garanbe is an independent contract and merely because the same was issued at the place within the territorial jurisdiction of this court and that the word 'only' is missing from the Counter Bank Guarantee clause, the same would not vest this court with the territorial jurisdiction to entertain the plaint".[45] Earlier, the court relying on the apex court's decision in *Modi Entertainment Network* v. *WSG Cricket Private Ltd.*[46] while discussing jurisdiction of the courts observed: "The growing Global commercial activities gave rise to the practice of the parties to a contract agreeing beforehand to approach for resolution of their disputes there under to either any of the available courts of national jurisdiction and thereby create an exclusive or non-exclusive jurisdiction in one of the available forums or to have the disputes resolved by a foreign court of their choice as a neutral forum according to

44 2017 SCC OnLine Del 105/4: MANU/DE/3372/2017.

45 *Id.* at para 31.

46 (2003) 4 SCC 341.

the law applicable to that court. It is a well settled principle that by agreement the parties cannot confer jurisdiction where none exists, on a court to which CPC applies but this principle does not apply when the parties agree to submit to the exclusive or non exclusive jurisdiction of a foreign court; indeed in such cases the English courts do permit invoking their jurisdiction. Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a foreign court termed as a 'neutral court' or 'court of choice' creating exclusive or non-exclusive jurisdiction in it".[47]

Contracts – *Forum Non Conveniens*

Gannon Dunkerly & Co.Ltd. v. *State Bank of India*[48] is a case involving construction contract, between the plaintiff and the fourth Defendant, a Libyan Government entity. This was for the construction of a township near Tripoli, Libya. The plaintiff was to construct 3600 housing units. Clause 6 of the Public Works Contract required the plaintiff to provide a Performance Bank Guarantee favouring the fourth Defendant through a Libyan Bank. The plaintiff asked the Defendant No.1, the State Bank of India to arrange this Performance Bank Guarantee. After complying with providing of Bank Guarantees the plaintiff faced difficulties in carrying out the contract commitments in that civil war and hostilities erupted in Libya which led to foreign military intervention culminating in the ousting of the then Libyan Government. On account of such a Force Majeure event the plaintiff was prevented from executing the project in addition to defendant's failure to handover possession of the site to the plaintiff. Under the terms (article 36) of the contract the plaintiff was entitled to compensation from the defendant in the event of prevention from continuing with the project on account of a force majeure event. The plaintiff, therefore, claimed suitable compensation. However, on the other hand, the defendant demanded a renewal of guarantee. The plaintiff found that factually more than 90% of the site was occupied by local residents who were opposed to the construction and unwilling to vacate it – a fact which was suppressed from the plaintiff. According to plaintiff the making and execution of the Public Works Contract was initiated by fraud and induced the plaintiff to secure the performance of its obligations by way of Guarantees. It is the case of the plaintiff that if the guarantees are permitted to be encased, it will suffer grave and irretrievable injustice inasmuch as it will be impossible for the plaintiff to sue and recover the amounts of the Guarantees from the defendant. It was contended on behalf of the defendant that the cause of action has derived from the Public Works Contract which conferred jurisdiction on the courts in Libya, article 51 of the Contract, which says, "the contract shall be subject to the laws and regulations in force in the Great Socialist People's Libyan Arab Jamahiriya – the Libyan Court," and hence Libyan Court is the competent court to settle any disputes arising from this contract.

In the facts and circumstances of the case the court observed, "the averment in the plaint clearly show that the Libyan Court's jurisdiction is not available to the

47 *Ibid.*

48 2017 SCC Online Bom 6384.

plaintiff. Merely to say that a court in Tripoli has jurisdiction is of no use. International Courts have in parallel cases invoked the principle of *forum-non-conveniens* or some variant of it. How far that principle is applicable is something that I need not examine…I will accept of course the general principles…that parties cannot by consent confer jurisdiction on a court that does not otherwise have it; that words of exclusion (such as "exclusively", "only" etc.) are useful but not necessarily determinative of a jurisdictional exclusion; that each case turns on its own merits, and that parties will generally be held to their bargain in a contract of valid forum selection. There is no quarrel with any of these prepositions….But where there are two courts of possible jurisdiction, and one is simply unavailable to a plaintiff, and this is not merely a question of hardship but actual prevention, then it is difficult to conceive of a plaintiff being wholly non-suited by telling him "you have chosen to sue here; and it matters not at all that you are enable to go there, to the other place, to sue".[49]

It was plaintiff's case that "since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or *force majeure* and the like". This is an observation of the apex court in *Modi Entertainment Network* v. *WSG Cricket Pte. Ltd.*[50] relied on by the defendant. The court accepted the defendant's contention in the facts and circumstances of the case and observed: "Since the date of this Public Works Contract the situation on the ground in Libya, Syria and other countries is such that it requires no great evidence to determine that it is impossible for a party or an entity to safely enter those countries, let alone do any business or conduct a litigation there. There are other circumstances that will come into play and somewhat doctrinaire approach of merely pointing to this or that jurisdictional clause without reference to the surrounding facts and circumstances is I think completely incorrect. A more detailed examination of the law on *forum-non-conveniens* might then have been necessary. But where the alternative forum is wholly unavailable, it defies logic and undermines equity to tell a plaintiff that he should go to a court to which he physically cannot go and that he is otherwise to be left without a remedy".[51]

IV ANTI-SUIT INJUNCTIONS

In area of conflict of laws, anti-suit injunction is an order issued by a court that prevents an opposing party from commencing and continuing a proceeding in another jurisdiction or forum. If opposing party contravenes such an order issued by a court, a contempt of court order may be issued by the domestic court against that party. In this year's edition of Survey in Conflict of Laws, a few cases have appeared concerning anti -suit injunctions.

49 *Id.* at para 16.

50 (2003) 4 SCC 341.

51 *Id.* at para 19.

Anti-suit Injunctions – An injunction with regard to a marital relationship

In *Jasmeet Kaur* v. *Navtej Singh,*[52] a question of anti-suit injunction with regard to a marital relations has arisen. The plaintiff in her application sought: "to pass a decree of declaration in favour of the plaintiff and against the defendant declaring that custody appeal initiated by the defendant against the plaintiff before, the Supreme Court at Stamford, Connecticut in USA titled as *Navtej Singh* v. *Jasmeet Kaur* and all the judgments, order and decree, directions, etc. be declared as null, void and enforceable. It was held in *Modi Entertainment Network* v. *WSG Cricket Pte Ltd.,* [53] "The principles governing grant of injunction on equitable relief – by a court will also govern a grant of anti- suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including foreign court, it is called anti -suit injunction. It is a common ground that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction *in personam*. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court".[54] On the facts and circumstances of the case, the court held, "In the opinion of this court, it would be incongruous if a suit for maintenance or custody of minor children is transferred to the District Court while an anti- suit injunction is filed by the same spouse seeking stay of maintenance and/or custody proceeding filed by the other spouse in a foreign jurisdiction is heard and decided by this court".[55] Consequently, the court did not grant the relief of anti-suit injunction to the appellant.

In *Dirshan Vanmali Patel* v. *The State (Govt. of NCT of Delhi):*[56] The petitioner, Dirshan Vanmali Patel, a South African national has filed a writ of habeas corpus for the production of his minor daughter, who is in the custody of his wife. He is seeking the return of the child to South Africa. The child is aged 10 months. Brief facts leading to this situation are: The petitioner, a South African citizen married in India was blessed with a daughter out of his wedlock. The couple having met through a website, their marriage ceremony took place in Gujarat in 2015 and their marriage was registered in New Delhi under the Hindu Marriage Act, 1955. The wife joined the petitioner in his house in South Africa, in Cape Town. The wife and her parents were evicted from matrimonial home and they returned to India. Soon thereafter the wife instituted two sets of proceedings in 2016. The first was a divorce petition under Hindu Marriage Act including for retention of the custody of the minor child. The second proceeding was as regards seeking protection under the Protection of Women from Domestic

52 2017 SCC Online Del 12511.

53 AIR 2003 SC 1177.

54 As quoted in 2017 SCC Online Del 12511 at para 11.

55 *Id.* at para 26.

56 2017 SCC Online Del 12226.

Violence Act, 2005. The petitioner on his part has instituted divorce and custody proceedings in Cape Town in South Africa against his wife (respondent-2). The wife, at this juncture filed an anti-suit injunction in the family court in India to restrain further proceedings in Cape Town in South Africa. However, the wife's petition and PWDV Act was dismissed. In view of the Petitioner's case for divorce and custody of the child, and since the child is of tender age, whose welfare is of primary concern, the court ordered for mediation. Parties consented for the mediation.

The mediation proceedings having failed, the court dismissed the petition allowing the parties to seek any other remedy that may be available to them in accordance with law.

Anti-Suit Injunctions in International Contracts

In *Hi-Tech Systems and Services Limited* v. *DILO Amaturen and Anlagen GMBH*[57] there were two applications – one from plaintiff and another from the defendant. The plaintiff filed a suit challenging the termination of two agreements viz. maintenance contract and job to job contract. The defendant filed an application for rejection of the plaintiff. Plaintiff in its turn filed an application to amend the plaint wherein *inter alia* it was stated that "the defendants are invading and/or threatening to invade the plaintiffs right to and enjoyment of the property and the invasion is such a compensation in money would not affect adequate relief. Injunction is necessary to prevent a multiplicity of judicial proceeding".[58] The defendant's application concerns with rejection of plaint on the ground of Forum selection clause and non disclosure of cause of action against the defendant. There were two agreements – maintenance contract and job contract. The plaintiff was claiming adjudication of its rights under the said agreements. Defendant arguing for the dismissal of the suit on grounds:

(i) forum selection, clause and law governing the agreement

(ii) The plaint does not disclose the cause of action

Both the agreements referred to in the dispute contain the Forum Selection Clause which reads: "Clause 10.2 Court of jurisdiction is the court first instance competent for the registered place of business of DILO. In case of litigation regarding rights and obligations of this contract only German Law is applicable".[59] And another clause reads: "Clause 12 - Court of jurisdiction is the court first instance competent for the registered place of business of DILO. In case of litigation about rights and obligations of this contract only the German Law is applied".[60]

Defendant is a company incorporated and registered under the laws of Germany. The plaintiff has found fraud by the defendants which prevented the plaintiff from

57 2017 SCC Online Cal. 5034.

58 *Id.* at para 14.

59 *Id.* at para 8.

60 *Ibid*.

performing its contract. This resulted in interference which led to the illegal termination of the contract between the plaintiff and the defendant-1 ending in breach of contract. On the facts, the court found plaintiff its application to amend the plaint had tried to implead defendant-2 who is based in India so as to avoid the court at Germany. The court rejected this plea and dismissed the suit with an observation that the plaintiff can initiate litigation at the registered place of business at Germany. This case in fact is an illustration of anti-suit injunction in the Indian state practice.

V INTERNATIONAL COMMERCIAL ARBITRATION AND CONFLICT OF LAWS

It is common knowledge that international commercial transactions inasmuch as they are 'international' and not domestic, are governed by principles of conflict of laws. This survey has chosen a few of many issues concerning conflict of laws in international commercial arbitration such as party autonomy, conflict of jurisdiction, and enforcement of foreign arbitral awards. This survey does not include general arbitration law including domestic perspective and is also not exhaustive in international aspects as dispute settlement through international commercial arbitration has vastly increased.

Party Autonomy and Conflict of Jurisdictions

Party autonomy, it is now trite to say, is a cardinal principle which governs international commercial contracts including commercial arbitration. The above principle aims to give higher preference to the choice of the contracting parties, however there has been a constant need for intervention of the courts to invoke principles of private international law and resolve the issues relating to conflicts of jurisdiction and governing law in international commercial arbitration.

One of the most important issues faced by the courts in India in last two decades has been: to decide whether courts in India have jurisdiction to adjudicate challenge to the awards which have arisen from arbitration conducted outside India. In other words, one of the dominant concerns for courts has been to resolve conflicts of jurisdiction in a foreign seated arbitration. After the Arbitration and Conciliation Act, 1996 (hereinafter 'the 1996 Act'), the roots for the above conflict could be traced to the Supreme Court judgement in *NTPC* v. *Singe*r, wherein it was laid down that validity of an award arising from a foreign seated arbitration could be challenged in Indian courts too, if Indian law was the substantive law governing the contract or the arbitration agreement. Fuel to the issue of conflicts of jurisdiction was added in 2005 from the case of *Bhatia International* v. *Bulk Trading S.A.*[61] which made applicability of part I of the 1996 Act even to foreign seated arbitration subject to the choice of parties,

61 (2002) 4 SCC 105.

wherein the choice could be express or implied. While a constitution bench of the apex court clarified the legal position in India on the issue of conflicts of jurisdiction in the case of *Bharat Aluminium Company Ltd.* v. *Kaiser Aluminium Technical Services Inc.*[62], (hereinafter BALCO), the controversy has refused to die.

In 2017, the Supreme Court dealt with the issue of jurisdiction on Indian courts under section 34 of the Act, in two cases: first, in *IMAX Corporation* v. *E-City Entertainment (India) Pvt. Ltd.*[63] and then in *Roger Shashoua* v. *Mukesh Sharma*.[64] In both the cases the issue before the court was whether courts in India have jurisdiction to entertain an application under section 34 of the Act for challenging the award arising from the arbitration held in London. Clarifying the legal position once again, in both the cases the apex court has answered the above question in negative.

> The case of IMAX Corpn. was about a situation where the parties entered into an agreement for supply of large format projection systems for cinema theatres to be installed in theatres all across India. Clause 14 of the agreement contained an arbitration clause which read as follows:

This Agreement shall be governed by and construed according to the laws of Singapore, and the parties attorn to the jurisdiction of the courts of Singapore. Any dispute arising out of this master agreement or concerning the rights, duties or liabilities of E-City or Imax here under shall be finally settled by arbitration pursuant to the ICC Rules of Arbitration.

As the dispute arose between the parties, the appellant filed a request for arbitration with ICC, and claimed damages. After consulting the parties, ICC fixed London as seat of arbitration. The arbitral tribunal passed final award which was then challenged by the respondent before the Bombay high court under section 34 of the 1996 Act. And, the question before the Court was whether the challenge to the award made by the respondent under section 34 of the Act was maintainable before a court in India?

A division bench of the Supreme Court answered the above question in negative. Reversing the order of the Bombay high court, the Supreme Court could held that jurisdiction of Indian courts to decide validity of award stands excluded in the cases where parties have chosen a foreign seat of arbitration. The Court reiterated that validity of the award should be determined in accordance with law of the State in which the arbitration proceedings took place, which in the case at hand was English law, given the fact that arbitration was held in London. In the current case the arbitration agreement has no express choice of seat of arbitration. However, the Court considered London

62 (2012) 9 SCC 552.
63 (2017) 5 SCC 331.
64 (2017) 14 SCC 722.

to be choice of parties given the fact that the as per the arbitration agreement, arbitration was to be governed by the rules of ICC and the rules of ICC clearly stipulated that seat of arbitration shall be fixed by the International Court of Arbitration appointed by the Council of ICC. The International Court of Arbitration fixed London, United Kingdom as a seat of arbitration, and the apex court in India considered London as a choice of parties, since neither of the parties objected to decision of ICC. The Court held that conduct of parties in agreeing to London as a seat of arbitration also amounted to exclusion of the applicability of Part I of the Act, thereby excluding possibilities of challenge under section 34 of the 1996 Act.

The Supreme Court answered a similar question few months later in the case of *Roger Shashoua*. This was the case where the Clause 14 of the shareholder's agreement (SHA) refers to arbitration. The controversy in this case arose in wake of the arbitration and governing law clause which read as follows:

> 14. ARBITRATION
> 14.1 ...Each party shall nominate one arbitrator and in the event of any difference between the two arbitrators, a third arbitrator/umpire shall be appointed. The arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce Paris.
> .....
> 14.4 The venue of the arbitration shall be London, United Kingdom.
> 17.6 GOVERNING LAW
> This Agreement shall be governed by and construed in accordance with the laws of India.

While arbitration in wake of the above clause was conducted in London and an award was passed, the appellants challenged the award under section 34, contending applicability of part I of the Act on two grounds: first, that as per the arbitration clause, London was only the venue and not the seat of arbitration, and therefore application of Part I was not excluded by the parties and second, that since the contract was closely connected to India and governing law of contract was India, the award even if obtained outside India could be considered domestic award following the Supreme Court judgement in *NTPC* v. *Singer Company*.

The Supreme Court rejected both the contentions in the case. It also decided that courts in India do not have jurisdiction to validity of the award obtained in London. Since the case involved a pre-BALCO arbitration agreement, the Court took note of the fact that the case will be governed by the ratio of *Bhatia International*. Therefore, the Bench looked into the question whether parties have expressly or impliedly excluded application of Part I of the Act. The apex court interpreted above clause to mean that choice in the given case could be interpreted as choice of seat, which will lead to the conclusion that the parties have excluded applicability of part I of the Act in this case.

The court held that only courts of the place where arbitration has been held (the juridical seat) has supervisory jurisdiction over the arbitration and that this involves jurisdiction to entertain any challenge to the award. It rejected the following two possibilities of invoking jurisdiction: (a) consent of the parties for applicability of part I of the Act the foreign seated arbitration, (b) closest and most real connection of the award test. The court made it clear that party autonomy cannot extend to conferring jurisdiction on Indian courts in a foreign seated arbitration. It also reiterated that courts in India cannot have jurisdiction on the basis of the fact that the contract was governed by the laws of India and therefore award had closest and real connection with India. The court in this case emphasized that the principle of concurrent jurisdiction or that jurisdiction would be with courts of the country to which transaction has its closest and most real connection, as laid down in *Singer Co. case,*[65] no longer applies in light of the 1996 Act, which has omitted section 9(b) of the Foreign Awards Act, 1961.

Distinction between 'seat' and 'venue'

Roger Shashoua has been yet another occasion wherein the apex court deliberated at length on the issue of *seat* and *venue* distinction in International arbitration. The judgment reiterates the point that juridical seat of arbitration is different from mere venue and that it is subject of interpretation in every case whether choice of a place in the arbitration agreement is to be understood as a mere choice of venue or of juridical seat. The court has upheld a long-standing principle of Private International Law which has governed international commercial arbitration: that while parties may specifically choose a specific set of law as governing law in an international commercial contract, the arbitration proceedings will be governed by the law of the place where arbitration is conducted since choice of juridical seat actually indicates choice of a legal system to govern the arbitration proceedings. The court stated:

> But when a Court finds there is prescription for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction.[66]

Party Autonomy: Extending Dimensions

A. Application of Party Autonomy and the Concept of Seat in Domestic Arbitration

The 'concept of seat' giving rise to a cardinal principle of Private International Law that law of seat will govern the arbitration proceedings has been a well accepted

65 *NTPC* v. *Singer Company*, (1992) 3 SCC 551.

66 *Supra* note 64 at para 72.

in the world of the international arbitration. This principle has been used in all world jurisdictions to resolve issues relating to conflicts of laws and jurisdiction. A recent and important development for Indian legal system has been application of this private international law principle in the world of domestic arbitration. The Supreme Court extended application of this concept also to domestic arbitration in the case of *Indus Mobile Distribution Private Ltd.* v. *Datawind Innovations Pvt. Ltd.*[67] This was the case where the contract was connected to three places, Delhi, Chennai and Amritsar. However, as per the dispute resolution clause, Mumbai was chosen by the parties as the place to resolve disputes by arbitration and the parties also conferred exclusive jurisdiction to the courts of Mumbai. The issue before the apex court in the appeal was whether a dispute resolution clause designating Mumbai as seat of arbitration, and an exclusive jurisdiction clause conferring jurisdiction on the courts of Mumbai can oust jurisdiction of the courts at Delhi or Chennai which were otherwise natural jurisdictions, being connected to the case.

Upholding the choice of parties and importing concept of seat in domestic arbitration, the court conferred jurisdiction on the courts at Mumbai. It held[68]:

> The moment the seat is designated; it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction - that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of section 16 to 21 of the Code of Civil Procedure be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

The aforesaid conclusion was arrived at by the Supreme Court by relying upon passages of an earlier Constitution Bench judgment of the Supreme Court in *BALCO* as well as the finding to the aforesaid effect as to exclusive jurisdiction clause in another but later Supreme Court judgment in the case of *Enercon (India) Ltd.* v. *Enercon GmBH*.[69] Introduction of the concept of seat in domestic arbitration surely breaks a

67 (2017) 7 SCC 678.

68 *Id.* at para 19.

69 (2014) 5 SCC 1.

new ground for arbitration law in India, not only for the purely domestic arbitration but also for "India seated" international arbitration. It also has the effect of adding 'consent of the parties' a new basis for conferring jurisdiction to the Indian courts or choice of neutral jurisdiction by the parties something which has not been possible so far.

While *Indus Mobile* has effect of giving a new rule of jurisdiction, it has not been followed uniformly by all the High Courts. Therefore, while High Court of Delhi and Bombay seem to be in agreement with the above view, Calcutta high court has taken a different view. In *General Instruments Consortium* v. *Lanco Infratect Ltd.,*[70] in a case decided on July 31, 2017 the Bombay high court refused to assume jurisdiction taking into consideration the fact that the dispute resolution clause conferred jurisdiction to the courts in Delhi. However, in a previous case named, *Municipal Corporation for the City of Kalyan and Dombivili* v. *Rudranee Infrastructure Ltd.,*[71] the same High Court rejected challenge to jurisdiction in favour of the court where cause of action had arisen (court of natural jurisdiction) given the fact that the arbitration clause did not contain a choice of seat of arbitration. Following the above line of argument, the Delhi high court also refused to accept jurisdiction in the case of *Dipendra Kumar* v. *The Strategic Outsourcing Services Pvt. Ltd.,*[72] decided on September 8, 2017 on the basis of the fact that the parties had agreed for arbitration in Bengaluru as a method and place for resolution of disputes.

While *Indus Mobile* has come to be treated as a precedent, an attempt to take a different approach appeared from the Calcutta high court in December 2017 in the case of *Hinduja Leyland Finance Ltd.* v. *Debdas Routh*.[73] The single bench of the Calcutta high court did not endorse the view that choice of a place for arbitration proceedings is to be seen as an exclusive jurisdiction clause having the effect of ousting jurisdiction of the courts which are otherwise connected to the case, in other words which can be considered courts of natural jurisdiction. To support its stand the judge in this case referred to the constitutional bench judgement of the Supreme Court in the *BALCO* case which places concurrent jurisdiction on the courts: the courts in which the subject matter of the suit is situated and the courts within the arbitration is located.[74] Accepting jurisdiction in the given matter the court held that refusing to do so would be contrary to the view taken by the Constitution Bench judgement with respect to concurrent jurisdictions of more than one court.

B. ***Party Autonomy and Two-Tier Arbitration***

An important development in International arbitration has been endorsement of the concept of two-tier arbitration in India in the case of *Centrotrade Minerals and*

70 2017 SCC Online Bom 7697.

71 2017 (6) MhLJ 753.

72 2017 SCC Online Del 10361.

73 MANU/WB/1294/2017.

74 *Supra* note 62 at para 96.

Metal Inc. v. *Hindustan Copper Limited.*[75] The main issue for the Court was: whether, according to Indian laws, the concept of party autonomy extends to incorporating a two-tier arbitration clause in the contract. The arbitration clause in the case read as follows:

14. Arbitration-All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction.

Clause 16 of the contract is also important and this reads as follows:

16. Construction- The contract is to be constructed and to take effect as a contract made in accordance with the laws of India.

The question before the court was whether it was permissible under Indian laws to have an arbitration clause which institutes a procedure for non-statutory appeal to a final award passed by an arbitral tribunal. Answering the above question in positive a three judges' bench of the apex court held that there is nothing in the 1996 Act which can be seen to be prohibiting parties from agreeing to a non-statutory appellate process, which allows them to settle dispute without recourse to courts. Upholding validity of the two-tier arbitration clause, the court held that a combined reading of sub-section (1) of section 34 of the A&C Act and section 35 thereof, suggests that an arbitral award would be final and binding on the parties unless it is set aside by a competent court on an application made by a party to the arbitral award. This does not exclude the autonomy of the parties to an arbitral award to mutually agree to a procedure whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal and the result of that appeal is accepted by the parties to be final and binding subject to a challenge provided for by the 1996 Act.

Enforcement of Foreign Arbitral Awards

In *Noble Resources Limited* v. *The Hon'ble Chief Justice, High Court for the States of Punjab & Haryana,*[76] the petitioner filed an application under section 47 (Part II) of the 1996 Act for enforcement and execution of the foreign arbitration award passed by Hong Kong International Arbitration Centre in Hong Kong before the District Judge in Gurgaon. This is as regards a repayment agreement executed

75 (2017) 2 SCC 228.

76 MANU/PH/2356/2016.

between the petitioner and the respondent. The respondent opposed the petition on an application on the ground of lack of jurisdiction. In terms of Explanation to section 47, the jurisdiction for enforcement of foreign arbitration awards has been exclusively conferred upon the High Court. The Additional District Judge relied on the Supreme Court's decision in *Sudhir G. Angur* v. *M. Sanjeev*[77] and allowed the application of respondent and dismissed the execution application of the petitioner for want of jurisdiction.

The petition in this court is directed against the order dismissing an application filed under section 47 of the 1996 Act (Part II) for enforcement of the foreign arbitration award. The court relied upon the apex court's views in *Commissioner of Income Tax Orissa* v. *Dhadi Sahu*[78] which observed: "It may be stated at the outset that the general principle is that a law which brings about a change in the forum does not affect pending actions unless intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for changeover of proceedings, from the court or the tribunal where they are pending to the court or the tribunal which under the new law gets jurisdiction to try them. The Supreme Court further pointed out that once leave was granted, the question of rejecting the plaint does not arise. Considering the views expressed by the Supreme Court, the Punjab and Haryana high court under the facts and circumstances of the case ruled that the impugned order passed by the Additional District Judge as illegal".

Glencore International AG v. *Dalmia Cement (Bharat) Limited*[79] examines the scope of section 48 of (Part II) 1996 Act in the context of enforcement of foreign award from the point of public policy of India. The case concerns with principles of natural justice and opportunity of hearing. Glencore and Dalmia entered into a contract. When disputes arose, referred to arbitral tribunal constituted under Arbitration Rules of London Court of International Arbitration (LCIA). An award was passed in favour of Glencore who filed a petition to enforce the foreign award. Dalmia, in turn, filed objections under section 48 to the effect that Dalmia was not given proper notice of appointment of arbitral tribunal or arbitral proceedings and as such it could not present its case as contemplated under section 48(1)(b) so as to render the proceedings violative of due process and principles of natural justice.

Further, Dalmia contended that damages awarded by arbitral tribunal are in conflict with fundamental policy of Indian law and that enforcement of award is opposed to public policy of India. On facts and circumstances of the case, the court found that Dalmia had full opportunity to present its case but had been unable to persuade the arbitral tribunal. Inability to present a case as contemplated under section 48(1)(b) must be such so as to render the proceedings violative of due process and principles of natural justice, the court observed. According to court's view "cases where arbitral tribunal does not accept case sought to be setup by a party does not

77 (2006) 1 SCC 141.

78 (1994) Supp (1) SCC 257.

79 2017 (4) Arb. LR 228 (Delhi).

give rise to a ground as mentioned in section 48(1)(b)".[80] Referring to measures of damages the court said that, "it is implicit in such submission as provided by the UK's Sale of Goods Act, 1979 which expressly provides the measure of damages would prima-facie determined in the manner indicated therein – which has been accepted by the arbitral tribunal – a fact which cannot be considered perverse so as to render enforcement of the award contrary to the Public Policy of India. "In view of the above analysis the contention that the enforcement of the award is opposed to public policy or is in conflict with the fundamental policy of Indian law is unmerited".[81]

The issue of enforcement of foreign arbitral award came up before the Calcutta high court in *Canadian Commercial Corporation* v. *Coal India Limited*.[82] Again the question raised pertained to public policy of Indian law in matters of converting foreign currency into Indian currency. Parties entered into contract and when disputes arose, referred to arbitration. Arbitral tribunal passed foreign award for costs. The award rests on the basis of the costs. Every head of claim on costs received the attention of the tribunal. The dispute resolution mechanism envisaged under the agreement was of arbitration which took place in UK but Switzerland was recognized as the seat of the arbitration, under the ICC Rules. The award debtor claims that the enforcement of the award would be contrary to the Public Policy of India. The court pointed out that it is not clear as to how the award debtor seeks to assail the enforceability of the award. The award debtor has not been able to cite any law or the judicial recognition of any policy under which the rejection of a claim and a counter claim in a reference must result in the parties being left to bear their own costs without any adjudication.

In fine the court ruled, "the Canadian company will be entitled to the costs of the proceedings for enforcement of the foreign award". The court in the context of the violation of public policy observed: "The award on costs in this case is not against the fundamental policy of Indian law. Nothing in the award militates against any law in force in India or any judicial pronouncement. The award on costs does not appear to be perverse nor has it been based on the *ipse dixit* of the tribunal without reference to the surrounding circumstances. In assessing whether a foreign arbitral award is contrary to the Public Policy of India, the ground cannot be used as an excuse to review the order on merits. The ground is of very limited scope and the award must be crying out as being patently unfair for it to be regarded as contrary to the Public Policy of India".[83]

VI RECOGNITION OF NOTARIAL ACTS DONE BY FOREIGN NOTARIES

Jaldhi Overseas Pvt. Ltd. v. *Bhushan Power and Steel Ltd.*[84] concerns with an application for enforcement of a foreign award. The award holder is a foreign company

80 *Id.* at para 26.

81 *Id.* at para 33.

82 2017(4) Arb LR 475 (Calcutta).

83 *Id.* at paras 13 and 11.

84 AIR 2017(NOC) 1111 (Calcutta); MANU/WB/0301/2017.

having its registered office at Singapore. The award debtor has raised a preliminary objection with regard to the maintainability of the execution application. His objections are that the applicant does not have his authority to file the application and the application has not been notarized as required under law. The company secretary executed a power of attorney authorizing one Ajit Kumar Patni to act on behalf of Jaldhi Overseas Pvt. Ltd. and instigate necessary proceedings for enforcement and execution of the award. This execution was witnessed by one Joseph Lobez, a Notary Public of Singapore, who duly authenticated the signature of the company secretary who has executed the Power of Attorney. It was made clear that the notarial certificate itself states that the executant of the Power of Attorney, Sripaya Balasubramanian, herself signed the document and the Power of Attorney produced before the Court also shows that at the last the notary has certified the signature of the executant. The entire process of notarization of the power of attorney as well as the identification and authentication of M/s. Sripriya Balasubramanian (Executant of Power of Attorney) by Joseph Lopez was certified by the Singapore Academy of Law, the same was certified by the Ministry of Foreign Affairs (Singapore) as well as by the High Commission of India, Singapore. The entire process adopted is in strict compliance of the chain of authentification for overseas document as stipulated in the Notaries Public Manual, Singapore:

(i) Notarisation by Notaris public
(ii) Authentification by Singapore Academy of Law
(iii) Further verification by Ministry of Foreign Affairs
(iv) Legislation by Embassies / Consulates

The authentication is also in strict compliance of section 3 of Diplomatic and Consulate Officers (Oath and Fees) Act, 1948. It was pointed out that "Singapore Courts accept affidavits or petitions notarized in India as would appear from the petition filed by the Judgment Debtor before the Singapore high court. Accordingly, by the rule of reciprocity as duly notarized document by a Notary Public in Singapore, ought to be accepted by the Indian courts as well in comity with international practice. It was submitted during the arguments that courts have repeatedly held that considering international recognition of the notary in the modern world of commerce, industry and dealings between different nations and countries, affidavits sworn before Notary Public, in a foreign country ought to be accepted, even in the absence of any notification regarding such reciprocal act done by a foreign notary in our country. It was further pointed out that section 85 of Evidence Act was enacted precisely to meet a situation as in the present case. Section 85 presumes that a power of attorney executed in a foreign country, duly authenticated by a notary public, must be presumed to have been validly executed and authenticated and such presumption in favour of the power of attorney executed will remain good and unassailable unless rebutted by cogent evidence. A bare perusal of section 85 of the Evidence Act would show that a duly executed power of attorney authenticated by a notary public in a foreign country, is entitled to the presumption of section 85 of the Evidence Act. Discussing the issue of recognition of Notarial acts by foreign notaries, the court made a thorough analysis of

the entire subject besides the state practice between India and Singapore. Referring to the current developments, the court mentioned the international treaty (i.e., The Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents, 1961) which shortens the chain of authentication it observed: "Under the treaty, public documents (which include notarial acts) that have been executed in the territory of a contracting state and which have to be produced in another contracting state do not need to be legalized. A simple certificate or 'apostille' in a prescribed form issued by the competent authority of the state from which the country originates will suffice. The United Kingdom and many other countries are parties to the treaty but Singapore is currently not a party".[85] The Court's study of the subject brought to light another Calcutta high court (decision) with an erudite judgment tracing the history of the institution of Notaries Public after a profound and insightful treatment of the subject *In Re: K. K. Ray (Private)Ltd.* (In the matter of Franklin Square Agency Inc., USA[86]).

The Court in the context of the instant case made the following observation on the Indian Notaries Act, 1952: [87]

The object of the Notaries Act, 1952, was to empower the Central and State Governments to appoint notaries, not only for the limited purposes of the Negotiable Instruments Act, but generally for all recognized notarial purposes, and to regulate the profession of such notaries. This was necessary because earlier the notaries' public were performing their duties by virtue of an ancient English statute. The Master of Faculties in England used to appoint Notaries Public in India for performing all recognized notarial functions, but it was not appropriate those persons in this country who wish to function as notaries should derive their authority from an institution in the United Kingdom. Section 14 of the Notaries Act, 1952, empowers the Central Government to issue notification recognizing notarial acts lawfully done by notaries in foreign countries on being satisfied that the notarial acts of India is also recognized by such country. In modern world of commerce, industry and dealings between different nations and countries notary plays a very important and pivotal role. Notary internationally is a recognized mode of acceptance of a foreign document. The Notaries Act, 1952, itself recognizes that in this modern world notarial acts of a foreign country is required to be recognized provided the other countries also recognizes and accept the notarial acts of India. Reciprocity between different countries is its essential basis. Without this reciprocity and mutual respect, the whole system and rational of the notarial acts would break down and would seriously affect commercial transactions throughout the world and their due administration by courts of law in different countries and jeopardise International Trade and Commerce and administration of justice.

The Court also discussed *inter alia*, the question whether a power of attorney notarized in a foreign country would be accepted in India with whom, India does not have any reciprocal arrangement. The Court's answer is that "on the principle of

85 *Id.* at Para 38.

86 MANU/WB/0008/1967.

87 AIR 2017 (NOC) 1111 (Calcutta); MANU/WB/0301/2017 at para 42.

comity of Nations, *lex loci* relating to procedure and existence of foreign law being proved and established, it demands that such affidavit should be recognized by the Indian courts. To deny recognition in such circumstances is to deny foreign litigants seeking redress and justice in Indian courts.[88]

After an extensive analysis of the subject, in the context of the facts and circumstances of the case the court held: [89]

The power of attorney executed before a notary public in Singapore and complying with the laws of the state and authenticated as required by that law, must be considered duly authenticated in accordance with the laws of India. Such a power of attorney is valid and effective under section 85 of the Evidence Act.

The Court further observed: [90]

Under the international treaty *i.e*., The Hague Convention abolishing the requirement of legalisation for Foreign Public Documents, 1961 public documents (which include notarial acts) that have been executed in the territory of a contracting state and which have to be produced in another contracting state do not need to be legalized. If Singapore had been a contracting party absence of a notification in the official gazette under section 14 of the Notaries Act would be inconsequential. The provision of the international treaty is to be read into the municipal law.

Finally on the facts of the case the court said, taking into consideration that a due procedure was followed by the Notary public at Singapore in authenticating the documents, the objection raised with regard to the authority of the deponent to form the affidavit is rejected.[91]

VII FOREIGN JUDGMENT

In *IAE International Aero Engines AG* v. *United Breweries (Holdings) Ltd.,*[92] IAE International Aero Engines AG, the petitioner company incorporated in Switzerland with a permanent place of business in US has approached the court in Bangalore by way of winding up petition with the case. The petitioner executed an Agreement called "V2500 Rework Agreement for maintaining various Aircraft Engines to KFAL (King Fisher Airlines Limited). Upon failure of KFAL to pay its dues the petitioner filed the present winding up petition in the High Court of Karnataka. The petitioner has contended that it has obtained a foreign judgment from the English Court in Summary proceedings on the basis of which it is seeking to foist a liability on the Respondent in support of the winding up petition. In the course of the proceedings the court was dealing with the question of residence of a foreign company in India with regard to its right to maintain the legal proceedings in India and had concluded that mere presence

88 AIR 2017(NOC) 1111(Calcutta); MANU/WB/0301/2017 at para 43.

89 *Id.* at para 49.

90 *Id.* at para 55.

91 *Id.* at para 61.

of a representative of foreign corporation in India is not sufficient if his only authority is to elicit orders from customers but not to make contracts on behalf of corporation. The court said that unless the corporation has a fixed place of business in India for sufficiently and reasonably long period of time, it cannot be said to hold as being present in India. The court was relying on a Kerala high court decision in *P. J. Johnson & Sons* v. *Astrofiel Armadorn S.A. of Panama*.[93] The full Bench of the Kerala high court dealt with the question of residence of a foreign company in India. The Court quoted authorities in Private International Law and observed: "To sum up: the decisions discussed above evidence what is now generally accepted as a rule of Private International Law;[94] and what may be regarded as part of Indian Law, namely, that a foreign corporation is resident in India only if it carries on business in India. A foreign corporation carrying on business in India is amenable to the jurisdiction of the local courts and is for all practical purposes present in India. This test is satisfied only if its business is carried on at a fixed and definite place which is, to a reasonable extent a permanent place within India. The mere presence of a representative of the foreign corporation is not sufficient if his only authority is to elicit orders from customers, but not to make contracts on behalf of the corporation. The question really is, as stated by Lord Loraborn, does the corporation really keep house and does business in India? Its real business is carried on where the central management and control actually abides. *De Beers Consolidated Mines Ltd.* v. *V. Howe.*[95] While a company is domiciled where it is incorporated, it is resident where its controlling power and authority is vested. Although dual residence is conceivable where there is division of management and control, it is nevertheless imperative that in some degree, in some measure, to some extent it can be said that the foreign corporation is centrally managed and controlled in India. This test can by no means be satisfied unless the corporation has a fixed place of business in India for sufficiently and reasonably long period of time. Although in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Actien-Gesellschaft Fur Motor Und Motor-fahrzeunbau Vorm. Cudell & Co.*[96] a very short period of residence at a fixed place was considered to be sufficient on the special and peculiar facts of that case, it was nevertheless recognized in that case by Romer, L.J. that, in principle, to satisfy the concept of residence the business should be carried on for a "substantial period of time".[97] These are the essential tests which must be satisfied if a foreign corporation has to be treated as present in India".[98]

On the issue of foreign decrees where *ex parte* order on merits and whether such a decree would be enforceable in Indian court or not with reference to section

92 MANU/KA/0280/2017.

93 AIR 1989 Kerala 53.

94 See, Dicey & Morris, on cit; and Cheshire & North, e.g. cit.

95 (1906) AC 455.

96 (1902) 1 KB 342.

97 *Id.* at 349.

98 MANU/KA/0280/2017 at para 154.

13(b) and section 44-A of the Code of Civil Procedure, the court relied on the verdict of the apex court in *International Woollen Mills* v. *Standard Wool (UK) Ltd.*[99]

On a substantial discussion on the main issue of the case, i.e., on the question of winding up of company the court held "the Respondent Company, UBHL is ordered to be wound up".

Super General Company v. *Suresh Thonikkadavu Veedu,*[100] is a revision petition filed by the petitioner challenging the order of the district court dismissing execution petition filed by the petitioner under section 44-A of CPC. A foreign judgment passed by a Federal Court in Sharjah in favour of the petitioner granting recovery of money against the respondent, was the issue in the execution petition. The district court found in terms of the materials submitted to it, the judgment-debtor was not in Sharjah while the proceedings were initiated and when judgment was pronounced. The District court giving an opportunity to petitioner to produce documents showing the existence of a notification in terms of section 44 A of CPC, disposed off the petition. The petitioner, has filed this revision petition against the order of the district court. In the context of the petitioner's petition the court observed: "The enforceability of a foreign judgment/decree within the territory of India and the Court established within its territory are governed by sections 13, 14 and 44A of the Code of Civil Procedure. Section 13 deals with the requirements on which a foreign judgment could be treated as conclusive. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigation under the same title, except the grounds enumerated in clauses (a) to (f) to section 13 CPC. The grounds enumerated in clauses (a) to (f) are exceptions to general rule engrafted and embodied under section 13 CPC. Section 14 of the Code of Civil Procedure deals with the presumption as to foreign judgments and the Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction. By its nature, the power given under section 14 and its content would make the legal position clear that the presumption available under section 14 is a rebuttable one.[101] Section 44 A of CPC deals with the forum in which a foreign judgment can be executed. This section deals with execution of decrees passed by courts in reciprocating territory. Under section 44 A(2) together with the certified copy of a decree of any the superior courts of any reciprocating territory, a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted shall also be filed and such certificate shall be conclusive proof of the adjustment.

Further, the person who wants to execute the decree under section 44 A CPC, should satisfy the requirements under section 13 so as to establish that it will not fall

99 (2001) 5 SCC 265.

100 MANU/KE/0439/2017.

101 *Id.* at para 2.

under clauses (a) to (f). The court further pointed out that in order to bring the matter within the sweep of section 44A at least two conditions should be satisfied. The mandate under section 44A is to satisfy with respect to existence of a notification by the Central Government in its official Gazette declaring two things, namely, (1) a reciprocating territory for the purpose of section 44A and (2) the Superior Court in reference to that reciprocating territory for the purpose of section 44A CPC. Without satisfaction of these two mandates, no decree or judgment or certificate, if any, issued by any foreign country can be executed within the territory of India under section 44A CPC, which is the only enabling provision in the Code for executing a foreign judgment/decree for money.[102]

In the course of the hearing the petitioner produced a copy of the agreement between the Republic of India and the United Arab Emirates on juridical and judicial cooperation in civil and commercial matters for the service of summons, judicial documents, commissions, execution of judgments and arbitral awards. In conclusion the court remanded back to the lower court for purposes of ascertaining the existence of notification under section 44A CPC so as to proceed with the matter in accordance with law in force and accordingly the judgment of the lower court was set aside. Indeed, it may be pointed out that the Kerala high court missed an opportunity to accord a judicial recognition to an office agreement between two countries as the agreement bore the seal of the two sovereign countries which would have served the purpose the notification and rendered justice to the parties.

In *Hanifa Kalangaltu* v. *Shaista Khan,*[103] this case involves the execution of a Foreign Decree – from Canada. A Canadian (Superior Court of Justice, Ontario) court judgment has been filed for execution, by the respondent in the Family Court at Thrissur to which the petitioner has raised certain objections. The court was considering the executability of the judgment. In the course of the hearing, the court formed an opinion that the judgment debtor had transferred certain funds with an intention to defeat the payment of the amount due to the decree holder and accordingly directed arrest warrant to be issued against the judgment debtor (petitioner herein). The main contention of the petitioner before this Court is that the documents produced by the respondent – decree holder do not amount to a foreign judgment which can be executed before a court in India. According to the petitioner, the parties are foreign nationals (Canadians) and the direction by the Canadian Court can only be executed at Canada and not in India. Further, it is contended that it is an *ex parte* order which is not decided on merits and cannot be executed before this court in terms of section 13(b) of the CPC. It is also averred that the family courts have no jurisdiction to execute such order. It was pointed out that under section 18 of the Family Courts Act execution of foreign judgment is not included. As per section 44 A of the CPC procedure a decree of foreign court can be executed only if certified copy of decree of the Superior Court of

102 *Id.* at para 5.

103 AIR 2017 Kerala 217.

reciprocating territory has been filed before the District Court. The Court found that it was not established whether Canada is a reciprocating territory.

The Court also observed that: [104]

The Family Court has been given special jurisdiction in terms of the Family Courts Act and the District Court as specified in section 44 A is the ordinary District Court having civil jurisdiction. In that view of the matter the Family Court did not have any jurisdiction to entertain the execution petition. On an overall appreciation of the view that the execution petition was not maintainable before the Family Court and therefore it has to be held that the impugned order is without jurisdiction.

VIII CONCLUSION

The topics in this edition depicts the varied aspects of Indian State practice in the area of conflict of laws. The broad threefold division is clear from the cases covered, namely, Family Laws, international trade and commerce and legal cooperation amongst courts from different countries. Thus, we find cases concerning child custody, marriage and divorce, international contracts, international commercial arbitration and recognition and enforcement of foreign judgments – both, direct (section 13 of CPC) and reciprocal (section 44A of CPC) along with recognition of Foreign Notaries by Indian courts. It is heartening to see rise in numbers of decisions dealing with conflicts of laws issues year after year.

104 *Id.* at para 15.