

CONFLICT OF LAWS

Lakshmi Jambholkar

It is the presence of the foreign element that marks the existence of conflict of laws, also known as Private International Law. Characteristically, in India the presence of a variety of Personal Laws gave rise to 'interpersonal conflict of laws as well.'¹ The main source of conflict of laws is the decisions of the courts. However, certain statutes and juristic writings have also contributed to the development of this aspect of law later.² Cheshire has

¹For instance, in the case of two persons domiciled in India, the personal laws may differ according to their religious allegiance. For further details, see T.S. Rama Rao, 'Private International Law in India', *The Indian Year Book of International Affairs*, (IYBIA), vol. 4, (1955) at 219.

²While some countries in Europe (e.g. Austria) provide a single specific statute for the whole of conflict of laws certain other countries such as Britain and India have various statutes on individual topics on conflicts principles. UK—Wills Act, 1861; Family Law Act, 1986; Private International Law (Miscellaneous Provisions) Act, 1995, India—Arbitration Act, 1996 (Part II); Indian Succession Act, 1925 (Part II), etc. In fact, unlike India in UK statutes implementing international conventions form an important source as the UK has ratified a large number of conventions in areas of family law and law of obligations.

rightly pointed out that 'Private International Law as found ... is almost entirely the result of judicial decisions.'³

It is endeavoured in this essay to identify various conflicts issues that have arisen before the Supreme Court of India since its inception in 1950. The apex court has delivered nearly a hundred judgements involving issues concerning private international law during this period. These decisions mark the trends in Indian private international law.⁴

The Supreme Court, in the course of deciding on issues involving foreign elements, has brought out the relevance and significance of private international law. It has emphasized that private international law, or as it is sometimes called, 'conflict of laws', is simply a branch of the civil law of the State evolved to do justice between litigating parties in respect of transactions or personal status involving a foreign element. The rules of private international law of each State must, therefore, in the very nature of things, differ. The court has held that by *the comity of nations* certain *rules are recognized*.⁵ It is submitted, however, that in private international law the comity of nations has no place. Existence of private international law is justified because it 'implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence'.⁶

Jurists have made it clear that principles of private international law are applied not because of comity of nations or 'to show courtesy' but because justice between parties requires it.⁷ Chandrachud, J, explained this aspect in *Satya v Teja Singh*⁸

³P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law*, (Butterworths), 12th edn, 1992 at 14.

⁴Earliest writings which evinced concern for Private International Law in India are: P.V. Rajamannar, 'The Future of Private International Law in India', *IYBIA*, vol. 1 (1952) at 20; V.K. Thiruvengkatachari, 'Developments in the Field of Private International Law in India', *IYBIA* vol. 2 (1953) at 195; and T.S. Rama Rao, *supra*, note 1. These writings initiated an awareness in the subject.

⁵*Viswanathan v Abdul Wajid* AIR 1963 SC 1 at 14-15. Emphasis supplied.

⁶*Dicey and Morris on the Conflict of Laws*, 12th edn [(1993) under the general editorship of Lawrence Collins Sweet & Maxwell, London], vol. 1 at 5.

⁷*Ibid.* at 7.

⁸AIR 1975 SC 105.

thus: 'the Indian conflict of laws may require that the law of a foreign country ought to be applied in a given situation for deciding a case which contains a foreign element. Such recognition is accorded not as an act of courtesy but on considerations of justice.'⁹

Jurisdiction

The preliminary and basic issue before any court of law concerns its right to adjudicate the matter submitted to it. A conflict case is a case containing any foreign element. The court therefore must answer this preliminary question of jurisdiction in the first instance. In this part the discussion is confined to the jurisdictional issues that have arisen before the apex court.

It is a general rule of private international law that courts do not assume jurisdiction over foreign immoveables. This principle was followed in *Ct.A.Ct. Nachiappa Chettiar v Ct.A.Ct. Subramania Chettiar*,¹⁰ concerning division of certain immoveable properties situated in Burma (now known as Myanmar). It was clearly pointed out in this case that courts in India have no jurisdiction to determine questions of title in respect of immoveable properties in foreign countries or to direct division thereof. Further, the court observed that 'where a court has no jurisdiction to determine any matter in controversy such as the question of title in respect of the foreign immoveable property it has no jurisdiction to refer it for the determination of the arbitrators.'¹¹

The Supreme Court relied on Dicey's *Conflict of Laws*¹² to the effect: 'The courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country.'¹³

An action *in rem* lies against a ship as a defendant in an admiralty court. As Dicey has pointed out '...the essence of the procedure *in rem* is that *res* may be arrested and sold by the court

⁹Ibid. at 108.

¹⁰AIR 1960 SC 307.

¹¹Ibid. at 312.

¹²6th edn, at 141 and 348.

¹³As quoted in *Ct. Act Nachiappa Chettiar, supra*, note 10 at 312.

to meet the plaintiff's claim, provided it is proved to the satisfaction of the Court ...' This cannot be done unless the owner enters an appearance and thereby submits to the jurisdiction. The apex court was concerned with the admiralty jurisdiction of the Indian courts over a defendant foreign ship, namely, *M.V. Elizabeth* of Greek nationality, in *M.V. Elizabeth v Harwan Investment and Trading, Goa*¹⁴ (where exercise of such jurisdiction was questioned).

The nature and scope of the admiralty jurisdiction of the high courts in the context of maritime claim against outward foreign ship formed the content of the Supreme Court ruling in this case. The court ruled that all foreign ships entering Indian waters fall within the jurisdiction of this country. The Indian courts' jurisdiction on the admiralty side to proceed *in rem* against the foreign ships on the cause of action concerning carriage of goods from an Indian port to a foreign port was affirmed. The apex court's observations in this case were not confined to the assertion of admiralty jurisdiction of the high courts in India alone. It clearly emphasized the relevance of the admiralty jurisdiction to the growing demands of international trade.

Besides tracing the origin, history, growth, and peculiarities of admiralty jurisdiction, the Supreme Court explained the legal position in India. It listed the relevant statutes generally that govern carriage of goods by sea in India. It referred also to the general principles of law regarding law of tort and public and private international law. The court lamented that India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Consequently, the court pointed out that India has to resort to a circuitous route for using the principles incorporated in the conventions as part of the common law of India for the enforcement of maritime claims against foreign ships. The following recommendations made by the court to improve the situation in this context need attention:

The remedy lies apart from enlightened judicial construction, in prompt legislative action to codify and clarify the admiralty laws of this country. This requires thorough research and investigation by a team of experts in admiralty law, comparative law and public and

¹⁴AIR 1993 SC 1014.

private international law. Any attempt to codify without such investigation is bound to be futile.... Where statute is silent and judicial intervention is required, courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience.... Perhaps the Law Commission of India, endowed, as it ought to be with sufficient authority, status and independence, as is the position in England, can render valuable help in this regard. Delay in adoption of international Conventions which are intended to facilitate trade hinders the economic growth of the nation.¹⁵

In *World Tanker Carrier Corporation v SNP Shipping Services*¹⁶ the court's jurisdiction in an action for limitation of liability of owners of sea-going vessel was the issue. A limitation action as in this case, falls under the high court's admiralty jurisdiction. The court of domicile of the owner and the ship is a court where a liability claim is filed. The Supreme Court, therefore, pointed out that a limitation action in admiralty jurisdiction cannot be filed in a court when all the claimants who are defendants to the action are foreigners residing outside India, who do not carry on business in India. It held that with no part of the cause of action having arisen within the jurisdiction of the Bombay High Court, it had no jurisdiction to entertain the admiralty suits. The court also ruled that the presence of a foreign defendant who appears under protest to contest jurisdiction cannot be considered as conferring jurisdiction on the court to take action.¹⁷

The rule of effectiveness was again followed in *Rajah of Vizianagaram v Official Receiver*.¹⁸ In this case, a company incorporated outside India was wound up as an unregistered company in this country in terms of section 271(3) of the Companies Act, 1913, which says that a company incorporated outside India may be wound up as an unregistered company when it ceases to carry on business in India. The apex court ruled that the courts of a country dealing with the winding up of a company can ordinarily deal with the assets within their jurisdiction and not with assets outside their jurisdiction.

Jurisdictional issues in personal law matters, particularly in family law areas, are generally based upon *lex domicilii*. In

¹⁵Ibid. at 1040-1.

¹⁶(1998) 5 SCC 310.

¹⁷Ibid. at 325-6.

¹⁸AIR 1962 SC 500.

Surinder Kaur Sandhu v Harbax Singh Sandhu,¹⁹ an interesting case concerning child custody, the Supreme Court adopted the rule—'State having most intimate contact with the issue will have jurisdiction'.

Thus it is seen that the Supreme Court, in exercising civil jurisdiction, has relied upon the basic principles of effectiveness and submission in cases containing foreign elements.²⁰

Domicile

Underlying the concept of domicile is the notion of permanent home. This notion is the basis for the determination of questions of status in conflict of laws. Law of domicile in post-independent India is found in statutes and in the judicial pronouncements. Article 5²¹ of the Indian Constitution makes domicile a *sine qua non* for conferring citizenship at the commencement of the Constitution. Part II of the Indian Succession Act, 1925, codifies largely the principles of conflict of laws relating to domicile. But the concept of domicile as such needs to be understood only through the judicial interpretation because neither the Indian Constitution nor the Indian Succession Act defines the expression. Although part of article 5 implies India as unidomiciliary, it is the apex court's decision which made it amply clear that there is only

¹⁹(1984) 3 SCC 698.

²⁰Definitions of these two principles are found in *I & G Investment Trust v Rajah of Kalikote* AIR 1952 Cal. 508, an important case in private international law, as follows:

Principle of effectiveness: a court should only pronounce judgement in a case where it can execute a decree within its own territory. Such a decree cannot therefore be passed if at the time of the service of the writ the defendant does not reside within such jurisdiction and is a foreigner, being the subject or citizen of another independent country, section 20 CPC also reflects this principle.

Principle of submission: It means a voluntary acceptance of the authority of a court to pass judgement which authority such a court would not otherwise possess (Sinha, J). For further details, see C. Kesava Rao, 'Civil Jurisdiction and International Law,' *IYBLA*, vol. 1 (1952), at 218.

²¹Article 5 says: 'At the commencement of the Constitution every person who has his domicile in the territory of India and...'

This part of article 5 is indicative that India is unidomiciliary, unlike USA which is multidomiciliary due to its federal structure.

one domicile in India. Thus in *Pradeep Jain v Union of India*²² the Supreme Court pointed out:

Article 5 of the Constitution is clear and explicit on this point and it refers only to one domicile namely, domicile in the territory of India.... The legal system which prevails throughout the territory of India is one single indivisible system with a single unified justicing system having the Supreme Court of India at the apex of the hierarchy, which lays down the law for the entire country.²³

Meaning of Domicile

In *Central Bank of India v Ram Narain*,²⁴ the Supreme Court noted that it is not possible to define domicile. The term lends itself to illustration and not a definition. Venkatrama Iyer, J, pointed out in *D.P. Joshi v State of Madhya Bharat*²⁵ that domicile means 'permanent home'. Explaining the meaning of domicile the apex court said in *Central Bank of India v Ram Narain*²⁶ that domicile denotes the relation between a person and a particular territorial unit possessing its own system of law. Indeed it is a mixed question of law and fact. The traditional statement, that to establish domicile there must be a present intention of permanent residence, has been affirmed in almost all Supreme Court decisions involving issues on domicile.²⁷

The overall issue of domicile has been explained in *Sankaran Govindan*. The court observed that so far as the mind of the

²²(1984) 3 SCC 654.

²³*Ibid.* at 668. The Supreme Court explained its ruling in the earlier two cases—*D.P. Joshi v MB State* AIR 1955 SC 334; and *N. Vasundara v State of Mysore*, AIR 1971 SC 1439—on this issue of single Indian domicile by saying that the word 'domicile' has been used in the context of domiciliary requirement for the limited purpose of admission or selection locally within the state unit.

²⁴AIR 1955 SC 36.

²⁵AIR 1955 SC 334.

²⁶*Supra*, note 24.

²⁷*Ibid.*; *Kedar Pandey v Narain Bikram Sah* AIR 1966 SC 160; *Sankaran Govindan v Lakshmi Bharathi* AIR 1974 SC 1764; and *Louis De Raidt v Union of India* AIR 1991 SC 1886. For comments on these cases see, 'Decisions', published in *ITBLA* vol 5 (1956) at 189; (1980) at 353; and Lakshmi Jambholkar, 'Conflict of Laws', 37 *ASIL*, 1991 at 493 published by the Indian Law Institute.

person at the relevant time was concerned he should possess the requisite intention. The relevant time would vary with the nature of the inquiry. It may be past or present. If the inquiries are related to the domicile of a deceased person, it must be ascertained whether at some period in his life he had formed and retained a fixed and settled intention of residence in a given country. One has to consider the tastes, habits, conduct, actions, ambitions, health, hopes and aspirations of a person because they are all considered to be keys to his intention to make a permanent home in a place.²⁸

We can caution ourselves, at this point, with Cheshire's criticism of the English viewpoint to the effect: 'one defect, due to the wide field over which the investigation of the court extends, is that the settlement of a disputed question of domicile becomes an unnecessarily complex matter. It is comparatively simple to identify a man's permanent home in the popular sense of the term....'²⁹ Thus according to Cheshire, the artificiality of the English conception gives a strained and unnatural meaning to the word 'permanent'. The Supreme Court appears to have followed the English conception of ascertaining a person's domicile.

*Kedar Pandey*³⁰ has spelt out the law pertaining to domicile and its various aspects. The sum and substance of this law as laid down in this case is that the law attributes to every person at birth a domicile, called domicile of origin. This domicile may be changed and a new domicile may be acquired by any person not under disability, known as domicile of choice by the fact of residing in a country other than that of his domicile of origin, with the intention of continuing to reside there indefinitely. Of the two kinds of domicile, i.e. domicile of origin and domicile of choice, domicile of origin is received by operation of law at birth; the domicile of choice on the other hand is acquired by any person by himself on the basis of actual removal to another country accompanied by his *animus manendi*. The domicile of origin is determined by the domicile (at the time of child's birth) of that person upon whom he is legally dependent. The place of

²⁸*Sankaran Govindan*, *ibid.*

²⁹Cheshire, *Private International Law*, 8th edn (1970) at 164.

³⁰*Supra*, note 27.

birth of the child has no bearing on its domicile of origin. A legitimate child receives the domicile of its father at the time of birth, a posthumous legitimate child that of the mother at that time. The onus of proving the change of domicile lies upon those who assert the change.³¹

Another issue that surfaced before the Supreme Court in the context of domicile related to migration, which plays a significant role in citizenship matters. Migration to another country does relate to the intention of the party concerned. Important decisions of the Supreme Court which figure in this discussion are *Kulathil v State of Kerala*,³² *Shanno Devi v Mangal Sain*,³³ and *State of Bihar v Kumar Amar Singh*.³⁴ These cases establish the relationship between articles 5, 6 and 7 of the Indian Constitution and principles of private international law concerning domicile. In the balancing act of the apex court the constitutional provisions were so applied as to override the well-established principles of private international law concerning domicile. In *Shanno Devi* the Supreme Court held that 'migrate' means going to another country with a view to acquiring a new domicile there. In other words, according to the court the word 'migration' included change of domicile. However, this view was overruled in *Kulathi*, giving significance to the *non-obstante* clause in articles 6 and 7.³⁵ One may comment that such an interpretation would mean that *migration might be a relevant factor in cases of change of domicile while migration per se from one country to another does not amount to change of domicile.*

³¹This legal position of domicile has been affirmed by the apex court in many decisions. See, in particular, *Louis De Raedt; Sankaran Govindan*, *supra*, note 27; *Mohamed Reza Debstani v State of Bombay* AIR 1966 SC 1436; *Fateh Mohd. v Delhi Administration* AIR 1963 SC 1035; *Hussain v State of UP* AIR 1961 SC 1522; *Union of India v Ghaus Mohammad* AIR 1961 SC 1526; *Ibrahim v State of Rajasthan* AIR 1965 SC 618; *State of Gujarat v Yakub Ibrahim* AIR 1974 SC 645; *Central Bank of India*, *supra*, note 24.

³²AIR 1966 SC 1614.

³³AIR 1961 SC 58.

³⁴AIR 1955 SC 282.

³⁵Other cases which followed this ruling are: *Abdus Samad v State of WB* AIR 1973 SC 505; *State of Assam v Jilkadir Ali* AIR 1972 SC 2166; and *State of MP v Peer Mohd* AIR 1963 SC 645.

In *Amar Singh*,³⁶ the court ruled that a wife who went to Pakistan leaving her husband in India loses her Indian citizenship by reason of article 7 if she fails to prove that her visit was only for some temporary purpose even though in law (private international law) she retained her husband's Indian domicile.

In *Narasimha Rao v Venkatalakshmi*,³⁷ while laying down a new base for recognition of foreign divorce decrees in India,³⁸ the Supreme Court observed that 'wife's domicile follows that of her husband and that it is husband's domiciliary law which determines the jurisdiction and judges the merits of the case.'³⁹ Interestingly, though the apex court described this rule of married women's domicile as 'the bondage of the tyrannical and servile rule' it made no effort to confer on women independent domicile.⁴⁰

Domicile of Corporations

The Supreme Court in *Turner Morrison & Co. v Hungerford*⁴¹ was concerned with the residence of a corporation having transnational business dealings. It was held that such a corporation 'resided' in India if it is involved in doing business in India and 'more generally that corporation can have multiple residences and domiciles.'⁴² The Indian approach, which has juristic support,⁴³ differs from the English view of corporation's domicile and residence. According to the English law, place of *incorporation* constitutes the domicile of the corporation, while the country where the central management and control is exercised becomes its residence.⁴⁴

³⁶*Supra*, note 34.

³⁷(1991) 3 SCC 451.

³⁸This issue has been discussed at a later stage of this paper.

³⁹*Supra*, note 37.

⁴⁰For detailed legal analysis of married women's domicile in general and in India in particular, see Lakshmi Jambholkar, 'Married Women's Domicile—A Legal Framework', in Kusum, ed., *Women—March Towards Dignity* (1993), Regency Publications (New Delhi) at 63.

⁴¹AIR 1972 SC 1309.

⁴²*Ibid.* at 1324.

⁴³See Upendra Baxi, 'Conflict of Laws', in 8 *ASIL* 1972, 146 at 149–51. In his detailed analysis Baxi supports the Supreme Court's view in this case and finds it to be in India's interest as a developing State.

⁴⁴See *Dicey and Morris*, *supra*, note 6 at 1103.

Family Law

Marriage

Marriage, being a personal matter, is governed by the personal law of the parties.⁴⁵ In conflict of laws, a person's capacity to marry is governed by the law of domicile, which in the Indian context has reference to personal laws owing their allegiance to various religions, which differ from one another in many aspects. This has resulted in interpersonal conflict of laws, whenever there is interaction. The situation involved mainly conversions from one religion to another. Indeed the question of capacity to take a second wife, though in law is based on the above-mentioned conflicts principle, in reality had a negative effect on the Indian society, putting the women to manifold hardships. *Sarla Mudgal* was directly concerned with the validity of the second marriage of a Hindu husband after conversion to Islam, which permits polygamy. The Supreme Court held the second marriage 'invalid' and 'would be void', 'in terms of section 494, IPC'.⁴⁶ It is submitted that, in terms of conflict principles, the issue squarely fell within the realm of interpersonal conflict of laws.⁴⁷ The apex court, however, pointed out the existence of inherent right to change one's religion and the marriage being governed by the personal laws.⁴⁸

In *Lakshmi Sanyal v S.K. Dhar*,⁴⁹ the Supreme Court applied the personal law (Canon Law) to uphold the validity of the marriage between two converts to Christianity, following the rule that husband's capacity renders the marriage valid in law.⁵⁰ This rule, though the apex court did not identify it, is 'the intended matrimonial home doctrine' test concerning the capacity of the parties to the marriage. The court observed: 'The question of capacity to marry and impediments in the way of marriage would have to be resolved by referring to their personal law'.⁵¹

⁴⁵*Sarla Mudgal v Union of India* AIR 1995 SC 1531 at 1534.

⁴⁶*Ibid.* at 1539.

⁴⁷By the application of conflicts principle the convert husband in this case had the legal capacity to take a second wife under Muslim Law.

⁴⁸*Supra*, note 45, at 1538.

⁴⁹AIR 1972 SC 2667.

⁵⁰*Ibid.* at 2672.

⁵¹*Ibid.*

Regarding capacity to marry, the court has followed the rule of personal law, i.e. the law of domicile. Despite the problematic, sensitive and intricate issues involved, the Supreme Court's trend in these cases evinces concern for society.

The law governing divorce, in choice of law situation generally, is the law of domicile. This coincides with the law of the forum, as the court of domicile alone has the jurisdiction to pronounce a divorce decree. The personal laws in India in matters of matrimonial jurisdiction vary.⁵² There have not been any choice-of-law situations before the Supreme Court. Nevertheless, the apex court in *Narasimha Rao*,⁵³ while dealing with the issue concerning recognition of foreign divorce decrees in India, observed that the jurisdiction assumed by the foreign court as well as the *grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married*.⁵⁴

The opinion of the Supreme Court does not follow the rule of domicile to govern personal law matters, which is generally the situation in the UK and elsewhere.⁵⁵ Instead, it recommended that the law under which the parties married should govern divorce, irrespective of the forums to which they present the petition. This ruling has the effect of disturbing the rule of domicile to govern matters of status in conflict of laws (being *lex domicilii*). There is every possibility of increasing the number of limping marriages⁵⁶ in due course.

Recognition of Foreign Divorce Decrees

Recognition of foreign divorce decrees in India, is dealt with under section 13 of the Civil Procedure Code, 1908, which lays

⁵²Reference here is to differing statutory provisions in India. For example see Hindu Marriage Act, 1955; Parsi Marriage & Divorce Act, 1936; Indian Divorce Act, 1869; Special Marriage Act, 1954; Dissolution of Muslim Marriages Act, 1939. The jurisdictions are based upon either residence or domicile.

⁵³*Supra*, note 37.

⁵⁴*Ibid.* at 462. Emphasis supplied.

⁵⁹See Jambholkar, *supra*, note 40 at 70.

⁵⁶Marriages limp because couples will be considered as married in one country while they are considered as divorced in another country.

down the conditions for conclusiveness of a foreign judgement in India generally. The court followed the application of this provision in *Teja Singh*,⁵⁷ *Narasimha Rao*,⁵⁸ and *Neeraja Saraph v Jayant Saraph*.⁵⁹ Each of these decisions provides different perspectives and explains the gravity of the situation created by foreign divorces, for women in particular. In all three cases, the foreign decrees were obtained from US courts requiring recognition in India.

TEJA SINGH

In *Teja Singh*, the husband left for USA for higher studies while the wife continued to live in India. The husband obtained a divorce in Nevada. The wife's application for maintenance on appeal reached the apex court. The presiding judges, Chandrachud, CJ, and H.R. Khanna, J, observed that principles of private international law governing matters within the divorce jurisdiction are so conflicting in different countries that not unoften a man and a woman are husband and wife in one jurisdiction but treated as divorced in another jurisdiction.⁶⁰ The apex court was explaining the doctrine of limping marriages. It is common knowledge that private international law is essentially a part of municipal law and private international law differs from country to country. The Supreme Court, therefore, pointed out:

[O]ur notions of a genuine divorce and of substantial justice and the distinctive principles of our public policy must determine the rules of our private international law.⁶¹

NARASIMHA RAO

Towards this objective, the court recommended for appropriate legislation. The Sixty-Fifth Report of the Commission on Recognition of Foreign Divorces (1976), however, did not bring any change in the Indian law. It is under these circumstances that the

⁵⁷*Supra*, note 8.

⁵⁸*Supra*, note 37.

⁵⁹(1994) 6 SCC 461.

⁶⁰*Supra*, note 8 at 108.

⁶¹*Ibid.* at 115. The Supreme Court in this case did not grant recognition to the American divorce decree from Nevada as it was obtained by fraud upon the jurisdiction of the foreign court.

Supreme Court attempted to bring about improvements within the existing provisions of section 13 of the CPC by providing a new contextual interpretation in *Narasimha Rao*.⁶² In this case also, the plea was for the recognition of an American divorce decree. The apex court was well aware that the law pertaining to recognition of foreign divorce decrees in India is based on English principles of private international law, whether common law or statutory rules. Lamenting this situation, the court observed: 'In spite, however, of more than 43 years of independence we find that the legislature has not thought it fit to enact rules of Private International Law in this area and in the absence of such initiative from the legislature, the courts in this country have been forced to fall back on precedents.'⁶³ It added:

A time has, therefore, come to ensure certainty in the recognition of the foreign judgements in these matters. The minimum rules of guidance for securing the certainty need not await legislative initiative. This court can accomplish the modest job within the framework of the present statutory provisions ... [T]he rules of guidance we propose to lay down in this area may prove inadequate or miss some aspects ... [T]he lacunae and the errors being left to be filled in and corrected by future judgements.⁶⁴

In the court's opinion, provisions of section 13 of the CPC are capable of being adapted specifically in conformity with public policy, justice, equity, and good conscience, and the rules so evolved will protect the sanctity of the institution of marriage and the unity of family, which are the cornerstones of societal life.⁶⁵ Accordingly, it deduced the new rule for recognizing a foreign matrimonial judgement in India as follows: 'The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married.'⁶⁶ Three exceptions have been appended to this rule. They are:

⁶²See for a detailed analysis of this case Lakshmi Jambholkar, 'Recognition of Foreign Divorce Decrees in India: A Case for Contextual Interpretation', 31 *JILI* (1991) at 432, and Lakshmi Jambholkar, *supra*, note 27 at 505.

⁶³(1991) 3 SCC 451 at 459.

⁶⁴*Ibid.* at 460.

⁶⁵*Ibid.*

⁶⁶*Ibid.* at 462.

- (i) where the matrimonial action is filed in a court of domicile and the relief is based on a ground available under the matrimonial law under which the parties are married;
- (ii) where there is voluntary submission to the foreign jurisdiction by the respondent and the contested claim based on a ground that is available under the matrimonial law under which the parties are married; and
- (iii) where the respondent consents to relief although the jurisdiction is not in accordance with the matrimonial law of the parties.

The apex court opined⁶⁷ that the 'aforesaid rule along with the exceptions has the merit of being just and equitable. It does no injustice to any of the parties ... has the advantage of rescuing the institution of marriage from that uncertain maze of the rules of the private international law of the different countries....' Further, in its view, this rule provides certainty in the most vital field of national life; conformity with public policy; accommodates the needs of modern life; and protects and frees women—the most vulnerable section of society, from the bondage of the husband's domiciliary laws.

The Supreme Court has thus filled a much-felt void in the matter of recognition of foreign matrimonial decrees in India, at the same time providing a new perspective to all the clauses of section 13 of CPC in the context of matrimonial disputes from the point of choice-of-law situation.⁶⁸ This indeed is the current law with a new approach. It also dispenses with the time-consuming legislative exercises. From the viewpoint of established conflicts principles, however, *lex domicilii*, as it is generally understood in conflict-of-law issues, gets negated by this ruling. It is not uncommon for an Indian couple, married in India, to establish their matrimonial home permanently in a different country. In such situations, the Supreme Court's ruling becomes a directive to the foreign court where the petition for the matrimonial cause has been filed in accordance with the local rules of jurisdiction. If the foreign court decides to follow the rule of *lex domicilii*, the couple's will be a limping marriage. In addition, in a conflict case the involvement of more than two

⁶⁷Ibid. at 463.

⁶⁸Ibid. at 459.

nations is possible, in which case the validity of the marriage is tested in terms of its formal validity and essential validity. Under these circumstances, '*the law under which the parties are married*' means: (i) *lex loci celebrationis* (place of celebration of marriage) or (ii) *lex domicilii*—the personal laws. Surely, the apex court ruling in this case does not guide us as to which of these would constitute the 'law under which the parties are married'. It appears that the court's ruling envisages only two situations—(i) where parties married under Indian laws seek dissolution in a foreign forum and provided the foreign court follows the Indian Supreme Court's ruling in its verdict, and (ii) where the parties are married in one country, seek divorce in another, but seek recognition in an Indian court. The court's ruling in *Narasimha Rao* leads to the conclusion that the ruling for its implementation depends upon the foreign courts' choice of the governing law between law of domicile (being the governing law of divorce at time of filing of divorce petition) and the law under which the parties are married. If the foreign court chooses to apply *lex domicilii*, the number of limping marriages are bound to increase.

It is submitted, therefore, that the change in law is only a partial fulfilment of the need. In matrimonial cases involving conflict of laws, since the women are more disadvantaged, their interest as a weaker section of society should be the prime concern. Also, the Supreme Court ought to have freed women, as in the UK and elsewhere, from the shackles of 'husband's domicile' for purposes of matrimonial jurisdiction. It is common knowledge that in the majority of cases of matrimonial litigation it is the story of the deserted wife.

NEERAJA SARAPH

In *Neeraja Saraph*⁶⁹ the court was dealing with an American nullity decree. The respondent was an NRI settled in USA. The Supreme Court, conscious that the case involved a problem of private international law, not easy to resolve, made the following recommendations that could be incorporated in legislation safeguarding the interests of women:

- (i) No marriage between a NRI and an Indian woman, which has taken place in India, may be annulled by a foreign court;

⁶⁹ *Supra*, note 59.

- (ii) Provision may be made for adequate alimony to the wife in the property of the husband in India and abroad;
- (iii) The decree granted by Indian courts may be made executable in foreign courts both on principle of comity and by entering into reciprocal agreement like section 44-A of the Civil Procedure Code, which makes a foreign decree executable as it would have been a decree passed by that court.⁷⁰

In this context, it may be pointed out that sections 13 and 44-A of CPC are well equipped for recognition and enforcement of foreign judgements in India—particularly, section 44-A which concerns direct execution of foreign judgement on the basis of reciprocal agreements. Of course, the net needs to be widened. At present only ten countries are covered. Further, the court's suggestion that foreign courts should not exercise jurisdiction over matrimonial disputes involving Indian women and NRIs is in the nature of a directive to the foreign forum and is uncalled for. For an NRI who may have got foreign citizenship and who is domiciled in the country of the forum, the court of that country is the court of domicile, which is well within its right to exercise matrimonial jurisdiction in the international sense under conflict principles.

Custody of Children

Courts in the contemporary context attach more importance to the welfare of the children in cases of their custody, particularly where the parents are separated or divorced and live in different countries. It is not the fitness of the parents but the welfare of the minor children that should be the consideration for the courts, in deciding custody dispute. In *Rosy Jacob v Jacob*⁷¹ the court was considering guardianship of children of a Syrian Christian couple. It was emphasized that all custodial orders by their very nature are not final, but are interlocutory and subject to modification in future upon proof of change of circumstances and that need of change of custody if any, must be in the paramount interest of the

⁷⁰Ibid. at 464.

⁷¹AIR 1973 SC 2090.

child.⁷² This view was reiterated in *Surinder Kaur Sandhu v Harbax Singh Sandhu*⁷³ when Chandrachud, CJ, ruled that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offspring of marriage. The Indian couple in this case had set up their matrimonial home in England, where the child, whose custody was in issue, was born. The child being a British citizen held a British passport. He was brought to India by the father while the mother was away at work.

Whenever a question pertaining to the custody of a minor child arises before a court, the matter is to be decided not on considerations of legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.⁷⁴ In *Dhanwanti Joshi v Madhav Unde*,⁷⁵ the mother removed the child from USA to India to escape the husband's cruel treatment towards herself. The child then was only 35 days old. The litigation between the spouses thereafter both in the US and India continued for fourteen years. During this period the custody of the child was being shifted from mother to father repeatedly. Finally, when the matter reached the Supreme Court, it clearly pointed to the issues involved in child custody and abduction from one country to another. Reference was made to the provisions of the *Hague Convention of 1980* on 'Civil Aspects of International Child Abduction', but since India is not a party to the convention, the apex court confined itself to *non-Convention State practice*. It followed the child's welfare as the sole criterion in cases of child custody. The interlocutory nature of child custody orders was established in this case, pointing out at the same time that any change in the custody should be in the paramount interest of the child.⁷⁶ Dicey's work on conflict of laws may be referred to in this context to the effect: 'undoubtedly the welfare of the child would be the first and paramount consideration today in any contest for custody between a foreign and an English guardian.'⁷⁷

⁷²Ibid. at 2101.

⁷³(1984) 3 SCC 698 at 703.

⁷⁴*Elizabeth Dinshaw v Arvand M. Dinshaw* (1987) 1 SCC 42 at 46.

⁷⁵(1998) 1 SCC 112.

⁷⁶Ibid. at 122, 126-7.

⁷⁷*Supra*, note 6 at 825.

Inter-country Adoptions

Welfare of the child is the cornerstone in inter-country adoptions as well. Conflicts principles have not developed in this subject in India, but the occurrence of inter-country adoptions involving Indian children is increasing. Indian courts administer Guardian and Wards Act, 1890, by which foreigners seeking to adopt Indian children are appointed as guardians. The courts have stressed the welfare of the minor as the dominant factor in such appointments.

In a series of cases, known as *Lakshmikant Pandey v Union of India*,⁷⁸ the Supreme Court has laid down principles and norms to be followed in inter-country adoption procedures involving Indian children and foreign adoptive parents with the object of ensuring the welfare of the child. The guidelines do not, however, include or refer to conflicts principles notwithstanding the invariable presence of the foreign element.⁷⁹ Commenting on the apex court's task, B.N. Sampath opined:

The judicial imprimatur enabling the adoption of an Indian child by a foreigner and a foreign law has introduced a novel concept hitherto unknown to Indian law. The application of foreign law by municipal courts for resolving disputes involving foreign element is based on certain principles of private international law. However, we can hardly invoke the principles of private international law in the present context. It is indeed a case of straight incorporation of the foreign law in the *corpus juris* of this country. Such a universality in judicial outlook is unheard of anywhere in the world.⁸⁰

The whole process of inter-country adoptions should be based on *lex domicilii*, as adoption concerns the status of a child in a new family of adoptive parents. It is an elementary principle of private international law that all matters of status are governed by the law of domicile.⁸¹ Such a step would help develop our own law on the

⁷⁸There are four cases in this series: AIR 1984 SC 469; AIR 1986 SC 272; AIR 1987 SC 232; and AIR 1992 SC 118.

⁷⁹See *ASIL*, *supra*, 27 at 515, *ibid.* 28 (1992) at 351 and *ibid.* 29 (1993) at 314.

⁸⁰See B.N. Sampath, *Lakshmikant Pandey v Union of India: An Instance of Excessive Judicial Legislation* AIR 1985 (Journal) 105 at 109.

⁸¹The provisions of Guardians and Wards Act of 1890 may be considered for carrying out procedural necessities and may thus fulfil the formalities of a secular adoption.

one hand and would have enabled such transfer of the child on a sound legal basis on the other. Conceptually, adoption might be understood differently in different countries. Minor children when subjected to inter-country adoptions should not be made victims of variations in the related concepts of adoption and fosterage. Further, recognition of the Indian court's order appointing the foreign adoptive parents as guardian in foreign jurisdictions may run into problems. Adoption of the Indian child by the adoptive parents in India itself, under secular rules, may pave the way to give the adopted child the status of an adopted child. Recognition of this status would amount to recognition of foreign adoptions and avert a two-stage legal process in the country of adoptive parents.⁸²

In the last of the *Lakshmikant Pandey*⁸³ judgement series, the apex court negated the plea of a licensed welfare agency that the Indian citizenship should continue until the adopted child attains the age of majority and is legally competent to opt. The court rightly opined: 'Such a step would run counter to the need of quick assimilation and may often stand as barrier to the requirements of the early cementing of the adopted child into the adoptive family.'⁸⁴

The query raised by the welfare agency involves both social and legal implications. The Supreme Court, however, has answered only the social aspect. The legal implications also need to be looked into for purposes of the welfare of the child. The child may be denied some of the local rights due to a child, or retention of foreign citizenship may affect one way or another conferring of the nationality or citizenship of the newly entered State.

Finally, the apex court may consider addressing itself (or delegating to the implementing authorities concerning inter-country adoption) to the following perspective regarding inter-country adoptions:

⁸²In the first instance the Indian court's order appointing the foreign parties as guardians under the Indian enactment needs to be recognized and secondly the adoption of the child by the foreign adoptive parents in accordance with their laws to enable the adopted child to become part of the adoptive family is mandatory.

⁸³AIR 1992 SC 118.

⁸⁴Ibid. at 120-1.

- (a) Right of entry to the adoptive country as an immigrant.
- (b) Declaration as regards the status of the child in the adoptive country.
- (c) Social security issues.
- (d) Property rights of the adopted child in the adoptive country.
- (e) Possible denial of foreign adoption as being contrary to public policy of the adoptive country.

Law of Obligations

Contracts

'The parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them.'⁸⁵ This autonomy of the parties to choose the governing law of the contract is part of the proper law of contract practised by almost all countries.

The law governing contract depends on the parties' intention, a perspective clearly established in *M/s Gobindram v Shamji K. & Co.*⁸⁶ In the instant case, the respondents agreed to sell 500 bales of African raw cotton to the appellants. Upon failure to perform the contract the parties submitted their dispute to the Bombay High Court, being the agreed forum under the contract. The contract also included an arbitration clause, with India as the chosen venue for arbitration. Upon these facts the Supreme Court ruled that 'the proper law to be applied is the Indian Law'. Explaining the basis the court remarked:

Whether the proper law is the *lex loci contractus* or *lex loci solutionis* is a matter of presumption; but there are accepted rules for determining which of them is applicable. Where the parties have expressed themselves, the intention so expressed overrides any presumption. Where there is no expressed intention then the rule to apply is to infer the intention from the terms and nature of the contract and from the general circumstances of the case.⁸⁷

⁸⁵*British India Steam Navigation Comp Ltd Shanmugha Vilas v Cashew Industries* (1990) 3 SCC 491 at 492.

⁸⁶AIR 1961 SC 1285.

⁸⁷*Ibid.* at 1294.

The proper law of contract being the governing law ascertained by express choice of the parties, the freedom to do so is not without limitations. The parties' autonomy to choose the applicable law holds good so long as the choice is bonafide legal and not against the public policy. The courts do have a residual power to strike down, for good reasons, a choice of law clause, totally unconnected with the contract.⁸⁸ Further, the chosen proper law must be the law at the time when the contract was made and holding good throughout the life of the contract. There can be no 'floating proper law'.⁸⁹

In the absence of parties' expressed intention the courts have to impute intention to ascertain the proper law on the basis of deductive analysis of the facts and circumstances of the case. Thus, in *Delhi Cloth and General Mills Co. v Harnam Singh*⁹⁰ the issue before the apex court was whether a debt due from the defendant-appellant to the plaintiff-respondent that arose in Lyallpur (Pakistan) could be held discharged by payment to the Pakistan authorities (as custodian of evacuee property) in accordance with a Pakistani law. The Supreme Court applied the grouping of elements test to ascertain the proper law of contract endorsing the objective approach and found in this case, the elements of the contract densely grouped at Lyallpur. Bose, J, therefore, held Lyallpur law as applicable law. In following the objective test, he denounced the fictionary element of implied intention in ascertaining the proper law that is generally adopted by the courts.⁹¹ He pointed out that it is 'unnecessarily artificial to impute an intention when we know that there was none especially in a type of case where the parties would never have contracted at all if they had, contemplated the possibility of events turning out as they did.' In this case the objective theory of Cheshire was upheld by the Supreme Court as opposed to the subjective test.

Apart from the proper law of contract chosen expressly or impliedly as dealt with above, courts also infer the same from the jurisdictional clauses referring to particular forums. In *M/s*

⁸⁸*British India Steam Navigation, supra*, note 85 at 497.

⁸⁹*Ibid.*

⁹⁰AIR 1955 SC 590.

⁹¹See Rama Rao, *supra*, note 1 at 254-5.

Gobindram,⁹² the apex court referring to the parties' choice of Bombay High Court's jurisdiction and India as venue for arbitration observed: 'of such arbitration clauses in agreements, it has been said on more than one occasion that they lead to an inference that the parties have adopted the law of the country in which arbitration is to be made.'⁹³ Similarly, in *British India Steam Navigation* the Supreme Court pointed out: 'If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.'⁹⁴

A contract for the carriage of goods in a ship is called, in law, a contract of affreightment. In practice these contracts are usually written and most frequently are expressed in two types of documents, namely, charterparty and bill of lading. It is an accepted principle that when the stipulations of the charterparty are incorporated in a bill of lading they become the terms of the contract and they can be enforced by or against the shipper, consignee, or endorsee. The terms of the contract on which the goods are carried are prima facie to be ascertained from the bill of lading. The Supreme Court was considering all the above mentioned aspects of a contract of carriage of goods couched in a bill of lading in *British India Steam Navigation Co.*⁹⁵ The question in this case was one of initial jurisdiction on the basis of the clause mentioned in the bill of lading. Referring to the bills of lading the court pointed out that it is a settled principle of private international law governing bills of lading that the consignee or an endorsee thereof derives the same rights and title in respect of the goods covered by the bills of lading as the shipper thereof had.⁹⁶ The court proceeded on the premise that the parties' claim is an action *in personam* in private international law and that an action *in personam* is an action brought against a person to compel him to do a particular thing. Following an analysis of proper law of contract, the court inferred the same from the jurisdictional clauses in the bills of lading in this case.

⁹²*Supra*, note 86.

⁹³*Ibid.* at 1295.

⁹⁴*Supra*, note 85 at 492.

⁹⁵*Ibid.* at 481.

⁹⁶*Ibid.* at 489.

Involuntary Assignment of Debt

In a lone case⁹⁷ decided by the Supreme Court involving an issue concerning involuntary assignment of debt, English conflict law was applied. Among other issues, the court was called upon to resolve whether the liability of the appellant (State Bank of India) to the respondent (Ghamandi Ram) in India be deemed to be extinguished in view of the operation of the Pakistan Evacuee Property Ordinance. The court considered this issue under the rule of private international law concerning involuntary assignment of debts as applied by English courts.

It followed the ruling in *Re Queensland Mercantile and Agency Co.*,⁹⁸ where it was held that *lex situs* of the debt determines not only the question of jurisdiction, but also the effect of the garnishment as regards the third parties. The court accordingly ruled that the liability of the appellant to the respondent be deemed to have been extinguished as the *situs* of the debt (Bahawarpur) after partition became part of West Pakistan, which passed the Pakistan Evacuee Property Ordinance.

International Arbitration

International arbitration concerns with resolving commercial disputes which involve two or more countries. Impressive unification in this area has prevented many conflict situations. Even so, issues dealing with conflict of law do come up before the national courts. Discussion in this part is confined to specific conflicts questions that have appeared in cases before the apex court, for example, governing law of agreements to arbitrate matters of public policy and law applicable to foreign currency conversions.

Let us first consider the law governing agreements to arbitrate disputes. An arbitration agreement is an agreement to submit differences (present or future) to arbitration. It is contractual in nature, has to comply with all the necessary requirements of a valid contract, and is governed by its applicable law. Applicable law is determined in the same way as that of an international contract, based on the parties' choice—express, tacit, or inferred.

⁹⁷*State Bank of India v Ghamandi Ram* AIR 1969 SC 1330.

⁹⁸(1891) 1 Ch. 536.

The principle of party autonomy, along with its logical limitations to choose the venue of arbitration and the applicable law, has world wide acceptance.

The Supreme Court in *NTPC v Singer Co.*⁹⁹ dealt with the proper law doctrine as applicable to international arbitration agreements in all its perspectives. The parties—an Indian public sector undertaking and a US company (Singer) chose the laws in force in India to govern their contract entered into in India. The parties also contractually chose rules of the International Chamber of Commerce (ICC) for conduct of arbitration. In the context of enforcement of an interim award made in London by a tribunal constituted by ICC, the Supreme Court clearly distinguished the law of arbitration in terms of substantive and procedural aspects. The court explained the legal position of law governing arbitration agreement thus:

[T]he proper law of arbitration agreement is normally the same as the proper law of the contract.... The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration ... the arbitration proceedings are conducted in the absence of any agreement to the contrary in accordance with the law of the country in which the arbitration is held.¹⁰⁰

Although the dispute was with a foreign partner in the contract, and the arbitration itself was conducted and the award

⁹⁹(1992) 3 SCC 551.

¹⁰⁰*Ibid.* at 563–4. Commenting on the apex court's handling of the NTPC case Late Prof. M.K. Nawaz has, in his book, *International Commercial Arbitration* (in print), pointed out:

This inference is questionable. For one thing the expression 'the proper law of contract' does not include within its ambit, 'the proper law of arbitration', and another para 27.7 of the general terms and conditions of contract contemplates arbitration of disputes between the parties by reference to the I.C.C. Rules of Conciliation and Arbitration. The I.C.C. Rules, for all intents and purposes, as Kochu Thommen, J, himself had admitted, are a self-contained and self-regulating system. Given the fact that the parties had intended to have a recourse to the I.C.C. Rules to settle their disputes, no question of the applicability of the Indian Arbitration Act of 1940 arises. The court, in the present submission, is wrong in holding that the award is governed by the Indian Arbitration Act.

was made in London in accordance with the agreed ICC Rules, the Supreme Court ruled the interim award in question as a domestic award in this case.

Exclusion of foreign laws on grounds of public policy is accepted under conflict of laws. Therefore, courts do not enforce foreign legal rights repugnant to public policy. *Renu Sagar*,¹⁰¹ which had a long history of litigation, while considering important issues of conflict of laws, dealt with this question of public policy. It was the central issue. The parties (Indian and American companies) who entered into contract for the erection of a power plant had agreed on American law as the applicable law and ICC arbitration for dispute settlement. In the context of enforcement of the ICC award, one of the submissions before the Supreme Court concerned non-enforceability of the award on grounds of public policy.

The court examined the ground of public policy within the framework of principles of private international law and pointed out that the foreign award would be refused enforcement if it was contrary to: (a) fundamental policy of Indian law; or (b) the interests of India; or (c) justice or morality.

Drawing a distinction between a matter governed by domestic law and a matter involving a foreign element the court said that the application of the doctrine of public policy is more limited in the case of the latter than the former. The court also opined that courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved.

In matters of foreign exchange the question of conversion of currencies poses problems in the enforcement of foreign arbitral awards. Conversion of the currency is necessary in cases where legal proceedings have to be instituted by the creditor to enforce awards made in foreign currency. In *Renu Sagar* the court ruled that conversion should be on the basis of exchange rate prevailing

¹⁰¹*Renu Sagar Power Co. v General Electric Co.* AIR 1994 SC 860. This is the last of the three cases that have come up before the Supreme Court since the time the parties have entered into contract in 1964. These decisions are known as 'Renu Sagar—I', 'Renu Sagar—II' and 'Renu Sagar—III'. While the first two are concerned with staying of local actions, the third is with regard to the enforcement of the foreign award.

in India *on the date of the judgement* and not on the date of actual payment.

Foreign Judgements

The judgement of a foreign court imposes upon the defendant a legal obligation, to fulfil which the courts in this country enforce when approached. This is the English 'doctrine of obligation' contained in section 13 of the CPC.¹⁰² According to this doctrine, when a foreign court of competent jurisdiction by its judgement creates a right in favour of a person, it becomes obligatory on the other party to comply with it. The inevitable advantages of this doctrine are: it eliminates the principle of reciprocity; and there is little need to prescribe the defences for a defendant because he can plead any fact that would disprove the existence of such an obligation.

The scope of section 13 of the CPC has been explained *in extenso* by the apex court in *Vishwanathan v Abdul Wajid*.¹⁰³ It was emphasized in this case that the foreign court must be a court of competent jurisdiction, that the matter adjudicated upon means the right claimed and that it must have been adjudicated upon directly between the same parties. The law relating to conclusiveness of the foreign judgement contained in clauses (a) to (f) of section 13 creates substantive rights and is not merely procedural.¹⁰⁴ The court's ruling in *Viswanathan* establishes the following aspects of conclusiveness of a foreign judgement clearly: 'conclusiveness' in section 13 refers to the final adjudication and not the reasons; the binding character of the judgement can be displaced only on the basis of the six grounds mentioned in the section: the question whether the principle of effectiveness¹⁰⁵ formed the basis of conclusiveness of the foreign judgement is debatable; conclusiveness referred to in section 13 is different in its operation from the rule of *res judicata* envisaged in section 11 as applicable to domestic judgements.

¹⁰² See Rama Rao, *supra*, note 1 at 261 for an excellent exposition of the case law in this respect.

¹⁰³ AIR 1963 SC 1.

¹⁰⁴ *Molaji Narsingh Rao v Shankar Saran* AIR 1962 SC 1737.

¹⁰⁵ See *supra*, note 20.

Viswanathan further establishes the general rules of restriction in matters of court's jurisdiction: (i) jurisdiction *in rem* over *res* beyond the limits of jurisdiction; (ii) title to immoveable property outside the jurisdiction; and (iii) courts will not exercise jurisdiction in enforcement in foreign penal and revenue laws. The rulings in this case also explain the basis of '*action in personam*' thus: A person who institutes a suit in a foreign court and claims a decree *in personam* cannot after the judgement is pronounced against him, say that the court had no jurisdiction which he invoked and the court exercised. The foreign court's competence in delivering the judgement in question under section 13 is understood in the international sense and not merely by the law of the foreign State under which the court functions. In *Viswanathan*, one of the basic rules followed in the recognition and enforcement of foreign judgements is the rule of submission¹⁰⁶ to foreign court. Generally, each case involving a foreign judgement illustrates the issue concerning such submission. In *Shaligham v Firm Daulatram Kundanmal*,¹⁰⁷ the Supreme Court held that the voluntary submission to a foreign court amounts to submission and does not constitute violation of principles of natural justice. Again in *Andhra Bank v R. Srinivasan*¹⁰⁸ the court ruled that if one of the defendants dies and his legal representatives happen to be non-resident foreigners, the procedural step taken to bring them on the record is intended to enable them to defend the suit in their character as legal representatives and on behalf of the deceased defendant; and so the jurisdiction of the court continues unaffected; also, the competence of the suit as originally filed remains unimpaired. *In form* it is a personal action but *in substance* it is an action continued against them as legal representatives.

'A decree passed by a foreign court to whose jurisdiction a judgement-debtor had not submitted is an absolute nullity only if the local legislature had not conferred jurisdiction on the domestic courts over foreigners either generally or under specified circumstances' is the ruling in *Lalji Rama v Hansraj Nathuram*.¹⁰⁹

¹⁰⁶Ibid.

¹⁰⁷AIR 1967 SC 739.

¹⁰⁸AIR 1962 SC 232.

¹⁰⁹AIR 1971 SC 974 at 977.

Doctrine of merger envisages merger of the original cause of action with the foreign judgement. However, in *India Badat and Co. v East India Trading Co.*¹¹⁰ implements this doctrine although it is at variance with the objective test of the enforceability that is followed elsewhere.¹¹¹

Interpersonal Conflict of Laws

All personal law matters are governed by law of the domicile in conflict of laws. Domicile became the basis for issues concerning status. India is a land of personal laws. Existence of various personal laws has resulted in the formulation of a 'composite system of personal laws' in India.¹¹² The presence of a variety of personal laws having their religious allegiance and various schools within these personal laws has resulted in conflicts of many sorts in their interaction. Conflicts arisen have been dealt with in

¹¹⁰AIR 1964 SC 538.

¹¹¹*Union Nationale des Cooperative Agricoles de Careales v Robert Catterall & Co.* (1959) Q.B. 44 has the same situation as in *Badat*. The Queen's Bench Division observed: 'The fact that the award was not directly enforceable in Denmark until a judgement of the Danish courts had been obtained did not prevent the award being a final award....'

¹¹²The observations quoted below of Prof. T.S. Rama Rao regarding the questions of domicile and personal law in India, expressed in 1955, will continue to hold good so long as Indian personal laws are not unified.

Personal law in India has been so pervasive that it had further repercussions in the field of Indian Private International Law.... In matters of status and succession, Hindus, Mohamedans and other, non-Christians have been almost completely left to their personal law, with but slight legislative interference. To add to the complications, there are schools of law among Hindus and Mohamedans themselves....

Mayne's observation that there is *lex loci* in India ... is ... born perhaps out of despair at the confusing congeries of personal laws in India, should not be understood at [its] face value; for otherwise it would amount to saying that Indian law has repudiated the fundamental norms of Private International Law. The better explanation is, to use Falconbridge's term [Falconbridge, *Conflict of Laws*, at 194], that the law of domicile (in India) comprises a 'composite system of personal law'; and not that there is no *lex domicilii* as such in India. The various systems of personal law are there because the *lex domicilii* allows them to operate; and they derive their force only from the *lex domicilii*. T.S. Rama Rao, *supra*; note 1 at 220 and 223.

accordance with principles of conflict of laws. However, for conflicts arising from inter-religious interaction, being sensitive and intricate principles of justice, equity and good conscience have been applied.

In *Virdhachalam Pillai v Chaldean Syrian Bank*,¹¹³ the Supreme Court was called upon to resolve a conflict between the Mitakshara law, pertaining to pious obligation followed in British India and that observed in Cochin and Travancore States. Claim in this case related only to the properties situated in Cochin. The court applied *lex domicilii* (law followed in British India) and not the *lex situs* (law prevalent in Cochin). The apex court's rationale explains the position of the personal law in India with stark clarity. The court observed:

Taking the Cochin state itself, the power of a person to dispose of property or to encumber it would have depended upon whether he was a Hindu or a Muslim or a Christian and in each case the right of the owner to dispose the property would depend upon his personal law as modified by any statute applicable to that community to which he belonged. There was in the matter of dispositions of the type no *lex situs* which could be applied irrespective of a personal law governing the owner. By way of example let us take the case of a testamentary power of disposition over immovable property in that state. If the owner were a Christian he might be entitled to dispose of the property to the full extent. If he were a Muslim, there would be a limitation on such a power based upon the rules of Muslim law applicable to him subject of course, to any statutory modification thereof. In the case of a Hindu, his power to dispose of by will would depend upon whether the property was self-acquired or joint and whether he was a member of a Joint Hindu Family, in the existence of co-parceners and the like. The Cochin law itself, therefore, recognised that Hindu Law was a Personal Law and that the rights of dealing with property flowed from the personal law of the owner. It is hardly necessary to cite authority for the position that Hindu Law is a personal law.¹¹⁴

In *Hardan Singh v Deputy Director of Consolidation*,¹¹⁵ the Supreme Court was confronted with two aspects of Hindu law in

¹¹³AIR 1964 SC 1425.

¹¹⁴Ibid. at 1434. See for a further analysis of this case, J. Duncan M. Derrett, 'Private International Law and Personal Law' (1965) 14 *ICLQ* at 1370.

¹¹⁵(1993) Supp 1 SCC 457.

succession matters. Choice lay between the customs of *Chondapatt* (a tribal law applicable to *Rajputs* in the villages of Meerut district) and the rules of succession known to the customary Hindu law. While the former allows wife-wise share in the property the latter permits equal share to progeny. Shortly put, the dispute is between dividing the property either into two-halves (between two wives) or into five shares (there were five sons in all). The apex court applied law of domicile, i.e. the tribal personal law in the case, without, however, identifying the law in terms of conflicts principles though the case fell within the ambit of conflict of laws.

The conflict in *Vimala Bai v Hiralal Gupta*¹¹⁶ lay between the Bombay School of Hindu Law and the Banaras School of Hindu Law as regards succession. The apex court, after an exhaustive study of the texts of Hindu Law on both the schools of thought, and the prevalent case law, observed: 'In India, a Hindu is governed by his personal branch of law, which he carries with him, wherever he goes. But the law of the province wherein he resides *prima facie*, governs him and in this sense and to this extent only, the law of Domicile is of relevance or importance.'¹¹⁷

The three cases discussed above depict inter-school conflicts. *Jorden Diengdeh v S.S Chopra*¹¹⁸ and *Sarla Mudgal*,¹¹⁹ on the other hand, illustrate interpersonal conflict of laws. In *Jorden Diengdeh* the parties belonged to Hindu and Christian religion and marriage had taken place under the Indian Christian Marriage Act, 1872. The case concerned a nullity decree which could not be passed under the existing Christian law, i.e. Indian Divorce Act, 1869. The court compared matrimonial causes available under the various personal laws in India and helplessly recommended for a uniform civil code.

In *Sarla Mudgal* the validity of a second marriage of a Hindu husband after his conversion to Islam was in issue. Interestingly, we found the apex court in a dilemma in this case. The court, though it held the second marriage 'invalid', could not boldly pronounce it as 'void', as Muslim Law allowed a second marriage.

¹¹⁶1990 (1) SCALE 49.

¹¹⁷Ibid. at 53.

¹¹⁸AIR 1985 SC 935.

¹¹⁹See *supra*, note 45.

The next best solution the court thought of was to recommend a uniform civil code. Perhaps a legal answer—the only one—that was possible in *Sarla Mudgal* as regards the validity of the second marriage was in accordance with principles of private international law concerning capacity of the parties to marry.

Concluding Remarks

The progressive development of Private International Law or Conflict of Laws in India is very slow. But the relevance of the topic is of immense importance as is seen from the various situations that the apex court has come across over a period of five decades. The scope for its development is ample but the awareness has to spread among not only the bench and bar but to the students of law as well. The subject has to receive a boost at various levels.

Some of the conflict of laws aspects have developed over the period. For example, questions of domicile, matters of family law, marriage and divorce and law of obligations, particularly contractual. However, there are certain other areas which need more attention, such as interpersonal conflict of laws, which have a large bearing on the Indian context of personal laws.

This essay has found from the judgements of the apex court important topics of conflict of laws such as: jurisdictional issues, domicile, marriage, divorce, child custody, inter-country adoptions, contracts, international arbitration, foreign judgements and interpersonal conflicts. There is ample scope for expansion.¹²⁰ Contemporary needs of the country necessitate worldwide interaction in almost every sphere of life. The earlier exhaustive study carried out in the year 1955 referred to in this work¹²¹ has laid the foundation for research on the ever-increasing case law in this area. As is well known, the entire gamut of conflict of laws grows in the natural way through judicial decisions. The legislation and the conventions have to cross many barricades before they contribute to the development of the law. The presence of a sound system of conflict of laws in a country will always infuse great confidence among the foreign inter-actors.

¹²⁰This essay is a modest attempt to identify the areas. Each area needs to be subjected to an in-depth study and analysis in the Indian context.

¹²¹T.S. Rama Rao, *supra*, note 1.