

Airo International Research Journal
Volume XIV, ISSN: 2320-3714
January, 2018
Impact Factor 0.75 to 3.19



UGC Approval Number 63012

A Multidisciplinary Indexed International Research Journal



ISSN : 2320-3714
Volume : XIV
Journal : 63012
Impact Factor : 0.75 to 3.19



ADHYAYAN
INTERNATIONAL
RESEARCH
ORGANISATION

ROLE OF JUDICIARY IN IMPLEMENTATION OF PRIVATE INTERNATIONAL LAW: A CASE STUDY OF INDIA

Karamdeep Saini

Assistant Professor, Institute of Law,
Kurukshetra University, Kurukshetra

Declaration of Author: I hereby declare that the content of this research paper has been truly made by me including the title of the research paper/research article, and no serial sequence of any sentence has been copied through internet or any other source except references or some unavoidable essential or technical terms. In case of finding any patent or copy right content of any source or other author in my paper/article, I shall always be responsible for further clarification or any legal issues. For sole right content of different author or different source, which was unintentionally or intentionally used in this research paper shall immediately be removed from this journal and I shall be accountable for any further legal issues, and there will be no responsibility of Journal in any matter. If anyone has some issue related to the content of this research paper's copied or plagiarism content he/she may contact on my above mentioned email ID.

ABSTRACT

Private international law governs the private rights of disputants, but with an international content because of foreign element in it. The foreign element connects the disputes with the legal system of a foreign country. This is either in terms of jurisdiction of the court or in terms of applicable law to settle the disputes or with both. The codification and academic research of this branch of law has received least attention in India. The Indian judiciary follows the English law to a large extent in deciding cases with a foreign connection in some of the cases, the judges expressed their concern on the high reliance on English law. In today's time, the notion of 'Vasudeva Kutumbakam' and (world is one Family) has realized owing to the increase in accessibility of new forms of travel, own border movement is not a rarity. This fact is well illustrated by the fact that about 30 million NRI reside in about 130 nations abroad. The Area of Private International Law is at infancy stage in India. Due to the lack of legislative developments in this regard, both at the international and domestic level, the sole refuge can be sought before the judiciary. Chandrachud, J, explained this aspect in *Satya v Teja Singh* 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. Some of the conflict of laws aspects has developed over the period. For example, questions of domicile, matters of family laws, marriage, divorce, law of obligations, etc. As and well known the entire gamut of conflict of laws grows in the natural way through judicial decisions. The sound system of conflict of laws in a country will always infuse great confidence among the foreign interactions.

INTRODUCTION

"It's not wisdom but Authority that makes a law".

Thomas Hobbes

All transactions between human beings are governed by laws. Each modern state has its own set of laws which govern transactions between persons residing within the territorial jurisdiction of

that particular state. However, it happens sometimes that the transactions between two person or bodies may not be confined or restricted to the territory of one particular state. Again, the two different persons or bodies may have their own laws and legal systems. Three principle questions of Private International Law :-

- (i) Choice of Jurisdiction
- (ii) Choice of Law
- (iii) Recognition and enforcement of foreign judgment

At a very basic level, international law and domestic law differ in magnitude. Domestic law governs the behavior and actions of individuals of a state (eg. - India), where as international law governs the behavior and actions of bodies of government States or countries and the private international law governs people of different states.

Characteristics of Private International Law:

- Private International law is a part of the domestic law of a state.
- Private International law is essentially a system of indicating choice.
 - Choice of Jurisdiction
 - Choice of Law
 - Rules for Recognition and enforcement of the judgement of a foreign court.

Definitions

Private International Law

Private International Law or conflict of Laws is that part of the law of a state which comes into operation wherever there is a dispute before a court which involves / contains a foreign element. The law in modern states are generally territorial in application but human transactions are not confined to the territory of one state. Therefore, wherever



UGC Approval Number 63012

there is a transaction extending over the territories of different states the need for the application of rules of private international law or conflict of laws would arise.

For example - An Indian enters into a contract to supply certain goods by a Chinese National to Japan 3 questions arises

- (i) Choice of law
- (II) Choice of Jurisdiction
- (III) Judgment of a foreign court

Private International Law should not be mistaken with Public International law; since the former is a part of the law of a state which will be invoked whenever there is a foreign element in a dispute.

Jurists have made it clear that the principles of private international laws are applied not become of comity of nations or to show country but because justice between parties requires it.

Chandrachud, J, explained this aspect in **Satya v. Teja Singh AIR 1975 SC 105** 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.

Domestic Law

Domestic Law also known as the Municipal Law, National Law or Internal Law of a sovereign state. "Domestic Law includes many levels of Law : not only national law but also state, provincial, territorial, regional, or local law."

Impact Factor 0.75 to 3.19

In India, the presence of a variety of personal laws gave size to, "interpersonal conflict of laws as well".

For example - 2 persons Domiciled in India, the personal law may differ according to their religions allegiance.

The main source of conflict of laws is decisions of courts, then - certain statutes and juristic writings have also contributed to its development.

Choice of Jurisdiction

The preliminary and basic issue before any court of law concerns its right to adjudicate the matter submitted to it. In conflict of laws i.e. case containing foreign element, the preliminary question is of Jurisdiction.

Matters before the Apex Court –

(i) **Lt. A Ct. Nachiappa Chettiar V Ct Act. Iubramania Chettiar AIR 1960 SC 307**

General Rule

The courts do not assume Jurisdiction over foreign immovable's. In the case, Immovable properties situated in Burma (now Myanmar). Division of property Indian Court has no jurisdiction in this controversy court relied on Dicey's conflict of law.

ii) **M.V. Elizabeth v. Harwan Investment and Trading, Goa AIR 1993 SC 1014**

The courts ruled that all the foreign ships entering Indian waters fall within the jurisdiction of this country.

(iii) **Rajah of Vizianagaram v. official Receiver AIR 1962 SC 500**

UGC Approval Number 63012

In this case, company incorporated outside Indian was wound up as an unregistered company in this country in terms of sec-271 (3), 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 anets within their jurisdiction and not outside its jurisdiction.

(iv) **Surinder Kaur Sandhu v. Harbax Singh Sandhu 1984 3 SCC 698**

In personal law matters (esp. family law)

Jurisdictional issues are generally based upon lex domicilii (law of the domicile). In this case, concerning child custody, the Supreme court adopted the rule 'State having the 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.

- Principle of effectiveness - a court should only pronounce judgment in a case where it can execute a decree within its own territory. (S-20, CPC, 1908 reflects this principle)
- Principle of submission - voluntary acceptance of the authority of a court to pan judgment which authority is not otherwise ponened by the court."

Domicile

Underlying the concept of domicile is the nation of permanent home. This nation is basis for the

- Law of domicile in post-independent India -
- Article 5 of the Indian constitution makes domicile a sine qua non for conferring citizenship at the commencement of 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 non of the above defines 'domicile'.

Apex court's decision which made it amply clear that there is only one domicile in India. In (i) **Pradeep Jain v. U.O.I. 1984 3 SCC 654**

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 with a single unified justicing system having the SC of India at the apex of hierarchy, which lays down the law for the entire country.

- (ii) **Central Bank of India v. Ram Narain AIR 1995 SC 36** 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. To establish domicile, there must be a present intention of permanent residence, has been affirmed in almost all SC decisions involving issues on domicile.



- (a) **Domicile of Origin** - The law confers a domicile on every person on birth. This is known as domicile of origin. The domicile of origin continues till domicile of choice is acquired. In **Sankaran Harindan v. Lakshmi Bharti AIR 1964 KER. 244** Krishnan domiciled (Kerala) India - moved to England stayed for 30 years. Expensed his intention in letters to friends and relatives to return India. On these facts the Kerala H.C. came to conclusion that he did not abandon his domicile of origin.

(b) Domicile of Choice -

Any independent person may acquire it and it is determined by law of existing domicile. S-10, Indian Succession Act, 1925, 'A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.'

Case : Mandal v. Mandal I.C.R 1956 PUN. 213

Two Austrian domiciled persons were married in Vienna in 1936. In 1939, on invasion of Austria by Nazi Germany, they fled to India. Since then they lived in India and had no intention of returning to Austria. All full bench of Punjab H.C. held that they had acquired a domicile of chaire in India.

Domicile of Dependents

Minor, Married women and mentally disordered persons (In capable of having a domicile of choice) Also known as imposed domicile as it changes with the person on whom the dependent is dependent.

- (a) **Married Women** - lawful wife - domicile of husband

By a valid marriage, the domicile of the wife becomes that of the husband, and the fact that married couple are living apart under a Separation agreement, or a husband has deserted the wife, does not render her free to choose a domicile apart from his as per case **Teja Singh v. Satya 1975 SC 105**

(b) **Minor Children** - who are below age of 18 years (India).

Natural Children -

- Legitimate child - S-7, Indian Succession Act, 1925 - Domicile of Origin of every person of legitimate birth, is in the country in which at the time of his birth his father was domiciled; or if he is posthumous child, in the country in which his father was domiciled at the time of father's death.
- Illegitimate child - S-8, Indian succession Act, 1925 - The Domicile of origin of an illegitimate child is in the country in which at the time of his birth, his mother was domiciled.
- S-14 of the Act - The Domicile of a minor follows the domicile of parent from whom he derives his domicile of origin.
- Exception - 3 exceptions when minor's domicile does not follow that of his parent -

(1) If minor is married,

(2) If minor hold any office or employment in the service of her majesty,



UGC Approval Number 63012

(3) If the minor has set up, with the consent of the parent, any distinct business.

- **Adopted children** - S-12, Hindu Adoptions and Maintenance Act, 1956, Under the Indian law adopted child is considered just like a natural born (child for all intents and purposes.
- Domicile of minor children after the death of parents - Under Indian Law, the domicile of the legitimate minor posthumous child is in the country in which his father was domiciled at the time of his death.
- Domicile of a child when parents have separated - covered under Domicile and Matrimonial Proceedings Act, 1973. The Domicile of the Child in this situation will continue to be the domicile of the father, except in these case - its mother.
 - (i) When the child is living with his mother and not father,
 - (ii) If he has acquired the domicile of mother by virtue of his having lived with her, then he will continue to have his mother's domicile, even when he leaves his mother, provided he is not living with his father, and
 - (iii) The child will have domicile of mother even after her death, if he acquired his mother's domicile by virtue of his having lived with his mother, provided no home with father.

[No point in Indian Law on this].

Impact Factor 0.75 to 3.19

- Domicile of married minor child : Married Minor female child, under, India law, acquires the domicile of her husband. [S-15, Succession Act, 1925].
- Domicile of Lunatics : S-18, Indian Succession Act, 1925, An insane person cannot acquire a new domicile in any other way than by his domicile, following the domicile of another person.'

The Act does not specify who this 'another person' is, but it seems clear that if the lunatic is a minor then it is the parent on whom he is dependent and if lunatic is a major and has a guardian, then 'guardian'.

Domicile of Corporations

The SC in **Turner Morrison and Co. v. Hungerford AIR 1972 SC 1309** was concerned with the residence of a corporation having transnational business dealings. It was held that such a corporation 'resided' in India if it involved in doing business in India and 'more generally that corporation can have multiple residences & domiciles. The Indian approach, which has juristic support, differs from the English view of corporation's domicile and residence. According to English Law, place of incorporation constitutes the domicile of corporation while the country where the central management and control is exercised becomes its residence.

Family Law

Marriage

Marriage being a personal matter, is governed by personal law of the parties. In conflict of law's, a person's capacity to marry is governed by the law

UGC Approval Number 63012

of domicile, which in the Indian context has reference to personal laws owing to their allegiance to various religions, which differ in various aspects. This has resulted in interpersonal conflict of laws, whenever there is interaction.

Case - **Narasimha Rao v. Venkatalakshmi 1991 3 SCC 451** The SC while dealing with issue concerning recognition of foreign divorce decrees in Indian observed that the jurisdiction assumed by the foreign court as well as grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married.

The opinion of the SC does not follow the rule of domicile to govern personal law matter, which is generally the situation in the U.K. Instead, it recommended that the law under which the parties married should govern divorce, irrespective of the laws (lex domicilii). There is possibility of increasing the number of limping marriages (Marriages limp because couples will be considered as married in one country while they are considered as divorced in another).

Case: **Neeraja Saraph v. Jayant Saraph 1994 6 SCC 461** In this Indian woman married NRI settled in the VSA, dispute of nullity of marriage by US court, SC observed.

- No marriage between an NRI and an Indian woman, which has taken place in India, may be nullified by a foreign court.
- Provision may be made for adequate alimony to wife in the property of husband in India and abroad;
- The decree made in / granted in Indian courts may be made executable in foreign

Impact Factor 0.75 to 3.19

courts both on the principle of comity and reciprocal agreement like u/s Y4A of CPC, 1908 which makes foreign decree executable as it would have been a decree passed by that court.

Custody of Children

Courts in the contemporary context attach more importance to welfare of children in case of their custody, particularly where the parents are divorced or separated 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 disputes.

Case : **Surinder Kaur Sandhu v. Harbax Singh Sandhu 1984 3 SCC 698** 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 an 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.

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

UGC Approval Number 63012

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.

Law of Obligations

Contracts

The parties a contract in international trade or commerce may agree in advance on the forum which its to have jurisdiction to determine disputes which may arise between them.

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, as per the case - **M/s Gobindram v. Shamji K and Co. AIR 1961 SC 1285**

Involuntary Assignment of Debt

In case - **State Bank of India v. Ghamandi Ram AIR 1969 SC 1330** The SC applied English conflict law. The court was called upon to resolve whether the liability of appellant (SBI) to the respondent (Yhamandi 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.

International Arbitration

It concerns with resolving commercial disputes which involve two or more countries. Impressive unification in this area has prevented many conflict situations.

The proper law of arbitration agreement is normally the same as the proper law of contract. The parties have freedom to choose the law governing an international commercial arbitration agreements. They may choose the substantive as well as procedural law governing the conduct of arbitration. In absence of agreement to contrary in accordance with the law of the country in which the arbitration is held.

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 English 'Doctrine of Obligation' contained in Sec. 13, CPC, 1908.

According to this doctrine, when a foreign court of competent jurisdiction by its judgment creates a right in favour of a person, it becomes obligatory on other party to comply with it.

Case: **Vishwanathan v. Abdul Wajid AIR 1963 SC 1** The law relating to conclusiveness of a foreign judgement creates substantive rights and not merely procedural.

Case: **Shaligham v. Firm Davlatram Kundanmal AIR 1967 SC 739** The SC held that the voluntary submission to a foreign court accounts to submission and does not constitute violation of principles of Natural Justice.

Conclusions

In today's time, the notion of 'Vasudeva Kutumbakam' and (world is on Family) has realised owing to the increase in accessibility of new forms of travel, own border movement is not a rarity. This



fact is well illustrated by the fact that about 30 million NRI reside in about 130 nations abroad.

The Area of Private International Law is at infancy stage in India. Due to the lack of legislative developments in this regard, both at the international and domestic level, the sole refuge can be sought before the judiciary. 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 progressive development of the 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 six 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 laws, marriage, divorce, law of obligations, etc. As and well known the entire gamut of conflict of laws grows in the natural way through judicial decisions. The sound system of conflict of laws in a country will always infuse great confidence among the foreign interactors.

"If we desire respect for the law, we must first make the law respectable".

- Laws D. Brandus

REFERENCES

1. The constitution of India, 'Bare Act with short notes [New Delhi : Universal Law Publishing Co. Pvt. Ltd, 2014.

2. Succession Act, 1925, Bare Act with short notes [New Delhi : Universal Law Publishing Co. Pvt. Ltd., 2011]
3. RAO, IS Rama, 'Private International Law in India', The Indian Year Book of International Affairs, (IYBJA), Vol. 4, (1955), p. 219.
4. NORTH, P.M. and J.J. FAWCETT, 'Cheshire and North's Private International Law' (Butterworths), 12th Edn., 1992, p. 14.
5. RAJAMANNAR, Pvt., 'The Future of Private International Law in India', IYBJA Vol. I (1952), p. 20.
6. V.K., Developments in the Field of Private International Law in India, IYBJA Vol. 2 (1953) p. 195.
7. DICEY and MORRIS, 'Conflict of Laws,' 12th Edn., [(1993) Lawrence collins sweet and Maxwell, London] vol. I, p. 5.
8. Cheshire, 'Private International Law', 8th Edn., (1970), p. 164.
9. Jabholkar, Lakshmi 'Married Women's Domicile - A Legal Framework', in Kusum, Ed. Women - March Towards Dignity (1993), Regency Publications (New Delhi), p. 63.
10. BAXI, UPENDRA, 'Conflict of Laws', ASIL vol. 8, 1972, p. 146, 149-151.
11. Diwan, Paras and Peeyushi Diwan, 'Private International Law' Deep and Deep Publications, New Delhi, 1998] 4th edn.