CONFLICT OF LAWS

Upendra Baxi*

1. INTRODUCTION

An analyst of conflict of laws in India must meekly accept the starvation diet of peripheral conflicts decisions concerning mainly the recognition and enforcement of foreign judgments. Occasionally the blandness of the diet may be relieved by the presence of a pungent spice like turmeric but the basic malnutrition remains. The sumptuous repast of true choice of law questions on which his European, and especially, American colleagues almost daily feed is denied to him.

Several factors contribute to this sad plight. The prime among them of course is the fact that the Indian legal system incorporates many of the conflict rules in its substantive law thus obscuring perception of conflicts-relevant case law. Marching with this are other features of this conflicts-in hospitable system—a unified judiciary and a nearly unified law. Nor of course high population mobility, and over industrialization, which so persist—

* B.A. (Gujarat); L.L.M. (Bombay); L.L.M. (University of California at Berkeley); Lecturer in Jurisprudence and International Law, University of Sydney.
2. Eg. Sections 11 (capacity) 23 (prorogation) 28 time-limitation stipulations) Indian contract Act, 1872; Section 5, Indian Succession Act, 1925, (embodifying lex situs and lex domicilli for succession to immovables and movables respectively); and sections 11 and 16 of the same Act concerning domicili; section 13, Civil Procedure Code, 1908, regarding enforcement of foreign judgments, whether by suit or by execution decree.
3. “Unified” judiciary here means merely the absence of dual system of courts—state and federal. The rich crop of cases on “diversity jurisdiction” arising in the United States are conspicuously absent in India. (And one may well be permitted to say this with a sigh of relief?) Codification of major aspects of substantive laws in the early part of the Century continues to inhibit acute questions of diversity of laws as well, though with seventeen separate states in the Indian Union, each constitutionally authorised to enact laws on a variety of subjects (and doing so prolifically) one may expect in the future an increase in the conflicts-situations. For already intricate questions of whether a resident of a State in India may have a state domicili, independent of Indian domicili, see Radhakapt v. State of Bombay, A.I.R. 1955 Bombay 439; D. P. Joshi v. State of Bombay, A.I.R. 1955 S.C. 334; Parnawanna v. Channawwa, A.I.R. 1966 Mys. 100,
tently enlarge the spheres of American conflicts law are to be found on the Indian scene.

And yet lack of academic involvement with such conflicts problems as have arisen so far must be singled out as the major contributing factor to the poverty of conflicts-analysis in India. Till very recently, little or no attempt has been made to introduce the Indian conflicts material in teaching, and consequently in learning, of conflict of laws in India. In most law schools, the great treatises of Dicey, Cheshire and Gravelson continue to be indiscriminately prescribed at graduate and post graduate levels without any substantial involvement, with, or at best a slight sprinkling of, existing Indian legal materials. Conflict rules thus learnt relate to socio-legal contexts which young Indian students can barely comprehend, and unlearning of the rules is very often a simultaneous process. But till now, private international law in India has

To be sure, a minority of Judges, lawyers, and scholars has maintained a distinctive interest in the subject as developed by Indian decisions though it is only now, with new developments in Indian legal education, that their labour will bear fruit. But till now, private international law in India has

4. The factors mentioned in the text provide the socio-economic contexts which while leading to increasing innovation in choice of law methodologies, also involve acute problems of social policy. See, for an emphasis on "relative social importance" of problems in choice of law, D.F. Gaver, The Choice of Law Process 12 and passim (165); A. Ehrenzweig, Private International Law 57-74 (1967). These factors generally affect development of law in other areas than conflicts. See, for example, on the slenderness of tort litigation in India, G.S. Sharma, "Horizons of Indian Legal Philosophy," 2 Jaipur L.J. 180 at 191; id., "Changing Perceptions of law in India," 7 Jaipur L.J. 1 at 8 (1967); S.M. Hassan, "Torts" in Jeeves An Annot. on Ind. L. 110 at 111-115.

5. Despite the fact that this writer had exceptionally able and inspirational teachers in private international law during his studenthood in India, he himself would be among the first to testify to the above learning-unlearning syndrome. What the writer imbibed was (in Professor Cheshire's words) a "faint fascination" for conflict of laws in general; but he missed, in the process of coming to terms with the complexities of the subject, the invaluable foothold into which could have best been secured by maximum adherence to Indian materials.


almost been reduced to a "non-subject" by the overall scholarly default, leaving judicial solutions of such problems as arise difficult for the Bench and the Bar and generally unrelated to the growth of law in India.

Much needs to be done to reverse the past, and the foregoing observations reflect regret rather than reproach. Paradoxically, the slenderness of the relevant Indian case-law, which might have contributed to the past indifference, furnishes now an impetus for a total reorientation for learning and teaching of Indian conflicts law. And the present Survey aspires to be a contribution towards that goal.

II. DOMICIL

Like almost all conflict of laws problems arising in India, problems concerning domicile are for the most part related to elaborate constitutional provisions concerning citizenship and occasionally to other statutory provisions. Consequently, in studying problems arising within these contexts, we come across a fascinating interaction between time-honoured conflict rules and rules of substantive law. In such an interaction some departures from rules and doctrines peculiar to conflicts law become inevitable, this feature assuming prominence when the latter are more settled in areas like domicile. The fact that "pure" conflict situations in this area are rare, is, if not constantly borne in mind, unfortunately likely to create an impression that Indian courts are evolving new conflict rules and to lead to pleas, however contextually justified, that they ought to do so.

The present approach rather stresses the need for contextual segregation. The provisions of Part II of the Indian Constitution prescribing rules for citizenship involve at the same time something more and something less than what is involved in the conflicts concept of domicile. But this peculiar Indian setting need not always affect "pure" conflict situations to which really conflicts rules and doctrines are directed. And Indian decisions in the latter type of situation may sometimes contribute to the common law conflicts theory and techniques. The general importance of this distinction, will, it is hoped, become clear as the two types of situations are discussed in some detail in this section.


To these must be added the pioneering section reviewing the conflicts cases in India in the Indian Yearbook of International Affairs; and now also (under the rubric "judicial decisions") a quarterly survey in the Indian Journal of International Law. The citations in this note do not of course purport to be exhaustive.

7. Pires v. Pires A.I.R. 1967 Goa 113; see on the reluctance of counsels to help the court on issues of private international law infra, note 89.
The years under review yield three noteworthy decisions on domicile. Only one decision, Rashid Hassan v. Union of India,\(^8\) raises questions about application of common-law conflict rules concerning a minor’s domicile. The plaintiff, born of Indian parents, resident of India, was deserted by his father who migrated to Pakistan. The plaintiff continued to live in India and on attaining capacity occupied an elective public office. He was arrested and detained under the Foreigners Internment Order, 1962, on the ground that he was a Pakistani national, since his domicile was “linked” to his father’s.\(^8\) Mr. Justice Tripathi ordered the release of the plaintiff under section 491 of the Criminal Procedure Code on the ground that paternal desertion was a factor grave enough to justify an exception to the general rule that a minor’s domicile follows that of his father. The learned Judge, while affirming the general rule, thus justified Cheshire’s hope that the rule will not be carried to its “logical conclusion” irrespective of the fact-situation.\(^10\)

While the question of citizenship was not pre-eminently involved in Rashid Hassan, the other two cases Mohammad Yusuf v. Union of India,\(^11\) and Mushkurul Hassan v. Union of India,\(^12\) both involved complex consider-
dations pertaining to interpretation of the provisions of Part II of the Indian Constitution prescribing rules under which citizenship could be bestowed or claimed. The crucial conflicts-relevant questions here concern the meaning of “domicile” in article 5 and that of “migration” in articles 6 and 7.\(^13\)

In Yusuf an Indian-born petitioner, while still a minor of fifteen years, decided to work from September, 1947, in East Pakistan, though his parents remained resident in India. Yusuf obtained a Pakistani passport, married and lived in Pakistan till about 1957. In 1963, his application for a certificate of Indian citizenship was refused by the Government of India and he was sought to be deported under relevant provisions of the Foreigner’s Act, 1946 and the rules made thereunder.\(^14\) The Petitioner resisted the order on the grounds that (i) at the time of commencement of the Constitution he was still an Indian citizen, his domicile being that of his parents and (ii) being a

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9. Ibid.
10. The primary rule is that the domicile of an infant automatically changes with any change that occurs in the domicile of the father . . . . This doctrine is generally laid down in absolute terms, but it is to be hoped that should the occasion arise it will not be pressed to its logical conclusion.

Cheshire, Private International Law 190-91 (6th edn., 1961). Among the examples offered by Cheshire as justifying departure from this rule are (i) desertion by the father and (ii) custody of children given to the wife in a situation involving divorces for adultery on husband’s part.

In this context, the learned Judge held as not relevant on facts the interesting decision of the same Court in Allah Bundi v. Union of India A.I.R. 1954 All, 456 where married minor girls (of the ages of twenty and sixteen years) had moved to Pakistan with their parents, though their Indian-citizen husbands continued to reside in India. Relying on Dicey, Conflict of Laws 44 (6th edn. 1949) and interestingly enough on L.J. Beale, Conflict of Laws 186 (1935) the learned Judge there held that the minor wives were incapable of effecting a change of domicile. (On this point, the decision must be taken to be overruled by State of Bihar v. Amar Singh A.I.R. 1955 S.C. 282; and see text accompanying notes 35, 36 infra). Section 15 of the Indian Succession Act, 1925, prescribing a unity of husband-wife domicile reinforced the reasoning from the above-mentioned authorities.

The Court, anticipating Shanko Devi v. Mangaladas Sain (A.I.R. 1961 S.C. 58), interpreted “migration” in articles 6 and 7 as meaning movement accompanied by intention to permanently reside in the country. The Court, however, held that this intention was absent in the present case. See also Shabbir Hassan v. State of U.P., A.I.R. 1952 All, 257; Karimun Nisa v. M. P. State Govt., A.I.R. 1953 Nag, 6.


13. Article 5, 6 and 7, of the Constitution of India.
5. At the commencement of this Constitution, every person who has his domicile in the territory of India—(a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory, of India for not less than five years immediately preceding such commencement, shall be a citizen of India.
6. Notwithstanding anything in article 5 a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this constitution if—
(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and
(b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or
(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India before the commencement of this Constitution in the form and manner prescribed by that Government.
Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.
7. Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:
Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.
minor at the relevant time he could not have "migrated" under article 7.

Mr. Chief Justice Narasimham defined the contentions as chiefly concerning the meaning of the term "migrate" under article 7. While doing so, it is important to note, that the learned Chief Justice did acknowledge that article 5 of the Constitution does enshrine the "well-settled rule of private international law" disabling certain classes of persons from independently acquiring a separate domicile. His Lordship, however, commendably refrained from accepting this rule as a "universal" or unqualified one, and expressly dissented from Mukhtar Ahmad v. State of U.P., which on a similar fact-situation applied the rule of incapacity of a minor to acquire domicile by migration to Pakistan.

At the level of constitutional interpretation, these considerations were further reinforced by the use of the non-obstante clause in article 7. So that in his Lordship's view, the conflicts rule, subject to qualifications in its own sphere, was similarly conditioned by article 7 and "cannot be blindly applied" in construing that article. Adopting the well-known test in Shanno Devi v. Mangal Sain, the learned Chief Justice held that "migration" under article 7 must be a finding of fact. In other words, if the petitioner as a matter of fact went to Pakistan with the "intention" of permanently residing there then neither the protection of dependent's domicile rule nor other factors (such as characterization of the residence as merely "provisional" as distinct from "permanent") will avail the plaintiff.

In Mashkurul the minority aspect of Yusuf was altogether absent and the main basis for declaration for Indian citizenship there sought was merely that the plaintiff and his parents were born and domiciled in India and that the plaintiff's visit to Pakistan was temporary in nature, subsequently prolonged by factors such as travel restrictions, and "coercion" on the plaintiff to obtain a Pakistani passport. Mr. Justice H.M. Beg found the long sojourn of the plaintiff in Pakistan (from 1948 to 1954) as more than merely "temporary" and was understandably impatient with the "scantiest possible" evidence that the plaintiff adduced to support his plea of an involuntary prolongation of his sojourn. Insofar as the petition involved construction of the term "migration" in articles 6 and 7 his Lordship was content to regard it as settled in view both of the majority and minority opinions in Kulathil Manm. v. State of Kerala.

Kulathil is a leading decision in this area requiring analysis in its own right but we will approach it here principally in the context of the above two decisions, and particularly in view of the use both of its minority and majority rationales by Mr. Justice Beg in Mashkurul. Kulathil involved both the elements of minority and alleged temporary residence, presenting thus for determination by the Supreme Court of India, the relation of these elements to the construction of "migration" in articles 6 and 7 of the Constitution. The appellant, son of Indian citizen-parents, migrated to Pakistan, as a minor of twelve years of age, in 1948. However, he visited India twice on a Pakistani passport in 1954 and 1956. Action was first taken against him under the Indian Passport Rules, 1950, for being without valid travel documents in India in 1964 and subsequently a deportation order was issued under the Foreigners Act, 1946.

The Supreme Court dismissed the appeal, with Mr. Justice Hidayatullah (as he then was) dissenting from the reasoning of the court. Before we analyze the differences of opinion on the construction of the term "migration", let us first note that this decision is a conclusive authority for the proposition that the general conflicts rule that a minor's domicile follows that of his father does not apply to citizenship provisions of Part II of the Indian Constitution. Both the majority and the dissenting opinion clearly lay down this proposition, though in different perspectives.

21. See Mashkurul 556.
24. Mr. Justice Wandoor (for the majority) appears to reserve his opinion on the issue of the dependents domicile rule as applicable to minors (see Kulathil 1619) in view of its approach to "migration" in article 6 and 7 as excluding domicile; but earlier in the judgment we find the characterization of an argument based on minor's inability to change his domicile as "the extreme argument." (Kulathil 1615). The fact that the majority relies on State of Bihar v. Kumar Anurag Singh, A.I.R. 1955 S.C. 282 (see text accompanying notes 34-41 infra for further analysis of this case) involving a departure from the dependents domicile rule is in itself sufficient to support the proposition in the text. Further, Mr. Justice Hidayatullah's statement that "The Constitution does not make a distinction between an adult and a minor" (Kulathil 1621) provoked no disagreement from his learned brethren. This latter statement, however, should not be read as laying down an unqualified rule.
important is the obvious corollary that this relaxation of dependent’s domicil
rule has necessarily no bearing on situations arising in contexts other than
that of Part II of the Constitution. In other words, it will be wrong to say
that the conflicts rule on a minor’s domicil stands modified in India generally.
This is the conclusion most relevant for private international law in India.

The majority in Kulathil departed from Shanno Devi v. Mangal Sain,58
which in effect holds that the term “migration” in articles 6 and 7 was used
in the Constitution in a narrower sense as not including just movement from
one country to another but as rather comprising such movement with
“the intention of residing...permanently.”59 Mr. Justice Wanchoo,
speaking for the majority in Kulathil, held that the term “migration” in
these articles had a wider (rather than above narrower) meaning as simply
moving from one country to another provided “such movement should
have been voluntary and should not have been for a specific purpose and of
for a short and limited period.”60 Mr. Justice Hidayatullah saw no justifi-
cation, in terms of majority opinion, for the departure from Shanno Devi,
to which his Lordship was a party, and persuasively canvassed the cogency
of its rationale.61 On the present facts, of course, the majority did not need
even in the context of Part II of the Constitution. So far most cases have involved “minor's
of the age group 14-20 years. But in case of a much lower age group, or an infant in arms,
a strong case can be made out for application of the dependent domicil rule even for Part II
provisions.

26. In this case, the election of Mangaldas Sain was impugned as invalid on
the ground that he was not a citizen of India. Born in 1927, of Indian parents, in territory
which after 15 August 1947 became a part of Pakistan, Sain moved in 1944, and resided
therefore, in Indian territory, barring a short sojourn in Burma. He was held by Das
Gupta, J., (for the Court) that the requirements of Article 6(1) of the Constitution were
fulfilled as both the ingredients of “migration” namely (a) physical movement and
(b) intention to reside permanently were adequately fulfilled.

Das Gupta, J., cited Australian and American decisions to show that the term
“migration” in statutes could be interpreted as having both a wider and a narrower sense.
Choo v. Martin 3 C.I.R. 649 (1905-06); United States v. Burke 99 Fed. Rep. 895 (1900);
The Administration of the White Australia Policy 67-112 (1967).
27. Kulathil 1618.
28. Shanno Devi’s (supra, note 25) rationale can be summed up in the following
propositions :
(a) “Migration” may mean either bare physical movement from one country
to another or such movement accompanied by, and manifesting, an
intention to reside permanently in the country to which one migrates.
(b) “Migration” in articles 6 and 7 means more than physical movement from
one place to another.
(c) This “more” is to be found in “intention to reside permanently” in the
place to which one migrates.

to depart from Shanno Devi reasoning.58 And though the Kulathil majority
seems to depart from Shanno Devi criteria of “migration” as to implicitly
overrule it, the formulation of the meaning of “migration” in Kulathil
remains sufficiently indeterminate, and indeed close to Shanno Devi which it purports
to reject.59

(d) This interpretation finds support in the proviso to Article 7. Article 7
in its main part provides that a person who either under Article 5 or Article
6 would have been deemed to be an Indian citizen migrates to Pakistan
after March 1, 1947, shall not be so deemed. But this rule will not apply
when a person, who has thus migrated, returns to India under a permit for
'resettlement or permanent return' (Shanno Devi 63).

(e) For these reasons, the “only explanation” of the Constitution-makers
lack of express mention of “domicil” in articles 6 and 7 can be that
they “where confident that in the scheme of this Constitution ‘migration’
could only be interpreted with the intention of residing there permanently.”
(Shanno Devi 63).

To these propositions, Mr. Justice Hidayatullah’s opinion in Kulathil may be said
to add the following:

(f) “Migration” under Kulathil majority also means more than physical
movement from one place to another; (Kulathil, 1619-20).

(g) “Just as domicile is a question of fact and intention, migration is also a
question of fact and intention” (Kulathil 1621) and the disagreement
between Kulathil and Shanno Devi is really about “what the intention
should be.” (Kulathil 1620).

The learned Judge thus speaking of “migration” seems to emphasize that while
“migration” is akin to “domicile”, the two notions are not necessarily identical in the context
of Part II of the Constitution. Insofar as they are not identical, the argument based
‘non-obstante’ clauses in articles 6 and 7 is well answered. And the Indian Courts
(including the Supreme Court) are certainly applying less rigorous standards in ascertaining
‘intention’ to change one’s abode in Part II situations than would be appropriate if
“migration” was identical with “domicile.” The case-law discussed here is sufficient to
substantiate this proposition. And see note 43, infra.

29. All the learned Judges agreed on the facts that the petitioner could not be said
to have “migrated” on their versions of the meaning of that term thus raising the question
of the propriety of the purported reversal of Shanno Devi by the Kulathil majority. Even if,
argues, Shanno Devi was wrongly decided, Kulathil hardly presented a situation for
such a reversal.

30. This writer doubts, despite headnotes in the law reports and textbook assen-
tions to the contrary, whether Shanno Devi has really been overruled by Kulathil. For the
latter to overrule the former there would have to be an explicit repudiation of propositions
(b), (c) and (d) of the Shanno Devi holding. (See supra, note 28). The Kulathil majority so
qualifies its “wider meaning of migration” as really to accept proposition (b) of Shanno
Devi rather than to repudiate it. Kulathil is altogether inadvertent, and fails to meet the
argument based on proviso to article 7 (proposition (d) supra, note 28). Cf. Seervai’s
criticism on this point, supra, note 23. While there does seem to be a rejection of the ‘inten-
tion’ test, the numerous caveats to movement from India to Pakistan (see text accompanying
supra, note 27) are flexible enough to permit importation of that test. Cf. Seervai, supra,
note 23 at 9n.)
Be that as it may, the majority opinions in Kulathil, the reasoning of the learned Justices seems to be well anchored in the seemingly formidable precedent in State of Bihar v. Amar Singh. 31 Both Mr. Justice Wanchoo, for the majority, and Mr. Justice Shah, in a separate concurring opinion, refer to this decision in support of their adoption of "a wider meaning" of migration in articles 6 and 7. 32 Strangely enough Shanno Devi herself does not advert to this decision at all; and this inadvertence is not mitigated by Mr. Justice Hidayatullah's opinion in Kulathil as he himself does not attempt to rebut on Amar Singh. It may be said that the argument based on Amar Singh presents as formidable an obstacle to Shanno Devi's rationale, as proviso to article 7 poses to Kulathil majority judgment. 33 In Amar Singh, Kumar Rani, Indian-born wife of an Indian citizen, went to Pakistan in July 1948, returning to India on a temporary permit in December 1948, and again in 1950 on a permanent residence permit. The latter permit was cancelled. The High Court of Patna on a writ petition invalidated the deportation order, inter alia, on the ground that a married woman's domicile followed that of her husband, who in this case was domiciled in India. 34

The Supreme Court held that the conflicts rule regarding married woman's domicile was qualified by article 7, which "clearly overrides Article 5." 35 Thus a wife who has migrated to Pakistan after 1 March 1947 cannot claim citizenship of India on the basis of this conflicts rule. The only way she can acquire citizenship was under proviso to article 7 which required a "resettlement or permanent return" permit. Since under the relevant rules, the Indian High Commissioner had issued the permit without prior consultation with the State in which Kumar Rani was to settle, the issue was not one of arbitrary revocation of the permit but rather one of improper issuance thereof. Accordingly, Kumar Rani was not a citizen of India. 36

Commenting upon this case, Mr. Justice Wanchoo observed in Kulathil that

32. Kulathil at 1618 and 1623 respectively.
33. Seervai, supra, note 23, persuasively points to the inadvertence to proviso to article 7 as enfeebling Kulathil reasoning. Strangely enough the learned writer himself fails to see Amar Singh as a problem.
34. See Sayeedan Khatoon v. State of Bihar A.I.R. 1951 Pat. 434 at 435. Incidentally, the observations of Shearer, J., viewing the dependent domicile rule as compatible with the status of women under Hindu and Muhammadan law and social organization, still remain relevant to situations not involving Part II of the Constitution. This aspect of the judgment is not affected by the overruling in Amar Singh; nor indeed there seem to be any policy grounds for a departure from the views expressed by Shearer, J., on this point.
35. Amar Singh 235.
37. Kulathil 1618.
38. Id. at 1623.
39. Supra, note 35.
40. Ibid.
41. Compare Amar Singh 285 with Kulathil 1623 reproduced below respectively: The following facts may be said to have been made out on the record:—
(1) Kumar Rani went to Karachi in July 1948. (2) Her story that she went there temporarily for medical treatment has been doubted by the High Court and appears to us to be unfounded. (3) When she came to India in December 1948 she did so on a temporary permit stating in her application for the permit that she was domiciled in Pakistan and accordingly representing herself to be a Pakistani national. (4) She went back to Pakistan in April, 1949, on the
ing in *Amar Singh* may thus be seen as anticipating, rather than contradicting *Shanno Devi*.

But it may be said that *Amar Singh* type argument may well prove formidable when the intention to reside in Pakistan was palpably and unequivocally absent. Not so. In fact, we believe, that *Kulathil* meaning of "migration" will defeat its own stated justification in such a situation; whereas the *Shanno Devi* criteria will yield an outcome that *Kulathil* justification intends to secure.

Assume that *A*, born in India, has moved to Pakistan on 25 October, 1947. Suppose further that *A* has done so voluntarily, that his visit is not for a specified duration or specific purpose. *A* lives in Pakistan till 26 January, 1951. Some time in 1954 he is found in India and served with deportation order as a foreigner. *A* now claims and proves that he had no intention to settle permanently in Pakistan, that he has never represented himself as Pakistani national. Nor has *A* considered necessary to avail of proviso to article 7.

On *Kulathil* reasoning the decision will be that *A* has "migrated under article 7, irrespective of the fact that the intention to make Pakistan his abode does not exist or has been proved not to exist. Under *Shanno Devi* criteria, *A* will not be said to have "migrated" at all (since in our hypothetical case we are assuming that the intention to settle in Pakistan is clearly absent) and article 5 on the basis of *A*’s birth in India will clearly govern the situation. The non-obstante clause with which article 7 begins will apply only where the determination is made that a person 'migrated' to Pakistan on 1 March, 1947.

Now, *Kulathil* majority offers "the abnormal movement of population" between the dominions of India and Pakistan as a basis for adopting a "wider" meaning of migration, as excluding domicile. The Court cites with approval, observations from its earlier decision:

43. Article 5 (supra, note 13) requires for Indian citizenship a domicile plus one of the three other conditions. A’s British Indian domicile is converted into Indian domicile on the commencement of the Indian Constitution. The fact that *A* is physically absent at the relevant time cannot in itself extinguish the domicile of origin. See, e.g., Dickey & Morris, *Conflict of Laws* 81-96. (8th ed., 1967).

Article 5 of course must be presumed to mean “domicil” in this sense, and it has been so held to mean. See, e.g., the judicial analysis of common-law principles, in *Kedar Narayan Pandey v. Narain Bikram A.I.R. 1966 S.C. 160*; *Central Bank of India Ltd. v. Ram Narain A.I.R. 1955 S.C. 36*.

So that *A*’s short absence, not accompanied by an intention to acquire a new domicile of choice, cannot deprive him of his Indian domicile, and consequently of citizenship.

Under *Shanno Devi* and *Hidayatullah test in Kulathil* "migration" in article 7 involves physical movement plus animus manendi. Migration becomes a concept akin to domicile but not the same as domicile. (See proposition (g) in note 28 supra.) Hence for article 7 to apply, there must first be a determination that *A* (in our case) has "migrated." Only if he has so migrated he can be deemed a non-citizen. As *A* is able to prove that he had no intention to settle in Pakistan, article 7 (on *Shanno Devi* criteria) will not apply to him. His claim to citizenship would then have to rest on article 5.

So slippery is the word "migration" that even an astute writer is led to equate it with just the bare fact of leaving India. Paradoxically in the course of canvassing the correctness of *Shanno Devi*, Mr. Seervai observes:

*Article 7 dealt with persons who left the territory of India after 1st March 1947, for the territory included in Pakistan. Such persons were not deemed to be citizens of India notwithstanding the fact that they had a British Indian domicile by birth, descent, or residence from March 1947 to 15 August 1947 or who by operation of law acquired an Indian domicile by reason of residence in the territory which was allotted to India.*

Seervai, supra, note 23, at 12 (emphasis added).

The statement of consequences of the operation of article 7 in the above statement is admirably precise but is unfortunately vitiated by reference to persons who "left" India on the prescribed date. Article 7 in terms does not refer to mere departure from India; it refers to migration which involves a determination of law. Mr. Seervai's manner of explaining the operation of article 7 of course comes close to *Kulathil* approach which he himself is concerned to refute.

Mr. Seervai's subsequent discussion of the proviso to article 7 is similarly marred by the loose reference to persons who "left" India. The proviso to article 7 when thus explained supports *Kulathil* rather than *Shanno Devi* interpretation. The proviso also applies to persons who have migrated under article 7, enabling them to return on obtaining requisite permit so that persons who under stress and strain of the tragic events following the partition formed an intention to live in Pakistan are allowed by the proviso to return to India if they so wish. Their decisions under traumatic conditions are thus not made irrevocable against them. *But see supra* note 47a.

It has to be remembered that in October or November 1947, men's minds were in a state of flux. The partition of India and the events that followed in its wake were unprecedented.... Minds of people... were completely unhinged and unbalanced and there was hardly any occasion to form intentions requisite for domicil in one place or another. Consequently, Kalathil majority opines that the Constitution-makers “could never have intended” to give a “narrower” meaning to migration in articles 6 and 7. Apart from the fact that such any reference to Constitution-makers, intention almost always remains problematic and inconclusive, the more important fact is that under its own criteria Kalathil majority, in the above hypothetical case, will have to come to a conclusion which it seems anxious to avoid on the basis of this justification. The fact that “men's minds were in... flux” should precisely lead under Kalathil approach to the recognition to A's claim to citizenship (because, A, having an Indian domicil of origin, moved to Pakistan on 15 October 1947). But this would hardly be possible if we were to apply the Kalathil criteria.

48. See supra, note 13 (for texts of the provisions); Kalathil (Hidayatullah opinion) supra, note 28; Seervai, supra, note 22.

49. The expression ‘migrated’ cannot have different meanings in the two articles. Kalathil 1622. Why not? See infra, note 50.

50. Both Kalathil and its precursor Amar Singh involved article 7, not article 6. Yousuf and Masikur likewise only involved the former provision. In contrast, Shanno Devi involved solely article 6. In strict law, one is entitled to regard these decisions as authorities only for the articles directly relevant to the decision, thus rendering the observations on the remaining articles mere dicta.
III. Recognition of Foreign Judgments and Notarial Acts

(a) Introduction

The decisions under this head, for the period under review, concern diverse aspects of the rules governing recognition of foreign judgments in India. The decision in A Full Bench of the Madras High Court in Sheik Ali v. Sheik Mohamed,53 is certainly the most important of the decisions of this period under survey. Sheik Ali also involved problems of the application of the Indian Limitation Act, 1908, as lex fori in the context of statutorily-enjoined reciprocity. Analysis of this aspect of the decision, however, follows in a later part of this Survey.54

In keeping with the common law conflicts tradition, Indian courts continue to regard foreign judgments as "facts", not entitled as such to recognition and enforcement. They can be enforced in a vast majority of cases by a suit in an Indian court having the appropriate jurisdiction55 and are occasionally said to confer a "cause of action."56 The "original cause of action", wherever this may exist, may often help to give jurisdiction to a particular court and indeed may be proceeded upon by a suit (where not time-barred) regardless of the foreign judgement.57 Judicial opinion reiterates the doctrine of comity as a source of the court's power to recognize and enforce foreign judgments simultaneously with a reiteration of the limitations on their power as formulated in section 13 of the Indian Civil Procedure Code, 1908.58 This latter provision, with a rather unusual exception,59 in effect embodies the general requirements about jurisdiction of and fairness in, foreign tribunals and includes some aspects of public policy enabling courts to refuse enforcement of judgments inconsistent with its norms.60

Recognition and enforcement of foreign judgments on the basis of reciprocity, however, did not find a place on the Indian statute-book till 1933. And even then, as now, the application of such statutory reciprocity is limited to a small number of countries,61 though pleas for more extensive reciprocal arrangements have not been wanting.62

(b) Reciprocity: The Procedural Aspect

Section 44 A of the Civil Procedure Code, 1908, as amended in 1952, continues to provide for the recognition and execution of money decrees of foreign reciprocating territories in India.63 This, however is accomplished

Professor Gravenes observes:

A provision of this kind conceals several difficult incidental questions, not the least of which is whether the foreign court should apply its own system of conflict of law or that of India.

58. See Rama Rao, "Private International Law in India," IV The Indian Yearbook of International Affairs 219 at 261-269 (1935).

59. Reciprocity seems to have been extended so far to Commonwealth Countries.

60. Rama Rao, "Conflict of Laws in India," Raffles Zeitschrift Fur Auslandisches und Internationales Privatrecht 259 at 276 n. (1958). The learned author is, however, mistaken in thinking that S. 44-A in terms applies only to the Commonwealth countries. This was so with S. 44-A as introduced by the amendment to the Code in 1937; but the section has since been amended in 1952, making possible a declaration of reciprocity with any country. See for the entire text of the section, note 61 infra.


44-A (1) Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it has been passed by the District Court;

(2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree had been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment;

(3) The provisions of S. 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court, executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of S. 13.

Explanation 1 : "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and 'superior courts' with reference to any such territory, means such courts as may be specifically said in the said notification.
by a statutory fiction which prescribes that the basis of such execution will be to treat the foreign money decree "as if it had been passed by the District Court" in India. The procedure prescribed by the section requires the filing of the foreign decree or judgment which is final and conclusive and a certificate of satisfaction, if any, of the decretal amount. It must be noted here that the section, however, subjects the execution of such foreign judgment to all the defences available under section 13 of the Code.

The principal issue concerning section 44-A of the Code centres on the scope of this statutory fiction. If the fiction is interpreted as providing a procedural device to facilitate execution of money decrees, then it will not extend in its application to issues such as time-limitations on the suit. On this view, section 44-A does no more than deal with the manner of execution of a foreign judgment. The District Court is to proceed with the execution as if the foreign judgment were its own.

The other interpretation would widen the ambit of this fiction beyond jurisdictional and procedural aspects. Under this view, the District Court would literally and logically regard the foreign judgment as its own, entailing the consequence that the period of limitation for enforcement of its own, or other domestic, judgments will equally apply to a foreign judgment. The assimilation of a foreign and a domestic judgment is thus complete for all practical purposes. In other words, section 44-A will form a complete code in itself.

This latter approach was adopted in Uthanram v. K.M.A. Kasim Co.

On 16 August 1958 the judgment-creditor filed a suit in the West Tanjore District Court for the attachment of immovable properties of one of the judgment-creditors for non-satisfaction of a Singapore High Court judgment.

Explanation 2: "decree" with reference to a superior court means any decree or judgment of such court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

62. On the issue whether filing of non-satisfaction certificate along with a foreign judgment is a condition precedent for execution the Sheik Ali Court held:

Sub-section (2) of that Section (44-A) does not pertain to jurisdiction, but is in our view procedural; it contains besides a rule of evidence as to the conclusiveness of the certificate in the specified respect.

Sheik Ali 53. Thus the view that "if such a certificate is not filed, the process of direct execution of the foreign judgment will not be available to the decree-holder" adopted in Uthanram v. K.M.A. Kasim Co. A.I.R. 1964 Mad. 221 was overruled.

63. See supra, note 61, sub-section (3) to S. 44-A. Also see supra, note 56.

64. A.I.R. 1964 Mad. 221 (hereafter called Uthanram).

dated 2 October, 1953, followed by a supplementary judgment of 25 May, 1954.

On the issue relevant here, Mr. Chief Justice Ramachandra Iyer held that since the judgment of the Singapore High Court must be deemed to have been passed by the District Court of West Tanjore on the above mentioned dates in 1954 the time limitations affecting the execution of the decrees of that Court must also apply to the foreign judgments. Article 182 of the Indian Limitation Act which prescribes a three-year limit for the execution of the decrees of a District Court would therefore apply with the same effect to the Singapore judgments.

This determination was reached by the learned Judge on the view that section 44-A "embodies and is... exhaustive of the law in regard to the direct enforcement of judgments," and the aim of the fiction was "execution and not merely the manner of execution" of foreign judgments of the superior courts in reciprocating territories.

In Sheik Ali v. Sheik Mohamed, the Madras High Court departed from the Uthanram approach to section 44-A. Sheik Ali involved this issue in a similar fact-situation and the lower court held the execution proceedings to be time-barred on the rationale of Uthanram. Mr Justice Veeraravani (speaking for the Court) in Sheik Ali agreed that section 44-A of the Code provides "compendiously but exhaustively" both for the "executability of a foreign judgment in a reciprocating territory" as also for "the procedure to be followed in execution." The learned Judge further accepted the view...
that for determining the scope of a statutory fiction “it is first necessary to find out the purpose for which it was created.”

But the Sheik Ali Court sought the purpose of section 44-A of the Code by reference to the structure of Part II of that Code (of which the section forms a part) whereas the Uthamram Court narrowly focussed on the section. In this perspective, Mr. Justice Veeraswami had little difficulty in showing that the scope of the statutory fiction extends no further than specifying a forum in India for the execution of foreign money decrees of the superior courts of reciprocating territories and to “attract...the manner or procedure” applicable to the forum.

Most immediately relevant to the present conflicts-centred analysis is the Court’s stress on the fact that if the Uthamram approach to the ambit of this fiction prevailed it would lead to “surprising results and anomalies.” The salient among these will, of course, be the consequence that the Indian time-limitation will apply to the foreign decree or judgment not merely before the filing of it with an Indian Court for execution but “even before the reciprocity was established.” For in the present case, as in Uthamram, the decree preceded the establishment of reciprocal arrangements for execution. This anomaly is scarcely rendered innocuous by the argument that the District Court should be deemed to have passed the foreign decree on the date of the declaration of reciprocity rather than from the date on which the judgment was actually delivered by the superior court of a reciprocating territory.

The Sheik Ali Court, rightly, was unable to find any justification for this type of interpretation in the legislative history of section 44-A or in its

71. Id. 50.
73. Sheik Ali 51.
74. Ibid.
75. Ibid.
76. In Uthamram the Singapore judgment was delivered on October, 1953 followed by a supplementary judgment on 25 May 1954 whereas the Government of India issued a notification extending S. 44-A to that Court on 1 September, 1955. Although there was some uncertainty in Sheik Ali about which of the judgment should be regarded as final the decrees of the Supreme Court of Federation of Malaya presented for execution bore the dates 31 July 1954 and 7 December 1954. Reciprocity, however, was established first by the Malaya Government on 13 September 1955 followed by the Indian Government notification on 3 January 1956. Problems will certainly arise when there is a greater time-lag in the declarations of reciprocity by the two governments. In Sheik Ali the time-lag was about five months. Of course, such declarations can be made retrospectively thus obviating the hard problems of fixing a point in time for the commencement of reciprocal arrangements. Even so, it does further strain the language of S. 44-A to extend the fiction to include a specific alternate reference to declarations of reciprocity.
77. Sheik Ali 47-49 (a very useful account).

language. It does, however, appear to the present writer that in rightly refusing to accept the Uthamram-generated anomaly, Sheik Ali has highlighted another. This is that the Civil Procedure Code in itself continues to permit the filing of foreign decrees for execution under section 44-A regardless of any time limit.

Under the Sheik Ali decision on the limitation issue (examined later on in this article) article 181, of the Limitation Act is applicable to foreign judgments, under section 44-A of the Code, only from the time of filing the foreign judgment with an Indian Court. The three year time limitation on such execution. Therefore commences from the date of the institution of the execution proceeding. It may be said, with considerable justification, that such a total lack of time limitation unduly favours the judgment-creditor at the expense of the judgment-debtor. It is quite conceivable that in some situations this preference may result in injustice to the judgment-debtor. At any rate such a policy represents one extreme point in a spectrum whose other end embodies the rule of thumb in Uthamram.

Perhaps, this is a situation that can best be remedied by legislative rather than judicial efforts. In fact, both Mr. Justice Veeraswami and Mr. Chief Justice Ramachandra Iyer drew attention to the British Foreign Judgment (Reciprocal Enforcement) Act, 1933, which provides a six-year time limit for registration of judgments. Although their Lordships did not commend legislative reform, both decisions indicate judicial difficulties in working with the present section 44-A in this regard. It may seem desirable to adopt the six-year limitation period operative under the 1908 Act, on suits upon foreign judgments, for execution of money decrees of superior courts of reciprocating territories.

Another reason that the Sheik Ali court offered for restricting the scope of section 44-A was that a wider interpretation of it will have the effect of including the law of limitation in the Civil Procedure Code. The former was, however, specifically and elaborately provided for in the Indian

79. Id. at 50-51.
80. VI infra of this paper.
81. Article 181, the Indian Limitation Act, 1908, prescribes a three-year time-limit from the time that the right to apply for execution accrues. Sheik Ali 54.
82. Sheik Ali 47; Uthamram 223. But see VI infra.
84. See Article 117 of the Limitation Act. But the 1963 Act provides a period of three years. See the analysis in Part VI of this paper infra. Article 183 provides for a twelve-year limit for enforcing a judgment of any Court established by Royal Charter. On this see the masterly historical analysis in Uthamram 224-225, which the Sheik Ali (at 54) Court adopted with approval.
decree would be contrary to section 1102 (6) of the Portuguese Civil Procedure, continued in force after the liberation of Goa, prescribing judicial confirmation of a foreign judgment in "conflict with the principles of Portuguese public order." The learned Judge held that the argument on behalf of the petitioner that the permissive decree of 1910, expressly abrogated by that of 1946, was reinstated by the Indian take-over of Goa, without any legislative enactment, lacked "even the merit of plausibility." 

In his concurring opinion, Alvaro Dias, A.C.J., invoked article 8 of the second Hague Convention on Nationality 1902, prescribing in case of divergent nationalities of spouses the "last common law" as their national law. Since the petitioner husband had now acquired British citizenship, the wife still remaining an Indian national, the learned judge proceeded to apply the Goanese law of indissolubility of marriage as the relevant law.

(d) Recognition of Foreign Notarial Acts

A somewhat unusual situation was presented in In Re K.K. Ray (Private) Ltd., when the office of the High Court of Calcutta was unable to find any rule or precedent under which a petition for winding up of an American Company verified by affidavits sworn before a New York Notary Public could be presented to the Court. All the relevant rules of the Court, concerning admission of affidavits, oaths and affirmations—the Code of Civil Procedure 1908, The Indian Evidence Act 1872, and The Indian Oaths

90. Supra, note 87 at 115.
91. Ibid.
92. Ibid. The 1946 decree was thus the law relevant to the disposal of the case. The extent to which the learned Judge was able to marshal the relevant conflicts material "unaided by the counsels" is shown not merely by his references to Cheshire and by the illuminating parallel he was able to draw between section 1102(6) of the Portuguese Civil Code and its Indian counterpart but also by his healthy astonishment that there should be "limping marriages" valid in one state but not so in another. His Lordship hoped that the "Utopia" of a uniform conflicts law on marriage may soon be "within human grasp." See Supra, note 87 at 117.
93. See Supra, note 87 at 117 for the text of the article.
94. Ibid. The learned Judge invoked the Hague "last common law" rule to counter the argument that the petitioner-husband had since acquire British "nationality," and this change in nationality will entail application of English law on the basis of article 27 of the Portuguese Civil Code prescribing that "the state and the civil capacity of a foreigner is governed by the law of his country." This raises a fine point of law, neither raised in this case, nor one which can be pursued further here, as to whether Portuguese ratifications to such conventions continue to be binding on the Indian citizens in Goa.
96. See Rule 16, chapter 15, Original Side Rules of the Calcutta High Court; quoted supra, note 95 at 636.
98. S. 82, The Indian Evidence Act, 1872; quoted supra, note 95 at 637.
Act, 1873—9 in terms referred to England and Ireland and were correctly described by Mr. Justice P.B. Mukherji as unhelpful "relics of the past." 109 The precedents also concerned the validity of notarial acts performed in India and were thus irrelevant to the instant situation. 110 The decision to admit the New York affidavits before the Court is noteworthy for its complex rationale, based on an admirable sensitivity to conflict of laws considerations and the functional aspects of the general problem.

The decision must be read in detail for its discussion of the history and function of the institution of the notary public, 108 for its deft use of English precedents, 109 for the exercise of the Court's power to act under its residuary rules 104 and of the provisions of the Diplomatic and Consular Officer (Oaths and Fees) Act, 1948, under which the Consulate General of India in New York had certified the affidavits in question. 109 More important for the present analysis is the prefatory assertion:

"The Comity of Nations, lex loci relating to procedure and existence of foreign law proved and established, demand that such affidavits should be recognized by the Indian Courts. To deny recognition in such circumstances is to deny foreign litigants . . . justice in Indian Courts." 110

The learned Judge further ascertained the prevailing reciprocity of mutual recognition of notarial acts, at least at the commercial level, between India and the U.S.A. and no doubt was impressed with the fact that the American courts also extended in a significant measure recognition to Indian notarial acts. 107 He concluded his judgment with an express request to the Government of India to declare by notification under section 14 of the Notaries Act, 1952, recognizing the prevalent reciprocity in this matter between the two countries. 108 It is much to be hoped that the Government will follow.

109. Article 4 S. 1, of the Constitution of the U.S.A.

Full Faith and Credit shall be given in each State to the public acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the effect thereof.

The already vast literature on this Clause is growing with the case-law. See, the analysis in, with materials there cited, A. Ehrenzweig, A Treatise on Conflict of Laws : 164-234 (1962); A. Ehrenzweig and D.W. Louisell, Jurisdiction in a Nutshell 96-99 (2nd ed., 1968)


111. Article 251, the Constitution of India:

(1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by the law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

See for an excellent summary of the Indian experience thus far, Seervai, Constitutional Law of India, 100-04 (1967).

112. See Rama Rao, "Private International Law in India," IV The Indian Yearbook of International Affairs 229-34 (1955); Seervai, supra, note 111, Seervai observes:

If, for example, the Workmen's Compensation Act, or laws relating to marriage and divorce, or local amendments to Union laws on the subjects in the Concurrent List produce such conflicts as have arisen in the United States, it is reasonable to believe that Parliament would put an end to such conflict by appropriate all-India legislation.

Id. at 103. It is conceivable, however, with the presently emergent multi-party political system, that the Union may for several reasons hesitate to impose legislative...
which have so far attracted the operation of the Clause—such as the fate of judicial decrees of the now assimilated Native States not previously forming a part of British India and of the transitional Part B states between 26 January 1950 and 31 June 1951—are now receding into history. The history or the recognition of the judicial acts of the Native States in the British Indian courts and their subsequent though limited, encounter with Indian courts remains and deserves to be examined in the conflicts perspectives, though this task clearly lies outside the scope of the present essay.

**Pannalal v. Narhari**, the only case in the two years under survey to raise a consideration of the Indian Full Faith and Credit Clause, like most early cases under it, deals with yet another type of transitional situation and is not of momentous importance. In this case, R.S. Bindra A.C.J. held inapplicable to a Bombay *ex parte* decree sections 50 and 1100 of the Portuguese Civil Procedure Code requiring in effect examination and confirmation by the Court of the Judicial Commissioner at Goa (a successor Court to the Tribunal do Relaco) of a “foreign” judgment prior to its execution in the territory. The learned Judge found these provisions to be inconsistent with article 261(3) of the Indian Constitution and negatived the contention that the decree of the Bombay High Court must be deemed to be a “foreign decree” in view of the fact that it was passed on 21 June 1960 before the Indian annexation of Goa:

> It is not the burden of clause (3) that the territory in which the decree passed after 26th January 1950 by an Indian Court is sought to be executed should also have been a part of the Indian territory on the date the decree was made.

For the present purpose it is sufficient to note that the requirement of judicial examination and confirmation will, under the Portuguese law still in force in Goa, continue to apply to foreign judgments, though the Indian courts will not be deemed foreign courts even in respect of judicial acts antedating the annexation of Goa. Both *Pires v. Pires* and the present decision show the continued vitality of the Portuguese law under the present administration of the annexed territories.

Uniformly, thus reviving the Full Faith and credit Clause. And of course cases might arise out of differences in State laws before the uniform legislation is enacted, see, e.g., *Kanaiabai v. Devram* A.I.R. 1955 Bom 300; *Rama Rao, loc. cit.

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**IV. JURISDICTION**

**a) Submission to Jurisdiction**

*Shalig Ram v. Firm Daulatram Kundannal,* is a decision noteworthy only for the reiteration by the highest Court in India of some familiar constituents of submission to jurisdiction. In a fact-situation involving resistance on the part of the appellants (of the former State of Hyderabad) to an *ex parte* Bombay decree made after the appellant’s application for leave to defend the suit in Bombay, Mr. Justice Kapoor held:

A person who appears in obedience to the process of a foreign Court and applies for leave to defend the suit without objecting to the jurisdiction of the Court when he is not compellable by law to do so must be held to have voluntarily submitted to the jurisdiction of such Court.

On the other hand, *Bharat Nidhi v. Megh Raj,* presented a situation where a Pakistani Court passed an *ex parte* decree against an Indian defendant, who was amenable neither by presence nor by submission to the foreign Court. The Court, following the well-known principles of private international law, pronounced the Pakistani decree an “absolute nullity”, though it did not find it necessary on the facts of the present case to arrive at any determination about transient jurisdiction.

**b) Corporations: The “Doing Business” Test**

In recent times, most questions concerning jurisdiction of the Indian Courts have arisen in the context of domestic corporations, and even then they have been confined only to governmental corporations. Both for the...
purposes of the writ jurisdiction of the Supreme Court and the High Courts, and for routine civil jurisdiction, the "head office" theory of the situs of corporation has mostly pointed to New Delhi courts, which is where the principal corporation offices are situated. After some initial hesitation, this theory has been rejected as unworkable for rather self-evident reasons. And to overcome the textual deficiencies giving rise to this initial hesitation a constitutional amendment now specifically prescribes that the judicial power under article 226 can be exercised when a cause of action arises, either wholly or in part, within the territorial jurisdiction of the High Court notwithstanding that the seat of such Government or authority or residence of such person" is not within such jurisdiction. For the present purposes, this clearly means that a governmental corporation or agency can be sued in the Indian Courts if the forum subsidiaries carried on business activities within the territorial jurisdiction. The overall drive of this amendment, as of certain judicial pronouncements, no doubt tends to offer a strong analogy for abandonment of the "head office" theory for non-governmental corporations, both foreign and domestic, whose forum subsidiaries engage in business within the territorial jurisdiction of forum courts.  

But even independently of this analogy the conflictual criterion of "doing business" especially by corporations registered abroad were laid down as early as 1937 when in Guardian Assurance Co. Ltd. v. Shiva Mangal Singh, the Allahabad High Court rejected the alternate criterion that a corporation can carry on business only where its principal business is be transacted by the directors. Needless to say, such "registered office" criterion cannot, with reason or justice, adopted in a situation where a forum subsidiary is actually engaged in business activities within the territorial jurisdiction of the Court. And the assumption of jurisdiction by Indian courts over forum subsidiaries of overseas corporations is further reinforced by the provisions of Indian Companies Acts which seek to regulate such enterprises in various ways on the clear basis of their business activities in India.

The above precedent was the mainstay of judicial reasoning in Babulall Choukhani v. Caltex (India) Ltd. The jurisdiction of the Calcutta High Court, under Clause 12 of the Letters Patent was contested on the ground that the "head office" of Caltex was in Bombay, making Calcutta an inappropriate forum, despite the fact that the Calcutta office of Caltex was at 216-17. The Court here relied on the well-known British decisions: Le Compagnie General Transatlantique v. Thomas Law and Co. (1899) A.C. 431; Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft Daddel & Co. (1902) I. B.C. 342; Saccharin Corporation Ltd. v. Chemische Fabrik von Fleyden (1911) K.B. 516. And see the recent analysis in Dickey—Morris, supra note 120, at 174-177, 178.

In Shiva Mangal Singh, supra, note 129, among other relevant facts—such as payment of licence tax to the Calcutta Municipal Corporation, display of registered capital, and maintenance of separate account books for Calcutta office—what seems to have weighed most with the Court is the fact that the authorized agents of the assurance company operated in Calcutta on its behalf. In Babulal a similar cluster of facts is further rendered even more determinative of the issue of jurisdiction by the additional fact of Caltex having a "district office" in the city. See infra, note 136.

See, for provisions of the Indian Companies Act, 1913, then relevant, supra, note 129 at 216. Also see Part XI (S. 559-608) ("Companies Incorporated Outside India") of the Companies Act, 1956. Cf. Babulall Case infra, note 133 at 209, 211.

Clause 12 of the Letters Patent provides that the Court in exercise of its original civil jurisdiction shall be empowered to "receive, try and determine suits of every description" if the Court has personal jurisdiction over the defendant or if it happens to be the situs Court in cases involving land or other immovable property. Further, the Court will have jurisdiction in "all other cases" if the cause of action "shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the original jurisdiction of the...High Court." See, for further analysis, Baxi, supra, note 54 at 152-153.

Since the present proceedings were under the original civil jurisdiction of the High Court, S. 20 of the Code of Civil Procedure did not apply to them in view of S. 120 of the Code—See Babulall at 209. (For the text of S. 20 of the Code see infra, note 140). There is a suggestion in Babulall that if the leave of the Court was obtained ("It was the first thing to have been obtained before the institution of the suit") Id. at 217) the question of jurisdiction would have been solved by the discretionary grant of leave, on the basis that a part of the cause of action had arisen within the Court's jurisdiction. Cf. Peoples Insurance Co. Ltd v. Bijoy Bhushan Bhowmik A.I.R. 1943 Cal. 199; Babulall, 212.


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124. Supra, note 121 at 24.

125. See Constitution of India, Articles 32 and 226.


129. A.I.R. 1937 All. 208.
acknowledged to be a “district office” of the Corporation. In a lengthy judgment notable for its liveliness, though (with respect) scarcely for conciseness, Mr. Justice B. Mukherji so felt the compulsion of the facts as to observe that “you cannot but hold that Caltex do carry on business in both places Bombay and Calcutta.” Accepting the fact that “the general supervision of the head office at Bombay is no doubt there, as it must necessarily be,” the learned Judge however stressed that this would not exclude the forum subsidiary also from doing business. Rhetorically, his Lordship queried, “what does it (district office) do here then, if not business?”

Although section 20 of the Code of Civil Procedure was not attracted in the present case, it must here be noted that it creates a statutory fiction by providing that for the purpose of jurisdiction within a court’s “local limits” a “Corporation shall be deemed to carry on business at its sole or principal office in India.” The severity of this fiction is somewhat

135. Babulall, 209. Incidentally, the Court did not regard the somewhat inaccurate description of the defendant in the plaint as a corporation “registered under the Indian Companies Act” (Caltex being registered in the Bahamas) as fatal to the assumption of jurisdiction by the Court.

136. The facts simply were: Caltex maintained at all relevant times an office in Calcutta; with stationary bearing all the insignia of Caltex, including advertisement of their products. For many variations on this theme, see Babulall, 209, 210, 211, 212.

137. Babulall, 209.

138. Ibid.

139. See supra, note 134.

140. § 20, The Code of Civil Procedure: “Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction:—
(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
(c) the cause of action, wholly or in part arises.”

Explanation I: Where a person has a dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II: A Corporation shall be deemed to carry on business at its sole or principal office in India, or, in respect of any cause of action arising at any place where it has also a subordinate office at such place.”

limited by the fact that it permits suit on a “subordinate office” of a corporation if the cause of action arises at the situs of such office. The latter qualification on the scope of the fiction becomes operative, however, only when the accrual of the cause of action coincides with the presence of a “subordinate office.”

We must add to this caveat a further one: When a corporation cannot be said to have such an office within jurisdictional limits of a court, the only recourse available to an aggrieved plaintiff will be to institute a suit at the place of the principal or sole office of the corporation.

To this extent then, the law does defer to what has been awkwardly characterized as the “head office” theory. In practice, however, the operation of many other conflict and procedural rules may tend to, and do, qualify the apparent rigour of this theory as embodied in section 20.

Furthermore, the efficient functioning of modern corporate enterprise very often entails the creation and maintenance of subsidiary offices at important centres of business and industry. Finally, of course, a liberal interpretation of the term “subordinate office” can go a long way to further limit the scope of the section.

(e) The “Creditor Residence Rule” and Jurisdiction

Ever since Chief Justice Sir Lawrence Jenkins ruled in 1905 in a Bombay case that section 49 of the Indian Contract, 1872, governs the
place of performance of contracts, displacing the common law rule that a "debtor must seek out the creditor." Courts in India have been deeply divided on the applicability of this latter rule in Indian conditions. And this division of opinion has scarcely been breached by the two intervening Privy Council judgments affirming the applicability of the disputed rule in certain situations. Thus, while in 1956 the Bombay High Court applauded the rule as "reasonable" and consistent with justice and equity, the Full Bench of the Punjab High Court in 1960 is found questioning this very justification of the rule in the light of Indian law and life, and further in a mood of extreme, but understandable, skepticism even exposing to doubt the very existence of this rule of the common law. The existing cleavage of judicial opinion seems all the more surprising when we are reminded that the common law rule "is rendered practically obsolete by the methods of modern business." 183

In Shobasigh v. S. I. Foundry, 184 the question of the applicability of the "debtor seek creditor" rule (hereinafter called briefly the "creditor residence rule") arose once again and was answered by Mr. Justice Bakshi of the Gujarat High Court in terms of the "binding" Bombay precedent favouring the application of the rule in India. 186 Shobasigh involved a not untypical situation where the question was whether the court of creditor residence (Bhavnagar Court) had jurisdiction to try a suit for recovery of money under a contract not adequately fulfilled. The defendant-appellees were in Bombay and the assumption of jurisdiction by Bhavnagar court was upheld by the High Court on the basis of the creditor residence rule. 187 An adequate appraisal of this decision requires a full admittance of conflicting lines of decisions, and more importantly, conflicting justifications offered for or against the adoption of the rule in India.

The leading Punjab decision Firm Hira Lal v. Bajji Nath 188 involved an Amritsar creditor seeking repayment of debt for supply of goods in an Amritsar Court against a debtor resident in the State of Assam. The usual objections on behalf of the debtor were that no cause of action had arisen within the local limits of jurisdiction of Amritsar Court since no express or implied promise was made to pay in Amritsar and since the defendant was non-resident there. 189 The principal issue before the Full Bench was whether the creditor residence rule operated so as to bestow jurisdiction on the Amritsar Court.

The decision of the Punjab High Court is interesting for the complex rationale it offers for the inapplicability, in Indian conditions, of the creditor residence rule. In what follows we shall examine the salient aspects of the reasoning with reference to the opposed line of decisions of the Bombay High Court, currently culminating in Shobasigh. It is worth noting at the outset that at least one Judge, Mr. Justice Daulat, was not entirely satisfied as to the existence of this rule in common law itself to the extent of calling it "an imaginary rule" 190 and of examining its application in Indian law on post-constitutional, rather than legally existing, basis. 181 Neither Mr. Justice Bishan Narain nor Mr. Justice Dua, however, was persuaded (in the separate concurring opinions) to adopt so extreme an attitude. 182

187. The goods supplied after "inordinate delay" were found defective and the consignment was refused by the plaintiff. Shobasigh 277 and see also text accompanying note 200. infra.
188. Shobasigh 279; but see text accompanying note 200. infra.
190. Bajji Nath 450-51.
191. The learned Judge was acquiescing at this stage to the contention by appellants in the context of section 49 of the Indian Contract Act, 1872. Bajji Nath 451. Also see infra, note 202.
192. His Lordship considered it "presumptuous" to proceed to consider such a rule as being a part of English law in view of the lack of "accurate information," and therefore addressed his mind to the question whether such a rule "holds good under our law" irrespective of its origin and operation elsewhere. Bajji Nath 450 see also supra, note 152.
193. Bajji Nath at 453, 454, respectively.
The first important cluster of arguments for the rejection of the rule centre on its incompatibility with Indian law. Mr. Justice Dulat argued that the rule was inconsistent with the jurisdiction conferring provisions of the Civil Procedure Code as well as with the place of performance provision of the Indian Contract Act. The former make the jurisdiction of the Indian Courts contingent upon the accrual of a cause of action within their territorial limits and situations involving the invocation of the creditor residence rule *ex hypothesi* entail absence of a cause of action in the sense of a contractual obligation to pay the creditor at a particular place. The provisions of the Indian Contract Act likewise do not embody the creditor residence rule. Moreover, the specific rule in section 49 of the Contract Act merely laid down "the duty of the promisor to apply to the promisee to appoint a reasonable place for performance of the promise" when no contractual designation of such a place is made in the first place.

In a similar vein, Mr. Justice Bishan Narain reasoned that if the creditor residence rule was to be regarded as an implied term of contract (which His Lordship thought not to be the case), the creditor will become entitled "in all cases" to proceed against the debtor at his place of residence or business. Such a position will be "contrary to the provisions of section 20 of the Code of Civil Procedure and to the policy underlying it." Moreover,

this conclusion will negate the possibility of proof of an implied agreement fixing a place of payment elsewhere as the incorporation of this rule in the agreement between the parties amounts to an express agreement which would necessarily exclude the existence of an implied agreement.

The force of the above mentioned set of arguments has already made

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163. For the text of S. 20, Civil Procedure Code, see supra, note 140; see also Baj Nath at 451, 452, and 454 (per Bishan Narain, J.). *Contra Shobhajit* at 230. In our analysis despite this categorical formulation the source of the Court's jurisdiction lies elsewhere. See infra note 200 and the text accompanying it.

164. See supra, note 246 for the text of the section.

165. See the lucid statement on this aspect in Baj Nath at 451.

166. Baj Nath at 452. The view implicit here is that section 49 merely stipulates the mode of performance and is as such jurisdictionally irrelevant. Section 49 is accordingly "of no assistance" on the jurisdiction issue. See infra, note 202.

167. Baj Nath at 453. A rule "variously described as "ordinary rule," "general rule," or a "common law rule," could not create such a fictional intention. Such creation lies within the province of a statute alone. See text accompanying infra, notes 175, 195.

168. Baj Nath at 453.


doubtful the wisdom of adopting the creditor residence rule. Mr. Justice Dulat was, however, further moved to consider the more general rationale offered by the Bombay High Court that the rule was worthy of adoption in certain situations because of its conformity with reason, justice and equality. His Lordship's response was quite candid:

It is, however, clear that it would be possible to find several rules of English Law, and for that matter rules of other foreign laws, just as good and just as much in conformity with justice as the rule now in question but I do not see how that would entitle the Courts to import into our laws all such rules.

Mr. Justice Dua, was more specific in his response to this type of argument. His Lordship found the common law rule inapplicable in India in view of "the conditions prevailing in this Republic" and especially its "territorial vastness." His Lordship continued:

In a small country like England the Courts there may have considered it just and convenient that in absence of an agreement, a debtor should, as a general rule, seek out his creditor, if within the realm in order to make the payment of the debt to him, but in a big country like ours, to impose such an obligation on a debtor may, not infrequently operate as an unjust, inconvenient and inequitable rule; particularly when by applying this rule jurisdiction is sought to be conferred on a Court within the local limits of whose jurisdiction the creditor-plaintiff happens to reside at the time of the institution of the suit.

The "territorial vastness," argument against the rule as expounded by Mr. Justice Dua seems also to embrace the judicial policy to prevent or at least inhibit forum-shopping on the part of the creditor.

Mr. Justice Bishan Narain stressed yet another aspect of impropriety of the proposed infusion of the rule in Indian law. The operation of rule, in His Lordship's analysis, will introduce by fiction an "implied term" as to place of payment where the creditor resides.

Such an introduction of a term in the agreement of parties by fiction of law . . . can be done only by statute and not by application of a rule which has been described as an ordinary or general rule.

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172. Baj Nath at 452-453.

173. *Id.* at 454.


175. Baj Nath at 453.
Neither the Indian Evidence Act nor the Indian Contract Act, however, created such a fiction.\textsuperscript{176}

The cluster of arguments based on the propriety of adopting the common law rule does not appear to have been so specifically canvassed as in most Indian decisions.\textsuperscript{177} In Shobhasingh the Court declined to arrive at the decision of Baij Nath arguments by undue obedience not all reasonable rules consistent with justice and equity can be imported to Indian law from other legal systems is prima facie attractive\textsuperscript{179} but the incompatibilities with Indian law. This view then will shortly be ushered in by the "territorial vastness" of India, as canvassed by Mr. Justice Dula's view that the Dua, stands reinforced by the Australian experience,\textsuperscript{180} where the adoption of the rule is also as qualified as Baij Nath Court would like it to be for India.\textsuperscript{181} This line of thinking of course directs mind to the wider problem of the case, the Indian and the Australian qualifications on the rule can be explained addition, as noted before, Mr. Justice Dua's argument also points to the this again can perhaps be countered by a restrictive interpretation of the meaning of terms such as "residence" or "place of business" of the creditor.

\textsuperscript{176} Baij Nath at 453.

\textsuperscript{177} See supra, note 148.

\textsuperscript{178} Decisions favouring the adoption of the rule have mainly focussed on its non-exclusion by section 49 of the Contract Act and the general stress on the reasonableness of the rule.

\textsuperscript{179} Decisions of the Bombay High Court are binding on its Gujarai counterpart if delivered prior to May 1, 1960, the State of Gujarat having been carved out of the State Gujarai Court ought to have recognized, even when considering the Bombay precedents as binding.

\textsuperscript{179} Of course even a nation so eager to benefit from the experience of other legal systems as India must in fact recognize the wisdom of restraints on legislative and judicial eclecticism. Thus far the caution is salutary. But the attraction of common law rules must not be identified as merely of this origin. Historical continuities of an Inherited legal system may demand discerning adoption and even importation of certain rules of the common law, but these, however, must be based on adequate and accurate knowledge of such rules and an equally adequate appreciation of their impact on Indian law and life.

\textsuperscript{180} F. Pollock and D. Mulla Indian Contract and Specific Relief Acts 324 (8th edn. 1957) (emphasis added).

\textsuperscript{181} See, e.g., Stone & Simpson, 1 Law and Society at 319-338 (1948).

\textsuperscript{182} Baij Nath 455; and see text accompanying infra note 180.

\textsuperscript{183} F. Pollock and D. Mulla, Indian Contract and Specific Relief Acts 324 (8th edn. 1957).


\textsuperscript{185} The quotation is from Earthworks Ltd. v. F. T. Eastment & Sons Ltd. (1966) Victoria Reports (Australia) 24. Also see, P. Nygh, Conflict of Laws in Australia 121 (1968).

\textsuperscript{186} Dicey & Morris, The Conflict of Laws 197 (8th edn., 1967).
Where no place for performance is specified either expressly or by implication from the nature and terms of the contract and surrounding circumstances, and the act is one which requires the presence of both parties, the general rule is that the promisor should seek out the promisee and perform the contract wherever he may happen to be. This rule applies not only to contracts for money, but to all promises for which the concurrence of the promisee is necessary.\textsuperscript{189}

From the above expositions of the common law rule, the following propositions seem to emerge clearly: (i) the place of performance must not be specified by express designation or should not emerge from the contract by necessary implication; (ii) the debtor is bound to seek out creditor “provided he is within the jurisdiction;” (iii) this rule applies where in addition to the above two conditions, performance under contract is such as to require the presence of both parties.

Proposition (i) refers us in fact to the very formulation that the \textit{Baij Nath} court arrived at, namely:

Where territorial jurisdiction of the Court is to be determined on the ground that the price of goods was payable within its jurisdiction, the Court should find as a fact whether the money was expressly or impliedly to be paid within its jurisdiction. To find this fact the Court is entitled to take into consideration the contract, its attending circumstances, the creditors' ordinary place of residence or business and the course of dealings between the parties including all the other factors relevant in a given case.\textsuperscript{189a}

It is only when facts and circumstances thus examined establish that the amount was payable within its jurisdictional limits that the Court can assume jurisdiction.\textsuperscript{190} And it is \textit{in this sense} correct that:

for the purposes of determining the forum where a suit by the creditor is to be instituted, the Courts in this country cannot apply the rule of common law that the debtor must seek out his creditor and make the payment wherever he may happen to be.\textsuperscript{191}

But it is very much to be doubted that what is here rejected is the correct version of the English rule. Rather, proposition (i) above precisely casts the same fact-finding responsibility for the rule to come into operation that the Court itself here expounds.

Proposition (ii) further seems to suggest that the creditors-seek-debtor rule comes into operation only when the forum is otherwise empowered to assume jurisdiction over the suit.\textsuperscript{192} In other words, the rule does not function as a source or ground of the court's jurisdiction but rather presupposes for its operation the existence of lawful jurisdiction.\textsuperscript{193} If so, however, it might reasonably be said that the rule is non-functional, for if the court otherwise possesses jurisdiction this rule does not need to be invoked at all. The present writer is inclined to think that this is indeed the contemporary legal position of this rule, regardless of its career hitherto in the common law.

It is, however, possible to attribute some functional value to the rule by maintaining that while it does not confer a forum with jurisdiction, it raises a rebuttable presumption in favour of the creditor as to the jurisdiction of the forum where the creditor resides or carries on business. Mr. Justice Bishan Narain who specifically considered this aspect of the rule acknowledged that in some situations "it may be fairly presumed that a place would have been fixed where the creditor would find it convenient to receive the money", and that such place may be considered to have been implied by the parties.\textsuperscript{194} The general context within which this observation occurs makes, however, its status in the overall decision by the learned Judge rather ambiguous.\textsuperscript{195}

Be that as it may, the transformation of the "rule" into a "rebuttable presumption" does manage to endow it with some functional significance. Yet another approach will be to characterise the creditor residence rule as a \textit{principle} of law, its role as such being to furnish "an authoritative

\textsuperscript{189} 8 HalIbury's Laws of England 168 (Third Simmonds Edition, 1954). See also Id, note (i) and (k) for the relevant case-law. (emphasis added).

\textsuperscript{189a} \textit{Baij Nath} at 455; also at 452 (per Durlat, J.).

\textsuperscript{190} \textit{Baij Nath} at 455.

\textsuperscript{191} \textit{Baij Nath} at 453 (per Dua, J.).

\textsuperscript{192} There is certainly some ambiguity here as to the meaning of the phrases "within jurisdiction" and "within the realm". The latter at first sight appears to refer broadly to the country as distinct from a specific forum within it. We are inclined, however, to treat the two terms as equivalent.

\textsuperscript{193} See, in the conflictual setting, text accompanying supra, note 188.

\textsuperscript{194} \textit{Baij Nath} at 454.

\textsuperscript{195} This reading of an implied intention marces ill with his Lordship's earlier reluctance to regard the rule as creating the fiction of an implied term. See \textit{Baij Nath} at 453. So also the operative paragraph on page 454 seems to restrict, to the point of extinction, the concession acknowledged in the text. This is because it is not quite clear whether the learned Judge regards the implied intention test as a matter of law, or as a matter of factual evidence.
starting point for legal reasoning.” The creditor residence principle then becomes an important, though scarcely the sole or even a principal, determinant of the assumption of jurisdiction by the forum. In the area of money payments the relatively preferred position that the principle reserves for the creditor may, therefore, be taken into account as an additional factor in conjunction with all other relevant factors.191

Thus, on the basis of the above two approaches, even as we agree: mentioned with the Baiji Nath Court that: Courts are not... bound to draw a presumption in favour of the creditor's place of residence or business in every case.198

we should also acquiesce with Shobasingh that it could not be held that the rule of English law is ousted for all times from being applied in India, even in fit cases.199

Finally, it remains to be pointed out that despite the judicial language pointing to the derivation of the court's jurisdiction from the operation of the creditor residence rule, the source of its jurisdiction may really lie elsewhere. Such indeed was the position in Shobasingh which at first reading even the present writer to think that the court did derive its jurisdiction from the rule. On a closer reading, however, it becomes indubitably clear that "for the purpose of deriving jurisdiction" Mr. Justice Vakil relied on the fact that the debtor had written a letter to the creditor in Bhavnagar agreeing to refund the money to the creditor.200 It was this fact, rather than any consequences of the creditor residence rule, that brought the suit within the territorial limits of the Bhavnagar Court. The reliance on the rule however, is understandable as providing an additional reinforcement for the decision. Perhaps this very decision is a significant illustration of what learned Justice had in mind when he spoke of the rule as being applicable in "fit cases." And no doubt other similar cases warrant a similar examination and conclusion, notwithstanding judicial language assigning to the rule a jurisdiction conveying function, which in reality it does not have.202

Proposition (iii) limits the operation of the rule to such performance of contracts as require the personal presence of both the parties. This limits further the functional significance of the rule for modern times pointing to its overall obsolescence.

V. PROROGATION

In a legal system like India's characterized by the most minimal conflicts potentialities,203 prorogation or contractual outer of jurisdiction of courts can only represent a somewhat innocuous exercise of party autonomy, motivated by considerations of convenience rather than the hopes of substantive legal advantages arising out of the forum selected. And yet the oft-noted anti-prorogation tendency of the common law finds a somewhat uneasy embodiment in section 28 of the Indian Contract Act which declares "void" agreements imposing absolute restriction on enforcement of contractual rights through "the usual legal proceedings in the ordinary tribunals" and those imposing time limit on the enforcement of the contractual rights.204 But even within the limitations thus imposed judicial construction of section 28 has been more responsive to party autonomy reinforcing the view that neither "history nor rationale... bear out the much repeated general axiom that parties may not... push the courts from their general jurisdiction."205

202. Thus, Mr. Justice Daula subjected Soniram Jeetnall v. R. D. Tata & Co A.I.R. 1927 P.C. 156 to a similar scrutiny as we have extended to Shobasingh. His Lordship conclusively demonstrated that "the conclusion of the Privy Council rested on the facts and circumstances of that case and not on the basis of any rule of law" Baiji Nath at 452. Nothing in Shobasingh meets this specificity. More repetition of what formulas the Privy Council approved can, with respect, hardly substitute a careful examination of the whole text and the context of the judgement. The latter, needless to add, is a method more conducive to a responsible and rational development of law. No doubt their Lordships' reiteration of the creditor resident rule is significant for the purposes of determining the ambit of section 49 of the Indian Contract Act. This while related to the issue of jurisdiction is scarcely a decision on that issue.

203. See supra, notes 3-6, and the text accompanying.

204. S. 28, the Indian Contract Act, 1872:

Every agreement, by which any party thereto is restricted absolutely from enforcing his or, in respect of any contract, by the usual legal proceedings in the ordinary tribunals, which limits the time within which he may thus enforce his rights, is void in that extent... For a general conspectus of the state of law in the area see Pollock and Mulla, supra note 185, 234-42; I.A.C. Patra, Indian Contract Act 555-572 (1966).

205. Ehrenwieg, A Treatise on Conflict of Laws 149 (1962). See generally, Id. at 147-60; and infra, note 209.
In the following discussion we will distinguish "domestic" from "international" proration, the latter necessarily involving the designation of a non-Indian forum and further frequently involving the professio juris (or choice of law) stipulations.

Out of the seven decisions in this area for the two years under review, only one concerns international prorogations and one with time limitation. The other five cases relate solely to domestic prorogation, though some decisions in this group also illustrate judicial perception of adhesion elements in the contracts before them.

209. Nearly third four of Jesaram's decision, supra note 208, is devoted to the discussion of the issue whether the consignor-defendant is bound by conditions held printed on the reverse side of a goods' ticket with adequate notice of the conditions of carriage on its front side. Though the ticket was not signed by the consignor the conditions were held binding upon him in view of the relevant English and Indian authorities. See Jesaram 92-94.

The Subramani decision, supra note 208, focused on the narrower issue whether the phraseology of the proration stipulation specifically ousted the Madural court by subjecting the contract to the "jurisdiction of the Cuttack courts only." Since this standard-form contract made the clause a part of the contract, the situation was distinguishable from one where the proration clause appeared on the letterhead of a company's stationery but on facts did not form a part of the contract. See Sadhia v. Sirdarmal Kasrimal and Co., C.R.P. No. 1010 of 1953 (unreported) mentioned in Subramani at 195. Such findings derive their justification from the judicial perception of adhesion elements in a contract. Narasimhan, A.I.R. 1968 A.P. 330 at 331.

The present writer feels that instead of thinking in terms of adhesion contracts, attention should be focused on adhesion elements in a contract. Investigation of the reality of party choice is a necessary condition of a meaningful judicial defrence to party autonomy.

Lack of equality in bargaining power often functions as a form of economic duress, vitiating freedom of contract. Contracts in which such inequality is manifest and in which such duress can be presumed, are called "adhesion contracts." The line of demarcation between adhesion and non-adhesion contracts is hard to draw in the light of the increasing use of standardized contracts. A holistic approach toward adhesion contract becomes correspondingly unworkable. The question is one of degree rather than of kind.


(a) Domestic Prorogation

The leading decisions under this head are Ajmera Bros. v. Suraj Mal, and Singhil Transport v. Jesaram. Both the above decisions involved reaffirmation of the principle that when two or more forums having jurisdiction are available the parties may by contract designate an exclusive forum for the settlement of contractual disputes. This reaffirmation was to be expected in view of "an overwhelming preponderance of judicial opinion" against the "well known rule of law that parties cannot by agreement oust the jurisdiction of any court." Similarly to be expected was the reiteration of the rationale that section 28 of the Contract Act prohibits absolute restriction of legal proceedings, whereas permissible domestic prorogation involves merely a partial restriction. The reference to some of the early leading decisions adopting this view also implicitly affirms, within the domestic context, the

212. Suraj Mal at 93-94; Jesaram at 44.
213. The quoted words are from the luminous judgment in H.K. Doda (India) Ltd. v. M.P.S. Mills Co. Ltd. 845 at 846 (per Rajamaniar C.J.) (Hereinafter called Doda) See also, Infra note 216.
214. See supra note 204.
216. There seem to be only three contrary decisions, National Petroleum Co. v. Rabello, A.I.R. 1935 Nag. 48 is perhaps the only decision rejecting domestic prorogation on the grounds of common law policy without any reference to section 28, Indian Contract Act. In Rammikkii v. Vivekananda Mills Co. Ltd., 49 Cal. W.N. 58 Gentle J, held that section 28 did not void domestic prorogation as a stipulation to arbitration to which section 34 of the Arbitration Act applied. Of Course, in this case Gentle J. was entirely guided by English decisions so regarding proration clauses, overlooking the crucial feature that these cases dealt with what we have here called "international" rather than "domestic" prorogation: Cf. the critique by Rajamaniar, C.J. in Dada at 847. See also the 1955 Calcutta decision cited earlier in this note highlighting additional deficiencies in this view (per Lahiri J at 163); citing with approval the disapproval of Gentle J.'s viewpoint by Chagla and Gajendragdhar J.J. in A.O. Nos. 71 of 1950 (Bombay) (unreported).

Finally, see Chittaranjan v. Purul Rani, A.I.R. 1946 Cal. 112 (per Henderson J.), holding that domestic prorogation does result in an absolute prohibition as regards a court thus excluded, but otherwise having jurisdiction. See esp. 112-113. Compare this view with text accompanying note 227 infra.
characteristic limits on party autonomy arising out of the imperative rules of the forum law.216

If the twin cases under discussion had limited their rationale to this well observed interpretation of section 28, they would not have merited further discussion. What, however, adds interest and merits comment is the additional aspect of the decisions involving an express repudiation of the view that domestic prorogation clauses are also not violative of section 23 of the Indian Contract Act which, inter alia, prescribes these agreements which "if permitted ... would defeat the provisions of any law."217 In Suraj Mal the lower court actually followed the much-disdained view of Mr. Justice A. J. Khan in Dwarka Rubber Works v. Chhotelal218 that such clauses in fact do violate section 20 of the Civil Procedure Code, 1908, under which a cause of action, in contract situations, may arise at more than one place.219 Mr. Justice Khan reasoned, though not without some diffidence, that domestic prorogation, being exclusionary of other forum, thus ran counter to the relevant provision of the procedural law. In effect then, on this view, though domestic prorogation is immune from attack under section 28 of the Indian Contract Act, it is vulnerable on the head of public policy under section 23 of the same Act.220

216. Dada, supra note 213, which was cited by both also refers to Dhannial Marwari v. Jankdas Baiji Nain 49 Cal. W.N. 123 which held unenforceable a stipulation having the effect of ousting "the jurisdiction of the only competent court and confer it on another which has no jurisdiction." (Dada at 847).

For limitations on party autonomy by imperative rules of the forum see Baxi, supra note 209 at 661-68 and the literature there cited. See especially, A. Ehrenzweig, A Treatise on the Conflict of Laws 456 et seq (1962); Id. Private International Law 223-225 (1968).

217. S. 23 Indian Contract Act, 1872:

The consideration or object of an agreement is lawful unless . . .

is of such a nature that, if permitted, it would defeat the provisions of any law.

218. A.I.R. 1956 Madh B 120.

219. See supra, note 140 for the text of the section.

220. In a case of contract, the cause of action may arise at more than one place according to s. 20 C.P.C. If the parties agree to file a suit in only one of the courts to the exclusion of others, which may have the jurisdiction to try it under s. 20 C.P.C., then this agreement ventures to suggest is one which, if permitted to stand, would defeat the provisions of law.

Should parties be allowed to come to an agreement which in effect tends to give a different direction to law? . . . This puts one in mind of the legal maxim, so widely known and accepted that parties cannot by agreement oust the jurisdiction of any court nor can they vest jurisdiction in a court not otherwise competent.

Supra note 218 at 21, relying for the last observation on Scott v. Avery (1885) 5 H.L.C. 811; Czarnikow v. Roth Schmidt & Co. (1922) 2 K.B. 478.

In overruling the lower court's decision Mr. Justice Narshimham in Suraj Mal did not give any clear rejoinder to the foregoing argument save noting that in Dada the court had negated a similar argument based on public policy against domestic prorogation.221 But as the learned Judge himself acknowledged the Dada rebuttal did not, in terms, refer to section 23 which in its relevant part provides a specific head of public policy potentially hostile to domestic prorogation. Mr. Justice Jagat Narayan was even more cryptic-contenting himself with the observation that the Chhotelal case was not "correctly decided."222 But this mode of dissenting cannot adequately refute, if at all, this important argument.

It is submitted that there are at least two ways in which the Chhotelal argument can be refuted. First, in terms of the Civil Procedure Code, it may be argued that accrual of cause of action at several places scarcely imposes an obligation on parties not to select one place in preference to others. Section 20 of the Civil Procedure Code in itself merely indicates courts which would have jurisdiction given the occurrence of certain operative facts. Cause of action in this context is merely a device to found jurisdiction: it is a jurisdiction-invoking device.223 Thus, it will be perfectly proper, without any agreement, for parties to institute suit in any one forum to the exclusion of others. A fortiori they could also accomplish this by a domestic prorogation clause in a contract. In other words, a provision of law sanctioning many competent fora is not defeated, but rather fulfilled, when one forum is exclusively preferred, by mutual agreement, provided of course the contract is not overlaid with adhesion elements.224

And, second, by exclusionary domestic prorogation clauses, courts having jurisdiction are not really deprived of their jurisdiction. The assumption behind this deprivation argument simply is that courts have inherent jurisdiction over certain causes of action. Even granting this, it will not be correct to say that domestic prorogation results in a deprivation of such jurisdiction; for contractual agreements being subject to imperative rules of law, cannot displace these very rules.225 As Mr. Justice Abdur Rahman of the Lahore High Court observed in the leading case of Missarji Lukmanji v. Durga Das226 it is not the court which is "deprived" of jurisdiction but rather the parties who have deprived themselves of:

221. See Suraj Mal at 44; Dada at 848, relying on the 1947 Lahore decision cited supra note 215.

222. Jesaram at 94.


224. See Baxi, supra note 209, for the notion of "adhesion elements."

225. Ibid.

the right of proceeding in that Court with a reservation that they would have the right to proceed in others which in law have jurisdiction to try ... Jurisdiction is one thing, right to exercise it is another.227

The decision of Mr. Justice Datta in I. M. General Society v. Hardev Single228 is noteworthy for adopting a balance of convenience test for testing the validity of a domestic prorogation clause.229 In an action for stay of suit under section 34, Indian Arbitration Act,230 the appellant insurance company relied on rubber-stamped clauses designating Madras court as forum for arbitration as well as adjudication. The proposal for the insurance was made in Calcutta and the relevant document was also issued there. The accident to the vehicle occurred "much nearer Calcutta than Madras"231 Repairs subsequent to the accident were carried out in Calcutta. As against these factors were the countervailing prorogation clauses. The learned judge felt that the "matter should be adjudicated in Calcutta rather than in Madras situated 1000 miles further away from the place of accident."232 For this, and other233 reasons, the leave to stay the suit was not granted.

Only a solitary fact favours rationalization of the decision as grounded on judicial perception of adhesion elements. The operative formula really seems to be "balance of convenience". Reliance on the latter formula, however, is likely to encourage inroads into party autonomy, especially if it is extended to domestic prorogation stipulations in general. When adhesion elements are minimal or altogether absent, the balance of convenience test would be inapposite as it would frustrate, rather than fulfill,

party intentions.234 Nor is the automatic transference of balance of convenience test from a Supreme Court decision235 involving both international prorogation and professio juris stipulations warranted in the context of domestic prorogation situation.

(b) Time Limitation

Kaist Ali v. New India Assurance236 raised a familiar question under section 28 of the Contract Act as to the validity of time limitation clauses in standard contracts. The insurance company sought through such a clause to foreclose legal proceedings on the claim after a period of three months from the date of its rejection.237 The suit was instituted nearly a year after the rejection of the claim and the time-limitation was impugned as invalid both under public policy and restraint of legal proceedings provisions of the Act.238 Mr. Justice Bhat negatived both the contentions holding that the "matter was completely covered by authority"239 to such an extent that "it would be a waste of time to embark on a discussion of points raised."240 The basis of this attitude lies, we submit, not so much on a mechanical reliance on precedents but rather on the fact that the plaintiff himself "had no justification"241 for the delay. The present fact-situation does not warrant, therefore, an extended discussion at this stage which certainly would have attracted adhesion elements—both formal and substantive—preeminent.242

227. Id. at 61.
229. See for the text and general analysis of case law, P.L. Paruck, The Arbitration Act, 1940 at 296-325, (1955). The problem of the validation of arbitration agreements as ousting jurisdiction of courts and as imposing restriction contrary to section 28 of the Contract Act, has been taken care of by Exceptions I and II of that latter section. See also Paira, Pollock and Mulla, supra note 204.
230. Supra note 228 at 341. This vicinarity aspect of accident can be severely tested in a situation where the place of accident was equidistant to both the courts.
231. Supra note 228 at 342. Perhaps, the most important of this cluster of facts is the maintenance of office by the insurance company at Calcutta.
232. The arbitrators had become functio officio in view of default by both sides in fulfilling their responsibilities under the arbitration clause. Supra note 228 at 342.
233. The endorsement containing domestic prorogation stipulation was in rubber-stamp, raising the issue whether they formed a part of the contract. On the facts it seems that this was not a case of a big company asking an individual to sign on the dotted line, accentuating thus its inequality of bargaining power. The respondents in this case were also a firm or company.
234. Cf. on the allied "centre of gravity" formula adopted by the American courts, Bixi, supra note 209, at 679-81, and the literature there cited.
237. Id. at 43.
238. Section 23 and 28 of Indian Contract Act. See supra notes 204, 217 respectively.
239. Supra note 237 and the authorities there mentioned. See also, Pollock & Mulla Patra cited supra note 204.
240. Supra note 237. The learned Justice does however advert to a mass of authority.
241. Supra note 236 at 44.
242. From the perspective of adhesion elements, though not so characterized, see the analysis by G. Patel "Law of Contract," 1966 Ann. Sur. Ind. L. 217 at 242-46 (1968). The leading case there perceptively analyzed provided for a notice of only three days after which insurance liability was sought to be disclaimed.
The Calcutta High Court in *B.R.H.M. (India) Ltd. v. S.E.A. Co. Ltd.* was confronted with a standard bill of lading provision containing a professo juris and a prorogation stipulation, both pointing to Swedish forum and Swedish law. The South East Asia Co. Ltd. sought a stay of the suit under section 9 of the Code of Civil Procedure on the basis of the above stipulation. The original suit in the Calcutta High Court concerned shortfall in weight of cargo delivered to the plaintiff under an agreement that the defendant shall meet such claims of the plaintiff as may arise from bad packing in Sweden, and consequently resulting in “loose delivery” of the cargo.  

In this dispute concerning the “nature, weight, and delivery” of cargo, and its unloading, the defendants contended that the above stipulations were binding on both parties. The cargoes were shipped from a Swedish port, ships officers knowledgeable on this score were resident-citizens of Sweden where also the relevant documents in Swedish language were located. Neither did the company’s vessels regularly ply to India. Countervailing factors in the plaintiff’s response included the facts that the company’s agents were in Calcutta, and the relevant evidence (documentary and of concerned port officials) was best available at the port of unloading.

On these facts, Mr. Justice Mitter found his discretion to stay the suit inapplicable. The learned Judge felt that defendants had not shown that the Swedish courts would have jurisdiction or that the stay application, filed a year and a half after the original suit would not expose the original plaintiff’s case in the Swedish court to the time-limitation of the

244. Ibid.
245. Supra note 243 at 25.
246. Ibid. The reliance on this factor is puzzling. Although the learned Justice subsequently accepts presumptively the jurisdiction of the Swedish court, it seems unavoidable that the above factor must have contributed to the decision that the Swedish court will be an inappropriate forum. The puzzle deepens when we recall that G.K. Mitter J. should not have been granted a stay of suit learned Justice there rightly relied on Dicey, *Conflict of Laws* 1085. *et. seq.* (7th ed., 1958).
248. *The Fehmarn* test has generally been followed in a number of Indian decisions and always with the same conscientious regard to party autonomy as Lord Denning himself showed in that case. The non-outer tendency based on the “inherent jurisdiction” of the forum court has thus been amply countervalued. It should also be noted that the Indian decisions have reformulated *The Fehmarn* test so as to include many more considerations than those indicated by the notion of close connection of the dispute with the forum. In particular, unlike *The Fehmarn*, Indian decisions show greater solicitude toward the professio juris stipulation.  

249. Supra note 243 at 25. In a very similar fact-situation in A.I.R. 1962 Cal. 603, cited infra note 250, the parties were relegated to the Swedish forum in accordance with prorogation clause. The instant case, however, does not even mention this decision.
251. His Lordship spoke of prorogation agreements as a “matter to which the courts of this country will pay much regard” and which “they would normally give effect.” Supra note 248 at 162.
252. Compare the observations of Bachwati J. in A.I.R. 1960 Cal. 153, supra, note 250 at 156. The Court acts upon the principle that in general the court will compel the parties to abide by their contracts.  
253. Lord Denning’s view that the English courts “being in charge of their proceedings” subject the prorogation clauses to “the overriding principle” that “no one by his private stipulation can oust these of their jurisdiction” in a matter “properly” belonging to them finds an echo in Mr. Justice Bachwati’s opinion, supra note 231 at 156.
254. Compare Lord Denning’s following observation, supra note 248 at 162.
255. I do not regard the choice of law in the contract as decisive. I prefer to look to see what country is the dispute most closely connected With the following observations by Mr. Justice Bachwati in A.I.R. 1960 Cal. 153, supra note 250, at 156 (emphasis added):
256. The prime face meaning of the Court is that the contract should be enforced and the parties should be kept to their bargain. Subject to this prima facie leaning, the discretion of the Court is guided by considerations of justice. The
VI. FAVOUR LIMITATIONS AND RECIPROCITY

Whether as "a principle" of "general application" and "universally admitted" or as a "result of historical accident rather than common law tradition" the precept that matters of procedure are governed by lex fori remains enshrined in most judicial decisions. The regime of lex fori thus established... is no doubt "fundamentally sound" though the justifications and rationalizations for it often contain "obsolete legal terminology and concealed policy considerations," testifying to the fact that "the provincial lawyer's thinking has usurped undue privilege."

However "arbitrary and unreliable in operation," one familiar exception to the rule has been to characterize the time-limitation as substantive rather than procedural, with the consequence that the foreign time limitation, whether it be shorter or longer, is applicable. The so-called "built-in" limitation has to depend on the incredibly tortuous substance-procedure dichotomy, to which the following simple policy rationale, stressing parties, justified expectations, seems much preferable:

balance of convenience, the nature of the claim and of the defence, the history of the case, the proper law which governs the contract, the construction of the dispute with the several countries and the facilities for obtaining even-handed justice from the foreign Tribunal are all material and relevant considerations. If a consideration of all the circumstances of the case the Court comes to the conclusion that it will be unjust or unfair to stay the suit, the Court may refuse to grant the stay asked for.

And see, A.I.R. 1962 Cal. 601, supra note 205 at 608-06 for discussion of this aspect of The Fehmorn Case.

257. Ehrenzweig, Treatise, 435.
259a. Ehrenzweig, Treatise 432.

Conflict of Laws

Whether a shorter foreign limitation should be applied will ordinarily depend on whether such application will protect the defendant from a law suit which, under the circumstances he was entitled to consider as barred.

Another exception to the precept that lex fori "governs" matters of procedure is to be found in the device of "borrowing statutes," peculiar to American conflicts context. Such statutes "typically bar suits on foreign cause of action that are barred by either the law of the forum or that of the cause of action" though they "often give preferential treatment to claims by residents against non-residents," a discrimination that has been held constitutional. These statutes then offer a legislative modification of the common-law rule regulating matters of procedure to lex fori, though in turn they generate their own problems.

In India, the few cases dealing with conflictual aspects of limitation law enshrine the proposition that lex fori applies to procedural matters. And the Indian Limitation Act in terms subjects suits instituted in India on contracts entered into in a foreign country to the "rules of limitation" prescribed by the Act and further declares that "no foreign rule of limitation shall be a defence" to such a suit unless the rule has "extinguished the contract" and the parties were "domiciled" in the foreign country during the period prescribed by such a rule. Although the Act specifically refers to

260. See the classic critique by W.W. Cooke, Logical and Legal Bases of the Conflict of Laws 154-93 (1942). See also Ehrenzweig, Treatise at 331-32, and other authorities there cited. Also see von Mehren & Trautman, supra note 259 at 321-324, 207-209.
261. Ehrenzweig, Treatise at 432.
262. Ehrenzweig, Treatise at 430-36. Also see the material cited id. at 428. To this may now be added the studies by Estes and de Cervara cited supra note 259. For the proposals for the drafting of an "ideal borrowing statute" id. at 133-67; Estes, supra note 262; de Cervara, supra note 259 at 69-132 and the valuable appendices thereto at 79-83, 82-84. See also Ehrenzweig and
263. See supra note 263 for a survey of the problems.
265. We... accept the propositions that by International Law, execution of a foreign judgment is governed by procedure in the lex fori and the law of limitation, where it does not concern the nature of the law of limitation, is procedural. Sheik Ali v. Sheik Mohamed, A.L.R., 1918 Med. 580 at 585 (F.B.).
266. The Indian Limitation Act, 1908, has now been replaced by the Act of 1963, an its predecessor in this respect. Section 11 of both the Acts are reproduced below, though the 1963 Act does not depart
S. 11, The Indian Limitation Act, 1908:
(i) suits instituted in India on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.
(ii) No foreign rule of limitation shall be a defence to a suit instituted in India on a contract entered into in a foreign country, unless the rule has extinguished
contract, "the principle underlying the section is one of universal application" and "should be extended to all obligations not merely those arising from contract."^269

A learned writer has criticized "the requirement of domicil for the parties" as "quite irrelevant and unwarranted" and has suggested that the question "should have been left for determination to the proper law of contract."^268 But the basis of this criticism is not clear as the requirement of domicil comes into operation only when a foreign rule of limitation has extinguished the contract and such a rule is pleaded as a defence to the suit in India. The provision then can rightly be viewed as a species of the "built-in" limitation to the regime of lex fori. When parties have been domiciled for the entire prescribed period of limitation in a foreign country, it is in fact in keeping with the parties' justified expectations that litigation should not be subsequently open to revival in Indian fora.

This same provision. can further be viewed as a type of borrowing

the contract and the parties were domiciled in such country during the period prescribed by such rule.

S. 11, The Indian Limitation Act, 1963:

(1) Suits instituted in the territories to which this Act extends on contracts entered into the State of Jammu and Kashmir or in a foreign country shall be subject to the rules of limitation contained in this Act.

(2) No rule of limitation in force in the State of Jammu and Kashmir or in a foreign country shall be a defence to a suit instituted in the said territories in a contract entered into in that State or in a foreign country unless:

(a) the rule has extinguished the contract; and

(b) the parties were domiciled in that State or in the foreign country during the period prescribed by such rule.


Limitation is a part of the law of procedure in any country, and the general principle is that the limitation in regard to suits will be governed by lex fori.

268. Rama Rao, "Private International Law in India", IV The Indian Yearbook of Int'l Affairs 219 at 271 (1955); Id., "Conflict of Laws in India," 22 Zeitschrift fur Auslandisches und Internationales Privatrecht 259 at 278 (1938). In this latter analysis this aspect is characterized further as "an undesirable deviation from English law." But this observation seems objectionable on both counts: on the supposed "deviation" provision "proper law of contract" incorporating substantive limitation, may, indeed by "extinguishing the right" render lex fori inapplicable. Cf. Rustomji On the Law of Limitation and Adverse Possession 131 (6th Ed., 1958) (hereafter called Rustomji).

Finally, if, as Rustomji suggests (with the support of considerable authority), section 11 of the 1908 Act (and the fortiori of 1963 Act) extends to all "obligations, not merely those arising from contract," the requirement of domicil, by construction, becomes secondary, rather than concomitant.

269. See s. 11(2) of the 1908 and 1963 Acts reproduced, supra, note 266.

statute. Some borrowing statutes in the United States specifically refer to the residence of plaintiffs at or outside the forum. In fact, this requirement of residence forms a basis for grouping such statutes under one category. The statutes of Alaska, Kansas, Louisiana, Oklahoma, Oregon and Washington require the application of the shorter foreign limitation when both parties are non-residents of the forum. Closer to the concept of the Indian Act, is the statute of Maine which bars jurisdiction when the "cause of action has been barred by the laws of any state, territory, or country while all parties have resided therein."^272 The difficulties associated with these American statutes relate to the question of the time of non-residence. In terms, it is not clear whether "acceptance of the foreign bar at the forum" entails non-residence of the parties "at the time of the accrual of the action, at the time of the suit or at both moments."^272 Findings on this aspect necessarily depend on the phraseology of each concerned statute. In comparison, the Indian provision does not have a similar potential for problems of construction, since it clearly requires non-residence during the period prescribed by the foreign rule of limitation. In addition, the concomitant notion of "domicil" in the Indian Act appears more stringent than that of "residence" though in actual operation it need not be so. It is noteworthy that the American borrowing statutes raise, besides, the difficult problems of what are known as foreign "tolling provisions." These provisions usually "suspend the running of the period on certain contingencies such as defendant's absence from jurisdiction or plaintiff's minority or insanity." Should the question of recognition of such tolling provisions ever arise in India, perhaps, as most American courts have eventually concluded, the Indian Courts may come to the view that such provisions should also be applied. The language of the Indian provision requiring the extinguishing

270. de Cervera, The Statute of Limitations in American Conflicts of Laws 115-117 (1966); Ester, supra note 259 at 80-81, 83, for a more complete and comprehensive analysis. (Ester includes Virgin Islands under this category.)


273. de Cervera, supra note 270 at 121.

274. Id. at 121-27.

275. See, generally, part II of this paper, supra.

276. Ehrenzweig, Treatise at 430.

277. Ibid. Also see Ester, supra note 259 at 61-67. Ester still seems to struggle somewhat ambiguously with the need to justify application at forum of a longer term of sister or foreign state in terms of its characterization as substantive rather than procedural, though in the end he stresses that application of "borrowing statutes" does render this dichotomy irrelevant.
ment of contract clearly points towards this approach; as tolling provisions under the foreign rules by definition cannot “extinguish” the contract.

The foregoing discussion enables us to better appreciate the limitation aspects of Sheik Ali decision, the other procedural aspects of the case having been considered earlier in this study. We may here recall that the major contention of the appellants was that section 44-A being the “enabling provision” for execution of foreign judgments under reciprocal arrangements attracted the Indian limitation laws as a part of lex fori. With this contention the Full Bench of the Madras High Court agreed:

Since lex fori governs execution, if under Indian law, the decree is barred, the judgment-debtor can successfully plead it in defence. But the court subjected the above statement to an “exception.” It seems to have been further contended that the longer period in the Indian law applying to a “similar judgment” of the Indian courts should also extend to the execution of the foreign decree even when it “may be barred or unenforceable in the country of its origin.” Mr. Justice Veeraswami held (for the court) that “to do so will be contrary to the basic requirements of reciprocity.” His Lordship added:

Reciprocity in the context means that Indian Courts will execute foreign judgments of Superior Courts in the reciprocating territories in the same manner as if they were their own decrees and vice versa. . . . Reciprocity applies to enforceable decrees in the country of their origin.

It is neither clear on the facts of the case as reported that the decree would have been unenforceable in the Federation of Malaya, nor indeed that the courts of that reciprocating territory will give a similar meaning to the notion of reciprocity. Be that as it may, it is quite clear that the court is inclined under reciprocity provisions of the Civil Procedure Code to apply shorter foreign statute of lex causae.

However, obesiance to lex fori as determinative of matters of procedure, and especially limitation, prevents the Sheik Ali court from realizing the implication of its own purported exception. This is that under the court’s formulation of the notion of “reciprocity,” a longer period under lex causae also leads to a displacement of lex fori. For if “reciprocity” refers to decrees enforceable in “the country of their origin” such reference necessarily applies both to a shorter and a longer term of limitation under the law of the foreign reciprocating territory. To labour the point a little further, when reciprocity bars enforcement of claims unenforceable by lex causae it should also be seen to require enforcement at forum of claims valid and enforceable by lex causae, notwithstanding the accrual of prohibitive limitation at the forum.

As noted earlier, the precept requiring application of lex fori to procedural matters, is not an absolute one. To the already limiting exceptions of substantive time limit, and borrowing statutes, the Indian reciprocity arrangements might still add another. And this additional exception to the regime of lex fori need, and should, not be based merely on the logic or verbalization of the notion of reciprocity. The basic policy rationale, parties’ justified expectations ( canvassed earlier in this section), can justify the suggested approach in appropriate cases.

The two allied issues in the limitation context before the Sheik Ali court were: (i) “Is there any period of limitation for filing a certified copy of a foreign judgment?” and (ii) which Article of the Indian Limitation Act, 1908, applied to the “execution of such judgment?” Both these recognized municipal decisions.” While commending this general approach stressing the basis of reciprocity in “statutory provision” or “judicial practice” Professor Szasz is careful to leave open the production of proof by the party concerned to the effect that “in reality reciprocity is not practised.” J. Szasz, International Civil Procedure: A Comparative Study 583 (1967). The section on “reciprocity” (580-84) in this valuable study is of particular relevance in the present context.

While the learned author is generally correct in grouping India with other legal systems which authorize the “municipal judge to supervise the foreign decision on its merits” and which accordingly “do not insist upon reciprocity,” it should be noted that s. 44-A of the Civil Procedure Code does establish an enclave of reciprocity. In the present case, as seen in the note immediately preceding, there is little to show that a longer foreign term was involved. For the parties’ justified expectations rationale, see text accompanying note 261 supra.

Although application of a longer term of lex causae will be somewhat unusual in view of the preference of the forum for its own shorter term, such application, even outside the context of reciprocity, does have a few parallels in the common law jurisdictions. See,
questions have a bearing on reciprocal enforcement of foreign decrees in India, and merit brief consideration outside the procedural context already studied in section III (b) of this paper.

In the section just mentioned, we were led to conclude that in attempting to liquidate the Uthamram type anomaly, Sheik Ali generated its own. For under its rationale and result filing of foreign decrees of the reciprocating territories under section 44A of the Civil Procedure Code is not subject to any time limit whatsoever. One reason for this result was of course the narrower view of the fiction in this section of the Code that the Sheik Ali court preferred. The jurisdiction of a District court under that section “arises from and [is] exercisable by the filing of a certified copy of the foreign decree or judgment.” The Limitation Act as lex fori can apply to the execution under this section “only after filing” of the foreign decree or judgment.

The additional reasons related to the operation of the Indian limitation laws may now be noted. Both the 1908 Act under which the present case was considered and its 1963 successor, apply only to suits, appeals and applications. But filing of a foreign decree or judgment under section 44A (i) “is not an application, and is not even a step in aid of execution.”

Filing, moreover, is “not a judicial act” attracting any limitation provision but rather a “ministerial” act. Finally, the act of filing in itself does not “give the right of execution” as this indeed is subject to all the defences available against a foreign judgment by virtue of sub-clause (3) of section 44-A of the Code.

for example, the position under Kentucky borrowing statute, Ehrenzweig, Treasi at 434. And even under the common law rule favouring forum limitation, lex causa will command adoption of its longer term if only the statute can be characterized as substantial. See Dicey & Morris, The Conflict of Laws 1094 et seq. (8th ed. 1967); and Ehrenzweig, loc. cit. Of course, “application of a fortuitous lex loci even as between forum citizens” (Ehrenzweig loc. cit) is possible under the present approach to reciprocity. But though possible, this should be avoided by a discerning study of each fact-situation.

286. See supra part III (b) of this study.
287. Sheik Ali at 55.
288. Ibid. For the text of s. 44-A of the Code see supra note 61.
289. Sheik Ali at 53. Mere filing of the foreign decree is not even an application for unlike the latter filing “contains no prayer” in regard to execution. The proper application can be made under O. XXI R 11 of the Code, after the filing has been made. See, for analogous decisions under s. 14(1) of the Arbitration Act, Sheik Ali at 53.
290. Sheik Ali at 53.
291. Ibid.
292. Ibid.
293. Supra note 290.
294. See for s. 13 of the Civil Procedure Code, supra, note 56.

If the last consideration had been stated as formulated above by us, it would (along with other reasons) not have been of any greater than the textual significance. But what Mr. Justice Veerawasmi did was to imbue section 44-A(3) with the notion of reciprocity. For the learned Justice spoke not of defences to foreign judgment under section 13 of the Code but rather stressed that it “will be open to the judgement-debtor to prove that the foreign decree is inexecutable in the country of its origin.” But surely the fact that the foreign judgment is “inexecutable” in the country of rendition is not a defence provided for by anything in section 13 of the Code.

Nor of course does section 11 of the 1908 Limitation Act come into operation in the instant case. The “liberty” of the judgement-debtor to oppose execution on the ground of preclusion by lex causae is declared to be “inherent...in the very concept of reciprocity for purposes of execution.”

We are not so much concerned here with the inaccurate invocation of section 43-A (3) by the Sheik Ali court as to stress that by bringing reciprocity to bear on the execution proceedings after the filing of a foreign decree or judgement, the court has managed to qualify the extreme consequences of its own result that “no question of limitation arises before or for filing under section 44-A (1) of the Code.” If reciprocity functions so as to borrow the lex causae shorter limitation (as it does for the Sheik Ali court) then the privilege of a foreign judgement holder to “file” such a judgment any time after its rendition, virtually becomes self-defeating. And perhaps this inclination also explains the court’s indifference to the problem of borrowing a longer lex causae term, noted earlier in this section.

On this analysis, we have then to acknowledge that the Sheik Ali generated anomaly turns out to be more apparent than real. A legislative fiat prescribing a period for the filing of the foreign decree, as canvassed earlier in this paper, will have the advantage of ensuring uniformity in all Indian jurisdictions. On the other hand, we should now add, it...
would altogether constrict the present leeways for possible judicial borrowing of a longer term in *lex causae* when, in the circumstances, it is in keeping with the parties’ justified expectations.

On the second question, namely the application of a specific limitation article of the 1908 Act, the court held that the residuary article 181 governed the instant case under which the prescribed three year period of limitation commenced when the right to apply to the court accrued. Were it not for the fact the new Act of 1963 retains some provisions of its predecessor, and for the fact that the 1908 Act remains still relevant for a few situations, the following brief survey would merely be one of historical interest.

Both the 1908 and 1963 Limitation Acts inspired no doubt by the maxim interest reipublicae ut sit finis litium prescribe varying periods of time limitation for a wide range of litigation. Mr. Justice Cecil Walsh who was exasperated by the (1908) Act’s 183 methods of “defeating” a man who “sleeps on his rights” would have found no less formidable the successor Act of 1963 which has 137 articles. Of these many articles, fortunately for the conflict lawyer, only a few are crucial.

Article 117 of 1908 Act provides a time-limit of six years for a suit upon a foreign judgement from the date of its rendition; the 1963 Act, by its article 101, now provides a period of only three years. Article 183 of the 1908 Act, prescribing a twelve-year limit a suit to enforce “a judgement,

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301. *Sheik Ali* at 54 reversing the holding of the District Judge on the applicability here of article 182. And see text accompanying note 310 infra for the current position.

302. Though the 1963 Act follows generally the structure of its predecessor (the 1908 Act), its schedule of prescription is based on more rationally manageable principles of classification of subject-matter of the suit. This of course is not the place for a comparative examination of the full legislation. For counterparts of articles 117 and 181 see now articles 101 and 137 of the 1963 Act, and text accompanying notes 306-310 infra.

303. See the saving provisions articles 30-31 of 1963 Act.

304. See, e.g., the notes 307-309 infra and text accompanying:

305. See, Mr. Justice Cecil Walsh’s Foreword to *Rustomji* at 11,:

   My complaint is against the form of law and the content of the reports. Was it really necessary in order to prevent a man from sleeping on his rights to devise 183 methods of defeating him?

   Mr. Justice Walsh confessed that he would “gladly consume in a bonfire every decision on the Law of Limitation” and start “to-morrow with the Statute and a clean sheet.” Obviously the new statute of 1963 does not heed his justified exasperation, which we share.

306. See, for general discussion under 1908, Act still relevant in parts, *Rustomji*, at 617-18.

307. See for text and commentary, *Rustomji* at 1125-1132.

308. See the learned historical analysis by S. Ramachandra, Iyer C.J., in *Utharam* at 224-225; cf. *Sheik Ali* court’s entire agreement with *Utharam* on this point at p. 54.

309. See, for text and commentary, *Rustomji* at 996-1125. The *Utharam* court on its wider view of the scope of the fiction of s. 44-A of the Civil Procedure Code held that article 182 will “automatically apply,” to “all cases” under that section, the result being that consideration of article 181 became “unnecessary.” *Utharam* at 226. The *Sheik Ali* court overruled *Utharam* on this point. *Sheik Ali* at 54. This article does not have a specific counterpart in the 1963 Act.

310. *Rustomji* at 989-995. Article 113 of 1963 Act now prescribes a three-year limit for “any suit” for “which no other limitation is provided elsewhere” (emphasis added).