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ENFORCEMENT AND RECOGNITION OF FOREIGN ANTI-SUIT INJUNCTIONS BY INDIAN COURTS – A KNOWN BUT LESS TRAVELLED ROAD

***Shashwat Srivastava**

ABSTRACT

Through this paper the author has brought the attention towards the field which may seem to be quiet straight forward, but on the contrary, it requires application of various international law principles in a very comprehensive manner alongside the necessary implications of the Code of Civil Procedure, 1908 for its implementation in India. There is a need to initiate discussion over this topic, since the Indian Courts have already elaborated and explored their power to grant anti-suit injunctions against an individual to initiate/continue proceedings before any foreign court. At this juncture it becomes pertinent to understand the fundamental principle that a right is always followed by a necessary duty, therefore while exercising their power to grant anti-suit injunctions the Indian Courts also need to respect any foreign anti-suit injunction being passed against an individual to initiate/continue proceedings in a suit filed before Indian Courts.

Therefore, the author while discussing the aforesaid issue has carved out certain aspects which would certainly have an impact and will assist the Indian Judiciary while deciding the scope of enforcing and recognizing foreign anti-suit injunctions. There can't be any straight jacket formula which would assist as a mirror image in each and every factual scenario but the courts will have the choice to make from an exhaustive set of principles, rulings and codified law.

INTRODUCTION

The anti-suit injunction is an equitable remedy the history of which can be traced from the 16th century England.[426] It was originally developed by the Courts of Chancery to restrain proceedings at common law.[427] Today, international anti-suit injunction is one of the more conventional forms of international provisional relief which is widely used to restrain a party

*Gujarat National Law University, Gandhinagar, Gujarat.

[426] Vol. 5, WS Holdsworth, A History of English Law 326 (2nd ed., Methuen & Co. Ltd., 1937).

[427] Ibid.

from commencing or continuing foreign court proceedings, either in breach of an exclusive jurisdiction clause or in an oppressive or vexatious fashion.[428] In granting the anti-suit injunction, the objective of the court is to protect its jurisdiction over the same parties and cause(s) of action from interference by foreign courts. However, the term "anti-suit injunction" is somewhat of a misnomer because it does not restrain the foreign suit or the foreign courts *per se*, as the name suggests.[429] Rather, the restraint is directed at a party to the foreign suit in question. Nevertheless, its apparent affront to principles of international comity has generated much debate and attracted its fair share of critics who see the use of an anti-suit injunction as an interference with, and undermining of, the jurisdiction of the foreign court.[430] Such intervention strongly implies and often actually creates jurisdictional conflict rather than the jurisdictional cooperation often associated with the notion of provisional relief in domestic and international litigation alike. That anti-suit injunctions are addressed to private persons within the jurisdiction of the enjoining court (operating against them in personam), rather than directly to the foreign court whose proceedings are at issue, does not substantially lessen the element of conflict.[431] Despite this, the use of anti-suit injunctions is now accepted as an established court practice in both the common law and civil law jurisdictions.[432]

The anti-suit injunction may take the form of either an interim anti-suit injunction or a permanent anti-suit injunction. The difference between the two forms lies essentially in the length of its lifespan; the interim anti-suit injunction is valid until the court determines the merits of the application for the permanent anti-suit injunction, which, in turn, is valid indefinitely, subject to the terms of the court order.[433]

[428] David Joseph QC, Jurisdiction and Arbitration Agreements and Their Enforcement 363 (2nd ed., Sweet & Maxwell, 2010).
[429] Turner vs. Grovit, [2002] 1 WLR 107.
[430] Ibid.
[431] Donovan v. Dallas, 377 U.S. 408, 413 (1964).
[432] Emmanuel Gaillard, "Reflections on the Use of Anti-Suit Injunctions on International Arbitration" in Pervasive Problems in International Arbitration.
[433] Adrian Wong, Interlocutory Injunctions 1 (2nd ed., LexisNexis, 2010).

BASIC PRINCIPLES AFFECTING AND REVOLVING AROUND ANTI-SUIT INJUCTION

a. ***Conflict of laws*** – It a branch of Indian Law applied by Indian Courts whenever a dispute before it involves a foreign element.[434] 'Foreign Element' in this context means a fact relevant to the issues involved in the proceedings which has a geographical or other connection with a territorial unit other than the territorial unit where the court is dealing with the proceedings. There may be a foreign element because the parties may be citizens of a foreign country, or domiciled in a foreign country, and the dispute may relate to their status of their property situated in that country, or a dispute may relate to a contract between an Indian and a party living abroad, or a suit may related to a tort committed outside India. In all these cases, there is a foreign element or non-Indian element.[435] It is to be understood that when a case involving a foreign element, Indian courts may apply or discuss some rules of foreign law, but while doing this they are neither surrendering their jurisdiction nor abdicating their powers, instead they are applying an Indian law, which is the appropriate Indian rule of conflict of laws, which in that particular case requires application of rules of an foreign law.[436] Further, one of the major branches of the rule of conflict of laws is the **Doctrine of Renvoi**, having its origin from England it is a process by which the court of a country adopts rules of foreign jurisdiction whenever conflict of laws arises during any proceedings. This doctrine mainly targets the act of forum shopping by applying same law over same issues in order to achieve same outcome, irrespective of the jurisdiction where the case is being actually dealt with.

b. ***Comity of Nations*** – Comity means the accepted rules of mutual conduct between State and State which each State adopts in relation to other States and expects other States to adopt in relation to itself. The doctrine has been increasingly applied in the field of anti-suit injunctions when the suit has been filed in a foreign country.[437] The principle of comity is increasingly used in common law countries, not as an explanation for the system of conflict of laws, but as a tool to show respect for the territorial jurisdiction of other states. More recently, comity has been invoked to justify the

[434] Viswanathan R vs. Rukn-Ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1.
[435] Atul M Setalvad, Conflict of laws, para 1.1 (2nd ed., 2009).
[436] Atul M Setalvad, Conflict of laws, para 1.2 (2nd ed., 2009).
[437] Dicey, Moris & Collins, Conflict of laws, para 1-009 (14th ed., Lawrence Collins, 2006).

caution which is required in the exercise of the power to grant injunctions to restrain proceedings in foreign courts. Comity requires that the concerned forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which such an injunction entails.[438] Internationally also among the courts it is becoming widely accepted that comity between the courts of different countries require mutual respect for the territorial integrity of each other's jurisdiction.[439]

c. ***Forum Non-Conveniens*** – The doctrine of Forum Non-Conveniens which originated in Scotland and later on brought to England and United States of America simply means that if legal proceedings are initiated in a particular forum and that forum is of the opinion that there is a more convenient forum where such *lis* should be tried, it desists from trying the particular *lis.* It is important to take note that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise the discretion in its favour, and that in respect of any such matter the evidential burden will rest on the party who asserts such existence.[440]

d. ***Parallel Proceedings*** - In American jurisprudence, there are no precise rules governing the anti-suit injunctions, rather the equitable circumstances are examined to determine whether the injunction is required to prevent an irreparable miscarriage of justice. It follows that a court need to be guided by two tenets. Firstly, the fundamental corollary to concurrent jurisdiction must be respected, i.e., parallel proceedings in concurrent in personam actions are allowed to be protected simultaneously. Secondly, impedance of the foreign jurisdiction to be avoided. [441] But when faced with foreign Courts of concurrent jurisdiction, not all American Courts abide by the rule favouring parallel proceedings.[442] Pursuit to which two distinct approaches which have been developed. Under the "liberal" approach to anti-suit injunctions, a Court will be willing to grant an injunction where the proceedings are duplicative in nature. The "conservative" approach advances the view that issuing anti-suit injunctions to prevent duplicative litigation is inconsistent with the rule permitting parallel proceedings" in concurrent *in*

[438] Nationale Industrielle Aerospatiale v. Lee Kui Jak, [1987] A.C. 871, 895 (P.C.).
[439] Credit Sussie Fides Trust SA vs. Cuoghi [1998] Q.B. 818, 827 (C.A.).
[440] Spiliada Maritime Corporation vs. Cansulex Limited, (1987) AC 460.
[441] British Airways Board vs. Lakers Airways Limited, [1985] A.C. 53.
[442] Richard W. Raushenbush, Antisuit Injunctions and International Comity, 1049-50.

personam actions. In the application of the "conservative" approach, anti-suit injunctions are only deployed when it becomes "necessary to protect the jurisdiction of the enjoining Court, or to prevent the litigant's evasion of the important public policies of the forum".[443]

e. ***Principle of Issue Estoppel*** – The principle of 'issue estoppel' has its origin in the Australian High Court in the case of Blair v Curran[444] wherein it was stated that, a judicial decision directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion. The Supreme Court of India in the case of Ravindra Singh vs. Sukhbir Singh and others[445] stated that the rule of issue estoppel prevents re-litigation of an issue which has already been determined in an earlier case between the same parties.

f. ***Lis Pendens*** – The Lis Pendens doctrine provides for a court in which a suit has been filed to stay proceedings when an action between the same parties over the same dispute has already been filed and is pending in another court. This doctrine of Lis Pendens" was originally developed in the interest of judicial orderliness within a single legal system, unitary or federal.[446]

LAW DEVELOPED BY COURTS FOR GRANTING ANTI-SUI INJUNCTIONS AGAINST FOREIGN TERRITORIES

i. ***English Judiciary*** – The rules regarding grant of anti-suit injunctions have been provided under *The Conflict of Laws* by Dicey and Morris, (13th Edn.) which have been derived from the judgments of House of Lords and Privy Council. One such rule is Rule 32(4) which states that *"An English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to an English (or, semble, another foreign) court."* Further, Rule 31(5) has been framed after referring to the decisions of House of Lords in the case of Spiliada Maritime Corpn. v. Cansulex

[443] Gan Shan Company Limited vs. Bankers Trust Company, 956 F.2d 1349 (6th Cir. 1992).
[444] Blair v. Curran, (1939) 62 CLR 464.
[445] *Ravindra Singh vs. Sukhbir Singh and others, (Criminal Appeal No. 67 of 2013).*
[446] Smith vs. McIver, 22 U.S. (9 Wheat.) 532 (1824).

Ltd.[447] and of the Privy Council in SNI Aerospatiale v. Lee Kui Jak[448], which states that *"An English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court, or the enforcement of foreign judgments, where it is necessary in the interests of justice for it to do so."* In SNI Aerospatiale Case[449] "The principles applicable to the grant by an English court of an injunction to restrain the commencement or continuance of proceedings in a foreign jurisdiction were not the same as those applicable to the grant of a stay of English proceedings in favour of a more appropriate foreign forum, and where a remedy for a particular wrong was available both in an English court and a foreign court the English court would normally only restrain the plaintiff from pursuing the foreign proceedings *if it would be vexatious or oppressive for him to do so*." In Spiliada Maritime Case[450] "The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that *the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice*."

ii. ***American Judiciary*** – A leading American decision restraining foreign proceedings in the interest of convenience is Cargill, Inc. vs. Hartford Accident & Indemnity Company[451], wherein the plaintiff sought a five million dollar recovery in federal court in Minnesota from each of two separate insurance companies under policies covering losses resulting from dishonesty on the part of certain employees of plaintiff's English subsidiary. Further an action before the English court was initiated on the same day when Cargill instituted suit in the United States and sought a declaration of non-liability to Cargill. The federal court issued the specific anti-suit injunction sought and also invoked the caution that such anti-suit injunctions should be ordered sparingly. Further the court concluded that it had both general authority to issue an anti-suit injunction targeting foreign country proceedings and specific warrant to do so under the circumstances. The reasons it gave amounted to a finding

[447] Spiliada Maritime Corpn. vs. Cansulex Ltd., [(1986) 3 All ER 843.
[448] SNI Aerospatiale vs. Lee Kui Jak, [(1987) 3 All ER 510.
[449] Ibid.
[450] Spiliada Maritime Corpn. vs. Cansulex Ltd., [(1986) 3 All ER 843.
[451] Cargill, Inc. vs. Hartford Accident & Indemnity Company, 531 F. Supp. 710 (D. Minn. 1982).

that the foreign action would be inconvenient as to warrant restraint of those proceedings.

iii. ***Indian Judiciary*** – The principle revolving around granting of anti-suit injunction has been very meticulously been discussed by the Hon'ble Supreme Court of India in the matter of Modi Entertainment Network v. W.S.G. Cricket Pte. Limited[452]. The apex court while discussing various case laws rooting out from English Courts made the important observations with regards to the power of Indian Courts to grant anti-suit injunctions against proceedings in the foreign court of law. The court held that courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction since being a court of equity is exercises jurisdiction in rem. But the apex court made an important observation and stated that such power to issue anti-suit injunction should be exercised in consonance with the rule of comity of court. Since in the end although the injunction is passed against the individual but it also interferes with the jurisdiction of the other court.

The Supreme Court then carved out the principles which will govern the applicability of granting anti-suit injunctions, and stated as follows –

1) *"In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:*
   a) *The defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;*
   b) *If the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and*
   c) *The principle of comity respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained — must be borne in mind.*
2) *In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum-conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.*

[452] Modi Entertainment Network vs. W.S.G. Cricket Pte. Limited, (2003) 4 SCC 341.

3) *Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.*

4) *A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.*

5) *Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.*

6) *A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.*

7) *The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."*[453]

ENFORCEMENT AND RECOGNITION OF FOREIGN ANTI-SUIT INJUNCTION BY INDIAN COURTS

We have already seen above the principle governing the power of Indian Courts to grant anti-suit injunction against any foreign suit or proceedings. Hence it is also important to understand the situation in circumstances when a foreign anti-suit injunction is being passed against an individual restraining him or her to initiate proceedings before the Indian Courts and how does the Indian Courts recognize and enforce such foreign anti-injunction. Under this light, the landmark decision of the Bombay High Court in the matter of **Shree Precoated Steels Limited vs. Macsteel International Far East India Limited and Another**[454] need to be discussed to understand the law applied by the Hon'ble Bombay High Court when a foreign anti-suit injunction was passed by English Court (Queen's Bench Division, Commercial Court, Royal Court of Justice, United Kingdom).

Factual Background – The dispute between the parties was with regards to the existence of the sale contracts between them, wherein as per the plaintiff the contract never came into since the defendant never responded to the counter offer made by the plaintiff. Further, the plaintiff also contended that the defendant never communicated the conditions of sale to the plaintiff under which Clause 15 categorically states that in the event of any dispute arising between the parties the dispute would be referred to and will be resolved by the English Court, hence granting non-exclusive jurisdiction to the English Court.

Procedural Background – In light of the dispute which arose between the parties with regards to the existence of sale contracts and condition of sales (Clause 15 specifically), the plaintiff filed a suit before the Bombay High Court. Subsequent to this, the defendant filed a suit before the English Court and obtained an anti-suit injunction order against the plaintiff to continue with the proceedings before the Bombay High Court. In furtherance to this, the plaintiff also contended under its Notice of Motion before the Bombay High Court to grant an anti-suit injunction against the defendant and restricting them to proceed with the suit filed

[453] Modi Entertainment Network vs. W.S.G. Cricket Pte. Limited, (2003) 4 SCC 341.
[454] Shree Precoated Steels Limited vs. Macsteel International Far East India Limited and Another, (2008) 2 Bom CR 681.

before the English Court. Ultimately the Bombay High Court not only refused to pass any such orders but also refused to enforce and recognize the anti-suit injunction which was passed by the English Court against the plaintiff to continue with the proceedings before the Bombay High Court.

JUDGEMENT OF THE BOMBAY HIGH COURT

Importance of Clause 15 –

- Clause 15 is an essential and crucial term of the contracts. In commercial transactions such clauses are indeed the fundamental basis on which the parties enter into contracts. In the absence of such a clause a party may not be inclined to enter into a contract at all even if all the other terms and conditions are agreed upon. Non-exclusive jurisdiction clause is no less of importance than a price clause in an agreement. Infact, parties maybe flexible to the price but never to the non-exclusive jurisdiction clause. The enforcement of rights under a contract and the involvement in judicial proceedings are considerations of equal.

Jurisdiction of Indian Courts –

The court held that if looked in purely physical terms, the India and not the United Kingdom which would be the most convenient jurisdiction to adjudicate the disputes, for the reasons like – No cause of action has arisen in England, instead a material part of cause of action has arisen in India. Logistically and financially Mumbai would be more convenient than the United Kingdom for both the parties. Relevant documents and the witness relied upon in English Court are in India. There would be no prejudice of any nature to any party in adjudication of their disputes before Indian Courts.

Jurisdiction of the English Courts –

Assuming that the contracts were concluded and that a copy of the terms and conditions containing Clause 15, did form a part thereof, then the jurisdiction will surely be in the lone hands of English Court pursuit to the paragraphs 24(5), (6) and (7) of the Modi Entertainment Network Case.[455]

The jurisdiction granted to English Court under Clause 15 not only included to decide on the validity, construction and performance of the agreement, but that prima facie also includes the dispute over the existence of the contract as an integral part of it.

[455] Ibid.

Comity of Nations –

- The main reason as why the Bombay High Court rejected plaintiff's request of anti-suit injunction against the proceedings of English Court is that such order would be against the principle of comity. The English Court has stated that the defendant in the proceedings before them have arguable case regarding jurisdiction, even if such an observation wouldn't have been made by the English Court, then also the Bombay High Court would not have passed anti-suit injunction orders.
- In situations where parties have contrary opinion of the existence of non-exclusive jurisdiction clause, one should adhere to the principle of comity and to allow the proceedings in each country to take their own course leaving the final decision in one country to have its effect on the proceedings in the other.
- The argument of the defendant that on the principle of comity suit before Bombay High Court needs to be stayed, which is totally on wrong lines. Such an argument is made on the wrong understanding that the prima facie view at an interlocutory stage is a final order.

1. Anti-Suit Injunction passed by the English Court –

- The manner in which the applications were made by defendant in the English Court won't form basis of Bombay High Court's order. The decision of the Bombay High Court can't be determined by the orders of the English Courts.
- The orders of the English Court being non-speaking orders without any reasons being provided behind the grant of anti-suit injunction, that to without even once hearing the case of the plaintiff.
- It the contention of defendant is accepted that it would amount to holding that a *prima facie* view taken by a Court in one country is to preclude the Courts of all other countries from a final decision on the issue till the Court of the former country decides the issue. Such an aspect it totally needs to be rejected.
- Suit before the Bombay High Court is not vexatious or on done on abuse of process, only on the reason that already a suit is filed before the English Court. Such contention has been made on the presumption that the plaintiff's contention of there being a no contract is unfounded.

2. ***Non-applicability of principle of issue estoppel –***

- For the purpose of operation of the principle of issue estoppel, the decision must be final and conclusive and not provisional or subject to revision.
- It was held in the case of Desert Sun Loan Corp v. Hill[456] that such principle rests on two important observations the first of which recognises that clear distinctions had to be maintained between final substantive determinations; final interlocutory rulings; and provisional interlocutory rulings. Other being that it has to be between the same parties on same issue on the foreign litigation.
- The decision of the English Court directing anti-suit injunction was not a final decision, which was also made expressly cleared by the English Court.
- Bombay Court stated that the contention of the defendant that the principle of issue estoppel especially for the foreign judgments should also be made applicable to provisional decisions is against the very fundamentals of the said principle.

3. ***Other relevant observations –***

- The matter must proceed on the basis that the plaintiff's contentions including the question whether the contracts were entered into or not are open both in the English proceedings and in these proceedings.
- There may be other consideration which may warrant the grant of the injunction but not where the only dispute is whether the parties were in fact parties to the agreement.
- If anti-suit injunction is granted just on the basis that the party is contesting the existing of non-exclusive jurisdiction clause/agreement then the consequences of it would be undesirable.
- English Court has only stated that there is a goof arguable case of defendant on issue of jurisdiction and nothing else. The court has also stated that it is also possible that the plaintiff might establish his case of non-existence of any contract.
- The modifications suggested by the plaintiff to the terms and conditions of the contract are material in nature. Defendant not responding to the modifications made by the plaintiff is a strong indication that there was no concluded contract.

[456] Desert Sun Loan Corp vs. Hill, [1996] 2 All. E.R. 847.

- It is important also to note that the point at issue relate first to the forum and not to the identity of the legal system to be applied. The English law can always be applied in our courts if it is found that the parties had agreed to be bound by the English law.

Ratio – The Bombay High Court held that there is a dispute on the existence of the contract and the communication regarding Clause 15 of the conditions of sale, and therefore, till there is no final clarification on these issues, a party can't be restrained from proceeding with a case instituted in a court of competent jurisdiction. Further, if the defendant proves that the contract was entered into it is always open for him to make an application for stay of the suit before Bombay High Court. Since both the parties have already initiated proceedings in different jurisdiction, the Bombay High Court allowed continuance of both the proceedings and the consequence of one of the proceedings would be decided when the other one has reached to a conclusion.

RELEVANCE OF CODE OF CIVIL PROCEDURE CODE, 1908

The Supreme Court in Modi Entertainment Case[457] made a very important observation over non-applicability of CPC when jurisdiction is conferred to any neutral state in a contract between two different states. The apex court held that it is a well-settled principle that by agreement the parties cannot confer jurisdiction, where none exists, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court; indeed, in such cases the English courts do permit invoking their jurisdiction. Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a foreign court termed as a "neutral court" or "court of choice" creating exclusive or non-exclusive jurisdiction in it. This observation of the apex court clears the doubt over the relevance of such exclusive and non-exclusive jurisdiction clause in agreements between two contracting countries granting jurisdiction to court of any other third country or likewise. But again, the apex court also stated while dictating its judgment that it cannot be laid down as a general principle that once the parties have agreed to submit to the jurisdiction of a foreign court, the proceedings or the action brought either in the court of natural jurisdiction or in the court of choice will per se be oppressive or vexatious. It depends on the facts of each case and the question whether the proceedings in a court are vexatious or oppressive has to be decided on the basis of the material brought before

[457] Modi Entertainment Network vs. W.S.G. Cricket Pte. Limited, (2003) 4 SCC 341.

the court. It is true that the courts would be inclined to grant anti-suit injunction to prevent breach of contractual obligation to submit to the exclusive or non-exclusive jurisdiction of the court of choice of the parties but that is not the only ground on which anti-suit injunction can be granted.

Hence, in light of the above mentioned background, the principles carved out from the Section 13 of the Code of Civil Procedure becomes very important to discuss enforcement and recognition of foreign anti-suit injunctions by Indian Courts. The Section 13 lays down fundamental rules which should be violated by a foreign court while passing a decree or judgment. The decree or the judgment of a foreign court will be conclusive except where it comes under any of the clauses carved out in Section 13 of the Code of Civil Procedure.

Section 13[458] - When foreign judgment not conclusive –

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except –

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [1] [India] in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

Understanding of a foreign judgment – A foreign judgment must be understood to mean 'an adjudication by a foreign court upon a matter before it' and not the reasons for the order made by it, or otherwise section 13 would not be applicable to an order made by it where no reasons are given.[459] The present section 13 provides that a foreign judgment may operate as res judicata except in the six cases specified in the section and of course in order to do so section 11 conditions must be fulfilled as well.[460]

[458] §. 13, Code of Civil Procedure, 1908.
[459] Brijlal Ramjidas vs. Govindram Gobordhandas, AIR 1947 PC 192.
[460] Indar vs. Thakur, AIR 1921 Lah 20.

Competency of the foreign court –The foreign court must be competent to try the suit, not only as regards to the pecuniary limits of its jurisdiction and the subject matter of the suit, but also with reference to its territorial jurisdiction, and the competency of the jurisdiction of the foreign court which is to be judged not by the territorial law of the foreign state, but by the rules of the private international law.[461]

Meaning of the 'matter' – The expression matter in section 13 is not equivalent to subject-matter, it means the right claimed.[462] The term 'matter' used in section 13 of the CPC refers to an issue to be decided. It is not as if the entire case has to be adjudicated upon and only then can the decision be executed.[463] The language of the section 13 speaks not of the judgment but 'any matter thereby directly adjudicated upon' and the word 'any' shows that all the adjudicative parts of the judgment are equally conclusive.[464]

Operation of Section 13 – *A* sues *B* in a foreign court. If the suit is dismissed, the decision will operate as a bar to a fresh suit by *A* in India on the original cause of action, unless the decision is inoperative by reason of one or more of the circumstances specified in the section.[465] If a decree is passed in favour of *A* in the foreign court and *A* sues *B* on the judgment in India, *B* will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign court, unless the decision of the foreign court is inoperative on any one of the six ground specified in the section.

Foreign judgment pronounced by a court without jurisdiction not enforceable – A foreign court cannot assume jurisdiction in cases where the claim is a personal one merely because the cause on action arose within its jurisdiction.[466] In the case of personal claims, it is the residence at the time when the action began that gives jurisdiction in a suit to a foreign court [467] unless : (1) The defendant was a subject of that foreign state;[468] (2) where the defendant in the character of a plaintiff had elected the forum in which he is afterwards sued; or (3)

[461] Vol. 1, Sir Dinshaw Fardunji Mulla, Mulla on Code of Civil Procedure 363 (19th ed., Justice Deepak Verma et al., 2017).
[462] R. Vishwanathan vs. Rukn-ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1.
[463] Janardhan Mohandas Rajan Pillai vs. Madhubhai Patel, AIR 2003 Bom 490.
[464] R. Vishwanathan vs. Rukn-ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1.
[465] Bababhat vs. Narharbhat, (1889) ILR 13 Bom 22.
[466] Gurdyal vs. Raja of Faridkot, (1895) ILR 22 Cal 222.
[467] Chunilal Kasturchand vs. Dundappa Damappa, (1950) ILR Bom 640.
[468] Ramalinga vs. Swaminatha, (1941) ILR Mad 891: AIR 1941 Mad 688.

where he, the defendant, had voluntarily appeared in that court and had submitted to its jurisdiction, or (4) where he had contracted to submit himself to that foreign forum.[469]

Submission to the jurisdiction of foreign courts – Where a suit is instituted in India on the judgment of a foreign court, effect will be given to the judgment, though that court has no jurisdiction over the defendant, if the defendant appears and defends the suit brought against him in that court without making an objection to its jurisdiction[470], for, having taken a chance of judgment in his favour, it is not right that he should take exception to the jurisdiction when judgment goes against him.[471] But, if he protests against the jurisdiction, and the suit is then proceeded with against him, the judgment is nullity, and no effect will be given to it in a suit brought on the judgment. It is also pertinent that the protest against jurisdiction must be made at an early stage of proceedings hence, where no objection to the jurisdiction was made until the case had reached the stage of appeal it would be a wilful submission to the jurisdiction.[472] Similarly, when person who appears in response to a summons of a foreign court and applies for leave to defend the suit without objecting to its jurisdiction would be considered as voluntarily submitted to the jurisdiction of such court.[473] Further, if a defendant while protesting against the jurisdiction, thereby taking the chance of getting a decision in his favour, he will be deemed to have submitted himself to the jurisdiction of the court.[474]

Agreement to submit to Foreign Jurisdiction – When there is an express agreement to submit to the jurisdiction of a foreign court, a judgment pronounced by such court binds the parties, and effect will be given to such a judgment in Indian courts.[475] But, the mere fact of entering into a contract of partnership in a foreign country does not involve an agreement that all matters and dispute arising in connection with the partnership will be within the jurisdiction of the courts of that country.[476]

Carrying on Business in a Foreign Country through an Agent – Persons who carry on business in a foreign country through an agent, submit to the jurisdiction of the courts of that

[469] Chormal Balchand vs. Kasturichand, ILR 63 Cal 1033.
[470] Ganga Prasad vs. Ganeshi Lal, (1924) ILR 46 All 119.
[471] Kandoth vs. N Abdul, (1976) 8 Mad HC 14.
[472] Kaliyugam vs. Chokalinga, (1884) ILR 7 Mad 105.
[473] Shaligram vs. Firm Daulatram Kumdammal, [1963] 2 SCR 574.
[474] Subramania vs. Annaswami, AIR 1948 Mad 203.
[475] Haji Abdulla vs. Stamp, (1924) 26 Bom LR 224.
[476] Emanuel vs. Symon, [1908] 1KB 302.

country by giving the agent a general power of attorney including the right to institute or defend suits relating to matters connected with their business or otherwise.[477]

Possession of Immovable Property in a Foreign Country – The possession of immovable property in a foreign country gives the courts of that country jurisdiction to deal with the property itself,[478] but not jurisdiction *in personam* over the possessor, even in regard to obligation connected with that property.[479]

Suits on foreign awards – An awards given in a foreign state by arbitrators selected by the parties cannot be equated to a judgment given by the foreign court and its validity is not open to attack on the ground mentioned in section 13.[480] An award pronounced in a foreign state is not a judgment within this section and no suit will in consequence lie on it even if it was filed in a foreign court unless it was made a rule of court.[481]

ENFORCEMENT AND RECOGNITION OF FREIGN ANTI-SUIT INJUNCTIONS BY COURTS OF OTHER NATIONS

Laker Airways vs. Pan Am World Airways[482] - Laker Airways was a small British Airlines which went into liquidation pertaining to difficulties in its financial operations. Through its liquidators, Laker instituted an antitrust action in federal district court in Washington, D.C. against several international airlines charging them on their involvement in predatory pricing against Laker Airways and to put it out of the business. Laker also involvement of its financial supplier, supplier's financial affiliate and lender bank (Midland Bank) which was not sued.

- Hence even before having been brought into the litigation, Midland Bank took the precaution of applying to the English High Court for an anti-suit injunction barring Laker from joining it as a defendant. After the bank obtained the relief sought.[483] Further, several airlines also applied to the English High Court praying in addition to an injunction halting the American proceedings pending against them, both a declaration that they had not engaged in any unlawful conspiracy and a "counter-anti-suit injunction," an order barring Laker from seeking

[477] Ramanathan vs. Kalimuthu, (1912) ILR 37 Mad 163.
[478] Douglas vs. Forrest, (1828) 4 Bing 686.
[479] Emanuel vs. Symon, [1908] 1KB 302.
[480] Ganguli Engineering Co. vs. Srimathi Sushila Bala, AIR 1957 Cal 103.
[481] Gopaldas vs. Dogduram, AIR 1952 Hyd 49.
[482] Laker Airways vs. Pan Am World Airways, 559 F. Supp. 1124, 1138 (D.D.C.) 1983.
[483] The circumstances of Midland's successful application in the High Court are recounted in Midland Bank vs. Laker Airways Ltd., [1986] 1 All E.R. 526, 528, 530 (Lawton, L.J.) (C.A. 1985).

an anti-suit injunction in the United States directed at the English proceedings. Though the English High Court temporarily granted the injunctions, it later denied permanent relief.[484] On appeal, injunctive relief was awarded by the Court of Appeal,[485] only to be later vacated on further appeal by the House of Lords.[486]

- While the British anti-suit litigation was still in its early stages, Laker sought an order from the American court barring the other defendants from obtaining anti-suit injunctions or counter-anti-suit injunctions in England. The application was successful,[487] and the district court's grant of relief was sustained on appeal.[488] It was only after the Courts of Appeal of the two jurisdictions had reached an apparent stalemate[489] that the House of Lords issued its order vacating the English injunction.
- According to the Lords, the business conduct of the airlines reasonably subjected them to the prescriptive antitrust jurisdiction of the United States, and Laker's American lawsuit could not therefore be deemed an "unconscionable" exercise in extraterritoriality, as the English Court of Appeal in ordering the injunctive relief had found it to be.[490]

SABAH Shipyard (Pakistan) Ltd. vs. Islamic Republic of Pakistan and Karachi Electrics Supply Corporation Limited[491] - A contract was entered into between SABAH and Government of Pakistan, wherein the parties consented to the jurisdiction of the courts of England for any action under the agreement to resolve any dispute between them.

- When dispute arose between the parties, Government of Pakistan brought an action in the Court of Senior Judge, Islamabad and obtained an anti-suit injunction against SABAH from proceeding before the English Court. SABAH also brought an action in the English court and sought an anti-suit injunction which was granted restraining Government of Pakistan from continuing proceeding in the Court of Senior Judge, Islamabad. Against this when Government of Pakistan made appeal before Court of Appeal, wherein it was held that Government of Pakistan under the agreement had agreed to submit any disputes between the

[484] British Airways Bd. vs. Laker Airways, [1984] 1 Q.B. 142 (C.A. 1983).
[485] Ibid.
[486] British Airways Bd. vs. Laker Airways, [1985] A.C. 58 (1984).
[487] 559 F. Supp. 1124 (D.D.C. 1983).
[488] 731 F.2d 909 (D.C. Cir. 1984).
[489] 577 F. Supp. 348, 355-56 (D.D.C. 1983).
[490] British Airways Bd. vs. Laker Airways, [1985] A.C. 58 (1984).
[491] SABAH Shipyard (Pakistan) Ltd. vs. Islamic Republic of Pakistan and Karachi Electrics Supply Corporation Limited, 2002 EWCA Civ 1643 (CA).

parties to the jurisdiction of the English court and to waive any objection that any action brought in England was in an inconvenient forum, therefore, it could not have been the intention of the parties that if proceedings were commenced in England, parallel proceedings could be pursued elsewhere unless there was some exceptional reason for doing so. The action of GOP in seeking to prevent SABAH in commencing proceedings in the agreed jurisdiction was construed as a clear breach of contract and it was observed that the proceedings in Pakistan might also be vexatious if commenced after the English proceedings and/or simply to attempt to frustrate the jurisdiction clause. The fact that GOP commenced the proceedings first, did not change the position because they did so as a pre-emptive strike.

CONCLUSION

The major issue which one would face while understanding and analysing the Enforcement and Recognition of Foreign Anti-Suit Injunction by Indian Courts is acute shortage of leading case laws/judgments delivered by the Indian Judiciary discussing this aspect of law. It is such an untouched aspect of law which would be quite relevant in the coming future, since one needs to consider that it is something which is related to International Law and hence its effect is not limited to the domestic circuits of any nation. The concerned aspect of law directly hits to the relations and respect being shared between judicial systems of the countries around the world among themselves. It is already evident through this research paper that the concept of anti-suit injunction is already something which is continuously being exercised by majority of the leading countries.

In this era of 21st century of globalisation, India is witnessing and becoming a part of major trans-border commercial transactions, cross border mergers, trade and business. Hence, it becomes quiet important to explore this aspect of law, wherein we can't find any codified version of law and whatever we have is to rely of the judicial precedents being set up in few major case laws. But at the same time, we need to understand the cycle of this anti-suit injunction process, as since if one court is granting anti-suit injunction against any individual to initiate/continue proceedings in some other foreign court, then it becomes very obvious that the other foreign court surely at some point of time will be discussing the scope of said foreign anti-suit. As under what circumstances a court can recognize and enforce such foreign anti-suit injunction and also when it will be reluctant to grant enforceability to such foreign anti-suit injunction.

While specifically focusing on the enforcement and recognition of such foreign anti-suit injunction by Indian Courts, we need to take assistance from certain authorities to appreciate the possibility of enhanced and developed law with more clarity on its applicability and existence in the coming future. As already discussed above the principles of conflict of laws, comity of nations, issue estoppel, forum non-conveniens, lis pendens and parallel proceedings, these are those principles which will be affecting a court's decision while it would be dealing with the enforceability of foreign anti-suit injunctions. For example, in certain proceedings where an exclusive jurisdictional clause gives right to court of a particular country, then an anti-suit injunction order has to be enforced by the court having natural jurisdiction since it has to comply with the principle of comity of nations and it could apparently declare itself to be forum non-conveniens to proceed with the matter. Further in certain situation court may allow proceedings to be held continuously in two different natural jurisdictions when parties have not specifically chosen any one of these two natural jurisdictions to decide the dispute. Further, when a court of law having competent jurisdiction over the issue raised has already passed a final judgment, then the other court would be under an obligation to not initiate/continue the same proceedings before itself by respecting the principle of issue estoppel. On the other hand even if a court has been granted with exclusive jurisdiction under a contract to adjudicate over the dispute, it not being the court with natural jurisdiction, in such circumstances the court having natural jurisdiction can issue an anti-suit injunction order against the proceedings initiated by one of the parties before the court with exclusive jurisdiction, on the ground that such court is violating the other aspect of the contract wherein the contract specifically mentions that the law of any other/third nation would be applicable while adjudicating over the dispute. Herein, the court with exclusive jurisdiction under the contract is violating the rule of conflict of laws, and hence it would be under an obligation to enforce foreign anti-suit injunction passed by the court of natural jurisdiction.

Apart from these principles of international law, we have seen the decision Bombay High Court in the matter of Shree Precoated Steel[492] wherein the dispute was with regards to the existence of exclusive jurisdiction clause, in which the court categorically refused to enforce the anti-suit injunction passed against itself by the English Court. Since there was no finality

[492] Shree Precoated Steels Limited vs. Macsteel International Far East India Limited and Another, (2008) 2 Bom CR 681.

over the exclusive jurisdiction of the English Court and at the same time Bombay High Court was a court of natural jurisdiction in purely physical terms. Further in the matter of SABAH Shipyard[493] which was totally opposite to the facts and circumstances of Bombay High Court case, since here there was an explicit exclusive jurisdiction clause in existence between the parties. Hence even the court having natural jurisdiction had to enforce the anti-suit injunction passed by the court having jurisdiction on the contract mutually entered upon between the parties. Again, in the case of Laker Airways[494] where although no such contract was in existence between the parties and suits were filed before two different courts having natural jurisdictions, even then one of the courts renounced its jurisdiction by deciding that the business of the major concerned party was subject to the jurisdiction of the other court. The reason why these landmark judgments have utmost importance in present circumstances is because they deals with (individually) all the possible scenarios, i.e., a case where i.) the dispute is over the existence of the contract containing jurisdiction clause, ii.) no contract was entered into between the parties, iii.) the contract entered into between the parties had exclusive jurisdiction clause.

Finally, even if one doesn't want to apply the principles of international law and the judgments of various courts and want reasons beyond them, then Section 13 of Code of Civil Procedure could be utilized. The court would be bound to enforce the anti-suit injunction passed by the foreign court if such injunction order doesn't fall in any of the exceptions enshrined under Section 13 of Code of Civil Procedure. But if the foreign anti-suit injunction order falls under any of these six clauses like, not from a court of competent jurisdiction or passed by violating principles of natural jurisdiction, etc., then the concerned Indian Court can certainly refuse to enforce the foreign anti-suit injunction passed against the individual to initiate/continue the proceedings before it.

Therefore, till the time either government takes effort in codifying a law specifically on this aspect or before we get more judgments from various High Courts and Supreme Court of India, the above discussed authorities could very well be used to understand the future enforceability and recognition of foreign anti-suit injunction by Indian Courts and to proceed further from thereon. As we need to understand that it is very unlikely to digest a trend where foreign anti-suit injunctions passed by any foreign court with/without competent jurisdiction

[493] SABAH Shipyard (Pakistan) Ltd. vs. Islamic Republic of Pakistan and Karachi Electrics Supply Corporation Limited, 2002 EWCA Civ 1643 (CA).
[494] Laker Airways vs. Pan Am World Airways, 559 F. Supp. 1124, 1138 (D.D.C.) 1983.

would every-time end up in vacuum because of the reason that Indian Courts are yet not prepared to decide over the enforceability and recognition of such foreign anti-suit injunctions.